

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1 (Phase II)

FURTHER RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO ORDER INITIATING PHASE II PROCEEDINGS AND NOTICE OF
FILING OF SWORN STATEMENT
(January 30, 2009)

On January 9, 2009, the Commission issued Order No. 168, initiating what it characterizes as “Phase II” of the above-captioned proceeding. Order No. 168 required the Postal Service to provide, by January 29, 2009, additional specified information with respect to three activities: the licensing of intellectual property on commercial products that relate to postal operations, the warranty repair program, and the sale of music compact discs (CDs). The Postal Service addressed the warranty repair program and the sale of music compact discs in a filing submitted yesterday. The Postal Service now provides a response to Order No. 168 concerning the specified licensing activities. This involves a Supplemental Sworn Statement from Gary A. Thuro, as well as this notice document in which certain preliminary issues are discussed.¹ A motion for late acceptance is also being filed today.

¹ On January 16, 2008, the Postal Service filed a notice of appeal of Order No. 154 with the D.C. Circuit Court of Appeals, pursuant to section 3663 of title 39. This appeal will address certain jurisdictional and definitional determinations made by the Commission in that Order. Nothing in this document or in the sworn statement should be construed as affecting, implicating, or prejudicing in any way the positions that the Postal Service may take during the course of that appeal. Rather, for the purposes of the Postal Service’s participation in this proceeding only, the validity of Order No. 154 is presumed.

In Order No. 154, the Commission authorized the licensing of intellectual property to continue as a “nonpostal service,” but deferred the issue of whether the “licensing of the Postal Service brand for use on mailing and shipping products related to postal operations” should continue. See Order No. 171 at 5 (clarifying Order No. 154). With respect to those licensing agreements, the Commission “found that the record was insufficient to permit it to make a reasoned and fair decision” as to whether they should be terminated or allowed to continue. Id. The Commission has therefore requested the filing of an additional sworn statement concerning these agreements, addressing the criteria of section 404(e)(3). Order No. 168 at 2-3. This statement is provided by Gary A. Thuro, who discusses the five current agreements that encompass (but are not necessarily limited to) products that “relate to postal operations.” Pending the outcome of this proceeding, the Commission has “directed that the status quo be preserved on existing Mailing and Shipping commercial licenses.” Order No. 171 at 4.

Based on the Commission’s discussion of this issue in Order Nos. 154, 168, and 171, the Postal Service considers that this Phase II proceeding is directed to determining whether the Postal Service should be able to continue licensing its brand on commercial products related to postal operations, both as a general matter, and with respect to the current five agreements. On the other hand, the Postal Service’s understanding is that the issue of whether these agreements are even eligible for continuation under the “grandfather date” of section 404(e)(2) is *not* a relevant consideration in this proceeding. In this

regard, several parties have previously argued that certain of these agreements are barred from continuing because they were not entered into until after January 1, 2006. See, e.g., Pitney Bowes Comments on United States Postal Service Response to Order No. 126 Regarding Licensing Agreements at 15 (November 24, 2008) (hereinafter “Pitney Bowes Comments”). However, the Commission has already determined that this grandfather date applies to the licensing of intellectual property on consumer goods as a whole, rather than to each individual licensing agreement. See Order No. 154 at 71; Order No. 171 at 5 (noting that the “licensing of the Postal Service brand for commercial purposes” was ongoing on January 1, 2006).² Furthermore, the Commission has described this Phase II proceeding as dealing with the sixth step in the analysis that it utilized in Order No. 154, noting that it is designed to develop a record “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.” Order No. 171 at 5.

The apparent focus of this Phase II proceeding has several dimensions. A first, highly specific question is whether the five current agreements discussed by Mr. Thuro should be continued. A second, more general question is whether the Postal Service should be allowed to license its intellectual property for use on products that are related to postal operations. With regard to the first question,

² Order No. 171 also noted that “licensing of the Postal Service brand for commercial activities was ongoing on December 20, 2006.” Order No. 171 at 5. Though the Commission made a point to mention that the licensing agreement that involves postage meter ink cartridges and printer ink cartridges had not yet begun on December 20, 2006, its reason for doing so is not immediately apparent. In particular, considering section 404(e)(2) and section 404(e)(3) apply the dates contained therein to the same term (i.e., “nonpostal service”), it would not make sense to apply the January 1, 2006 date at one level (i.e., to the licensing of the Postal Service brand for consumer goods as a whole), while applying the December 20, 2006 date at a different level (i.e., to each individual licensing agreement).

the determination whether to allow the current agreements to continue need not necessarily constitute a dichotomous “yes or no” decision; rather, the Commission can conclude that certain products encompassed by an agreement are authorized to continue, while certain other products encompassed by the same agreement should terminate. A relevant consideration here is the fact that, as Mr. Thuro discusses, most of these agreements also encompass products that are not related to postal operations.

