

ORDER NO. 171

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Tony L. Hammond

Review of Nonpostal Services

Docket No. MC2008-1

ORDER ON MOTION FOR CLARIFICATION

(Issued January 16, 2009)

Order No. 154, issued December 19, 2008, reviewed each nonpostal service offered by the Postal Service to determine, pursuant to 39 U.S.C. § 404(e)(3), whether such services should continue. That Order found the record insufficient in certain respects to permit a ruling on three issues, and by Order No. 168, issued January 9, 2009, the Commission initiated a second phase of the proceeding to develop the record more fully on those issues.¹

A Pitney Bowes Inc. Motion for Clarification of Order Nos. 154 and 168 (Motion) was filed January 12, 2009. The Motion notes that the time to appeal Order No. 154

¹ See PRC Order No. 154, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008 (Order No. 154); and PRC Order No. 168, Notice and Order Initiating Phase II Proceedings, January 9, 2009 (Order No. 168).

“may expire shortly” and requests clarification of “whether the Commission intended its determination with respect to the commercial licensing activities of the Postal Service to constitute a final order or whether the determination is interim, preliminary, and interlocutory.” Motion at 3.

Commission rules provide interested persons 7 days to answer motions. 39 CFR 3001.21(b). The Commission will be closed on January 19 and 20, 2009, so answers to the Motion are due on January 21, 2009. Thus, if the Commission defers action on the Motion until after it has had an opportunity to evaluate any answers, its clarification will issue after the date for filing a notice of appeal of Order No. 154.

The Motion requests clarification of the Commission’s intent. The Commission finds that the public interest is served by providing clarification in advance of the due date for potential answers. The potential benefit of answers in opposition to a request for clarification is outweighed by the public interest in successfully communicating what is intended by Commission orders. Furthermore, the Commission recognizes that notwithstanding its intent, interested parties may view a Commission action to be either “a final order” or “interim, preliminary, and interlocutory”, Motion at 3, and an appellate court may rule on that issue.

The Commission therefore will provide the requested clarification, subject to subsequent opposition to the Motion. If appropriate, this Order can be withdrawn or modified. Participants choosing to respond to the Motion are invited to address whether further action to eliminate confusion about the legal status of services evaluated in Order No. 154 would be beneficial.

In short, Order No. 154 is interim and interlocutory as regards to some licensing activities of the Postal Service and final as to others. It is interim and interlocutory as to the licensing of the Postal Service brand for use on commercial Mailing and Shipping products related to postal operations. It is final as to other licensing activities.

The source of confusion seems to stem from the multiple uses of the clause “commercial licensing.” The descriptor “commercial licensing” was used by the Postal

Service to categorize several revenue generating activities in its response to Order No. 126.² The Postal Service used this term to encompass all activities involving licensing of its intellectual property.

As the first phase of this proceeding was nearing completion, Pitney Bowes, Inc., focused concern on one portion of what the Postal Service called its commercial licensing activities, specifically on “its recent foray into the imaging supplies business.”³ The Postal Service provided additional information on this activity, describing it generally as the licensing of its intellectual property, specifically its brand, for use on commercial products. Response to Order No. 126, at 1. n.3, 5.

In discussing whether this activity was consistent with the policies of the Postal Accountability and Enhancement Act, Pitney Bowes distinguished between licensing of Postal Service brands for promotional purposes, and licensing of Postal Service brands for commercial purposes. Pitney Bowes Comments at 10-14. It considered promotional uses; for example, placement on hats or toys, to be appropriate. *Id.* at 14. In contrast, it argued that placement for commercial purposes, that is, to convey the impression that a product has been produced or endorsed by the Postal Service, should not be permitted for products related to postal operations. *Id.* at 12-13. The Commission found this to be a reasonable distinction. Order No. 154 at 75.

The Commission further found that the record before it, which contained numerous post-brief filings, needed to be supplemented and clarified to enable it to determine fairly whether there is a public need for the licensing of Postal Service brands either for imaging supplies products, or more generally for “Mailing and Shipping”

² See Response of the United States Postal Service to Order No. 126 Regarding Licensing Agreements and Notice of Filing of Sworn Statement, November 17, 2008, at 1 and 5 (Response to Order No. 126); Statement of Gary A. Thuro, November 17, 2008. See also Initial Response of the United States Postal Service to Order No. 74, June 9, 2008, identifying the Postal Service’s commercial trademark licenses, at 22-23 (Response to Order No. 74).

