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

REVIEW OF NONPOSTAL SERVICES	Docket No. MC2008-1 (Phase II)

UNITED STATES POSTAL SERVICE MOTION FOR AN
EXPEDITED STAY OF ORDER NO. 392 RELATING TO THE
LEPAGE'S LICENSE AGREEMENT
(June 21, 2010)

In Order No. 392, issued on January 14, 2010, the Commission ordered the termination of certain license agreements between the Postal Service and private sector producers of commercial mailing and shipping products, pursuant to section 404(e). See Order No. 392 at 12-26. The license agreement with LePage's was one of these agreements. The Commission required that all sales of inventory produced pursuant to the agreements be terminated by December 31, 2010, at the latest. Id. at 27. The Commission noted, however, that it would reconsider that mandate upon a showing that it would cause "hardship." Id.

Recently, the D.C. Circuit upheld the Commission's regulatory authority over Postal Service licensing. See United States Postal Service v. Postal Regulatory Commission, 599 F.3d 705 (D.C. Cir. 2010).[1] On March 31, 2010, LePage's indicated that it plans to file a motion requesting that the Commission reconsider its decision to order termination of its agreement with the Postal Service. See LePage's 2000, Inc. and LePage's Products, Inc.'s Notification of Concurrence in USPS' Motion For a Stay of Order No. 392 and of Their Intention

[1] Following this decision, the Commission dismissed as moot an earlier Postal Service motion to stay, which moved for a stay pending resolution of that judicial proceeding. See Order No. 432.

to File a Further Submission. The Postal Service supports such relief, and will file its own pleading to that effect subsequent to LePage's filing.

The Postal Service hereby requests a stay of the Commission's order that the Postal Service terminate and close-out its license agreement with LePage's, until such time as the Commission issues its decision regarding the pleadings that will be filed by LePage's (and subsequently the Postal Service). This requested stay is limited solely to the LePage's license agreement, and does not implicate any other aspect of Order No. 392. A stay is appropriate under the standards of Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir.1958) and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (hereinafter "WMATC"). These are (1) the likelihood that the moving party will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be substantially harmed if the stay is granted; and (4) the public interest in granting or denying the stay. As noted in WMATC, "[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." 559 F.2d at 844.

In considering the first factor, the Commission need not make any probabilistic determination as to whether it is likely to grant the relief requested by LePage's and the Postal Service. As the court noted in WMATC, a stay is appropriate when an agency has "ruled on an admittedly difficult legal question and then the equities of the case suggest that the status quo should be maintained." WMATC, 559 F.2d at 844-45. In this regard, the Commission expressly indicated in Order No. 392 a willingness to conduct further deliberation on the mandate it issued in that Order, if a pleading requesting reconsideration is filed. LePage's has, in turn, indicated that it will file such a pleading. The first factor therefore supports the issuance of a stay.

Furthermore, the equities of the case clearly support a stay. For the Postal Service's part, it has previously discussed how premature termination of this license agreement would cause it irreparable injury, in the form of lost and unrecoverable royalty payments, both in its previous motion to stay and in the Supplemental Statement of Gary A. Thuro, filed on February 26, 2010. See United States Postal Service Motion for a Stay of Order No. 392 Relating to Mailing and Shipping Licenses at 3-5. The Postal Service incorporates that discussion here. Furthermore, while the Postal Service has the right under the contract to terminate the agreement upon governmental order (including order of the Commission), there is always a high potential for legal disputes (and the costs associated with such disputes) to arise out of the exercise of such contractual authority. A favorable Commission decision on reconsideration would prevent the occurrence of any such disputes; a stay, in turn, would ensure that costs arising out of any such disputes are not expended unnecessarily.

In addition, the potential injury to LePage's from early termination of the agreement, in terms of lost business and the upsetting of contractual relationships, might be as significant as the injury that would accrue to the Postal Service. The extent of any injury to LePage's, of course, will have to be demonstrated by LePage's in its promised filing.

While the injury to the Postal Service (and possibly to LePage's) is clear, maintenance of the status quo until the Commission issues its reconsideration decision will not lead to any material harm to other interested persons. During the Phase II proceedings, the LePage's license was not the subject of any attack by a competitor.[2] The lack of any specific opposition to the LePage's agreement by any party who actually competes with LePage's is a strong indication that a continuation of the status quo would not be materially adverse to any party.

Similarly, no harm to the public interest would result from a continuation of the status quo. While the Commission has found that the public interest is served by the Postal Service terminating the LePage's agreement, it has also recognized that the public interest can accommodate a close-out period, and expressly held open the possibility of adjustments to its Order No. 392 mandate in the case of "hardship." If such a remedy is consistent with the public interest, so is the maintenance of the status quo until such time as the Commission disposes of the reconsideration motion that it expressly invited in its Order.

Finally, the Postal Service respectfully requests that this motion be decided expeditiously. Absent a stay, the Postal Service would need to take additional steps to terminate the agreement by the end of next week. Termination within that timeframe is necessary in order to give LePage's the benefit of a 180 day sell off period, which is contemplated by the license agreement,[3] while still allowing sales to be terminated on December 31, 2010. At the same time, the Postal Service does not wish to prematurely cancel the contract, if there is the prospect of the Commission revising its mandate in Order

[2] The only license agreement that drew criticism from a competitor of the licensed products was the Clover Technologies, Inc. agreement, which was challenged by Pitney Bowes. That agreement has been terminated and is not implicated by this motion. Furthermore, Pitney Bowes has clarified that it has no opposition to continuation of the LePage's agreement, under Commission regulation. See Notice of Pitney Bowes Inc. Regarding the Status of USPS-Branded Replacement Postage Meter Ink Cartridges and Postage Meter Supplies (November 19, 2009).

[3] Nothing in this statement should suggest that the Postal Service necessarily interprets the license agreement as requiring a wind-down period of any particular length in the event of termination due to governmental order.

No. 392. The Postal Service's position is further complicated by the fact that while LePage's announced its intention to file a motion several months ago, it has not yet done so.[4] The Postal Service is therefore faced with the need to request expedited relief at this time, to preserve the contract until such time as the Commission issues a final order on reconsideration.

Respectfully submitted,

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[4] Postal Service counsel have been in contact with counsel for LePage's and has urged LePage's to file its pleadings as expeditiously as possible.