In addition, any determinations with respect to the current agreements need not necessarily dictate an answer to the second, general question. In other words, the Commission should not permanently foreclose the possibility of the Postal Service entering into licensing agreements in the future that encompass products related to mailing or shipping activities, simply because one or more of the existing agreements may be considered inappropriate. Postal Service-branded products that relate to the mailing and shipping activities should not be viewed as inherently suspect. Many (though perhaps not all) of these types of products fall within the definition of “postal services,” meaning the Postal Service is statutorily authorized to provide those products directly. For example, the provision of mail preparation items such as boxes, envelopes, and tape in Postal Service retail outlets is a “postal service.” See Order No. 154 at 33-34. The LePage’s 2000, Inc., licensing agreement involves similar goods, in that it encompasses envelopes, bubble-wrap, and other products that are designed for use in preparing items for entry into the mailstream.³ If the Postal Service is

³ The agreement also covers certain moving supplies (e.g., mattress covers), which are obviously designed for purposes unrelated to the entry of mail.

allowed to offer such mail preparation goods directly through its retail channels, it should also be allowed to license its brand for use on the same type of goods sold through other, non-Postal Service, retail channels. Similar considerations apply, for example, to the licensing of scales, which are also sold directly by the Postal Service.

Mr. Thuro discusses the appropriateness of licensing the Postal Service brand on products related to mailing and shipping activities. As he notes, the availability of mailing and shipping products bearing the Postal Service brand in retail locations other than postal retail outlets can be particularly attractive to the public. See Supplemental Thuro Statement at 4-5. He also notes that the Postal Service is the only entity that is able to provide this branding. Id.

The one agreement discussed by Mr. Thuro that has given rise to controversy involves postage meter ink cartridges and supplies, as well as items that are not as closely related to postal operations—inkjet and laser toner ink cartridges and supplies.⁴ Pitney Bowes argues that this agreement should not be continued because “there is no evidence that the Postal Service’s entry into the mature, highly-competitive imaging supplies market would serve a public

⁴ As noted by Mr. Thuro, the postage meter ink cartridges are categorized, for internal Licensing Program purposes, as “Mailing & Shipping,” while the inkjet and laser toner cartridges and supplies are categorized as “Video Games and Computer Products.” See Thuro Statement at 2. This distinction was noted by the Postal Service on page 2 of the Appendix in its response to Order No. 126, though the agreement was simply placed in the “Mailing and Shipping” category for purposes of responding to Order No. 74. Of course, the Postal Service recognizes that both types of goods are subject to this proceeding, since the Commission has noted that it deferred its decision on termination or continuation with respect to the license for “imaging supplies products.” See Order No. 171 at 3-5. However, this internal distinction within the Licensing Group reflects the fact that postage meter ink cartridges are related to postal operations to a degree that inkjet printer and digital toner cartridges are not, as the whole purpose of postage meter ink cartridges is to be used to prepare pieces of mail. Treating both of these types of cartridges as being within a single “imaging supplies” market for purposes of this proceeding obscures the real differences between them.

need that the private sector is not currently serving.” Pitney Bowes Comments at 16. Pitney Bowes also argues that the offering of Postal Service-branded postage meter ink supplies is particularly inappropriate because the Postal Service exercises “regulatory authority” over postage evidencing systems. Id.

There are two preliminary things to note about these assertions. First, Pitney Bowes characterizes the “imaging supplies market” as being highly competitive. Id. However, there is testimony on the record that Pitney Bowes dominates the postage meter ink cartridge market. See First Declaration of Randall Hooker at ¶¶ 5-7. While Pitney Bowes has noted that remanufactured postage meter ink cartridges for use in Pitney Bowes meters are available through a variety of sources, it has not contested Mr. Hooker’s assertion that it dominates the market. See Pitney Bowes Inc. Response to Pinpoint LLC’s Motion for Late Acceptance at 3 (October 31, 2008). Treating both of these types of cartridges as being within a single “imaging supplies” market for purposes of this proceeding obscures the difference between the market for postage meter ink cartridges, and the market for printer cartridges.

Second, the fact that the Postal Service regulates the production and distribution of postage evidencing systems is not a basis for determining that this agreement is impermissible. The Postal Service regulates postage evidencing system providers, with the primary goal of protecting revenue. See 39 C.F.R. Part 501. With regard to postage meter ink cartridges, however, Postal Service standards are limited to the fluorescence of the ink, in order to ensure that facer-canceller equipment can properly process the mail. The limited nature of the

Postal Service's regulatory involvement with postage meter ink belies the claims that this licensing agreement raises any legitimate anti-competitive concerns. It is not immediately apparent how the Postal Service would adopt ink fluorescence standards that could be preferentially beneficial to its licensee, or, even if it could, why it would have any meaningful incentive to do so. Furthermore, even if the Postal Service did act in such an anti-competitive manner, there are ample remedies available, such as a complaint to the Commission based on section 404a of title 39. As such, the parties' unsupported speculation that the Postal Service could theoretically act in an anti-competitive fashion should not form any basis for determining whether this agreement should continue.

Respectfully submitted,

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