³ Pitney Bowes Inc. Comments on United States Postal Service Response to Order No. 126 Regarding Licensing Agreements, November 24, 2008 at 6 (Pitney Bowes Comments).

products related to postal operations; and further, whether the private sector has the ability to meet the public need. *Id.* This is one of three areas where the record was insufficient to allow the Commission to reach a final decision prior to the statutory target date of December 19, 2008, and Order No. 154 therefore directed that the status quo be preserved on existing Mailing and Shipping commercial licenses pending the further proceedings described in Order No. 168. *Id.* at 76.

The Commission's decision with regard to commercial licensing activities generally, and to licensed imaging supplies products, can best be understood by reference to the eight-step decision process set out in the Introduction to Order No. 154. *Id.* at 2-3.⁴

The first issue is whether the licensing of Postal Service intellectual property for commercial activities is a service, and then more specifically, if the licensing of the Postal Service brand is a service. The Commission found licensing to be a service. *Id.* at 71.

The second issue is whether this service is postal or nonpostal. The Commission found it is nonpostal. *Id.*

The third step was inapplicable.

⁴ The Commission reviewed each revenue-generating activity as follows:

- 1) Does it constitute a service? If not, the inquiry is at an end since the activity is not subject to review under 39 U.S.C. § 404(e).
- 2) If it is a service, is it postal or nonpostal?
- 3) If postal, a proceeding to add the service to the Mail Classification Schedule is required.
- 4) If nonpostal, was the service offered on December 20, 2006? If not, it is not subject to this review. If so, it is subject to review.
- 5) If nonpostal, was it offered as of January 1, 2006? If not, it may not lawfully continue.
- 6) If nonpostal and subject to review in this proceeding, should it be authorized to continue taking into account (a) the public need for the service, and (b) the private sector's ability to meet that need?
- 7) If not authorized, the service may not be offered.
- 8) If authorized to continue, should it be designated as a market dominant, competitive, or experimental product?

The fourth issue is whether licensing of the Postal Service brand for commercial activities was ongoing on December 20, 2006. The record demonstrates that it was,⁵ although it further appears that licensing the brand for use in the image supplies business had not yet begun.⁶

The fifth issue is whether licensing of the Postal Service brand for commercial activities was ongoing on January 1, 2006. The Commission found it was. Order No. 154 at 71.

The sixth issue is whether licensing of the Postal Service brand for commercial activities should be authorized to continue. On this issue, the Commission bifurcated its decision. The Postal Service indicates it licenses its brand to 42 third-party vendors for use on the following categories of consumer goods: apparel (5); art (1); cards and stationery (1); fabric (1); fashion accessories (8); food (2); gifts and collectibles (6); Mailing and Shipping (5); pet products (2); and toys and games (11).⁷ As to the licensing of the Postal Service brand for activities unrelated to postal operations, which covers most of these categories of consumer goods, the Commission found that authorization to continue was appropriate. Order No. 154 at 74-75.

In contrast, with regard to the licensing of the Postal Service brand for use on mailing and shipping products related to postal operations, including imaging supplies, the Commission found that the record was insufficient to permit it to make a reasoned and fair decision. *Id.* at 75. Therefore, it announced its intention to develop the record on this (and two other) issues in a second phase of the proceeding to enable it to make a properly informed judgment on (a) the public need for this service, and (b) the private sector's ability to meet that need. *Id.* at 76; see also Order No. 168. Pending the

⁵ Response to Order No. 74, at 20-23; and Response to Order No. 126, Attachment. See also Statement of Tina M. Lance on Behalf of the United States Postal Service, March 19, 2008, at 10-11.

⁶ Response to Order No. 126, Attachment at 1.

⁷ Response to Order No. 74 at 22; see also Statement of Gary Thuro. The number in parentheses is the number of vendors reported by category.

completion of Phase II, existing licenses for products related to Postal Service operations could continue, but no new licenses for such products could be initiated. *Id.*; see also *id.*, n.146.

The seventh step was inapplicable on December 19, 2008.

The eighth issue is whether the authorized services should be designated as market dominant, competitive, or experimental. The Commission found the licensing of the Postal Service intellectual property for commercial activities to be competitive. *Id.* at 73.

It is Ordered:

The Pitney Bowes Inc. Motion for Clarification of Order Nos. 154 and 168, filed January 12, 2009, is granted subject to subsequent responses in opposition filed on or before January 21, 2009.

By the Commission.

Judith M. Grady
Acting Secretary