

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  
RECONSIDERATION OF ORDER NO. 392  
RELATING TO THE LEPAGE'S LICENSE AGREEMENT  
(July 16, 2010)

In Order No. 392, 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.<sup>1</sup> The Commission required that all sales of postal-branded mailing and shipping products 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 its mandate upon a showing that it would cause "hardship." Id.

On July 1, 2010, LePage's submitted a pleading requesting that the Commission reconsider its decision to order that the postal-branded mailing and shipping products produced by LePage's be terminated. See LePage's 2000, Inc. and LePage's Products, Inc.'s Submission in Support of USPS' Motion for a Stay of Order No. 392 (hereinafter "LePage's Motion"). This pleading is

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<sup>1</sup> Order No. 392 applied to the sale of licensed mailing and shipping products. See Order No. 392 at 26-27. While the license agreement with LePage's also covers moving supplies and stationery, which is not implicated by Order No. 392, this is a very small portion of the products sold by LePage's pursuant to the agreement.

supported by two declarations. For the reasons discussed below, the Postal Service also requests that the Commission allow the license agreement with LePage's to proceed according to its terms.<sup>2</sup>

The Postal Service previously argued that its mailing and shipping licenses, including the license with LePage's, provide not only the benefits found by the Commission in Order No. 154 to justify the continuation of licensed products unrelated to mailing and shipping, but additional benefits as well, in terms of facilitating access to postal services in non-postal locations, encouraging the use of the Postal Service for customers' delivery needs, and reassuring customers that products are quality products suitable for mailing and shipping purposes. See Thuro Supplemental Statement (January 30, 2009, as revised on March 20, 2009); Postal Service Initial Brief at 10-12. The Commission, however, found that there was no evidentiary support for these claimed additional benefits. See Order No. 392 at 16-18, 24-25. Furthermore, the Commission found that any benefits conferred by these agreements were "mitigated by factors that are not applicable to promotional licenses reviewed in Phase I." Id. at 14-15.

The concerns expressed in Order No. 392 do not justify the termination of the postal-branded mailing and shipping products produced by LePage's. First, LePage's notes that there is empirical grounding to witness Thuro's logical

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<sup>2</sup> As noted above, the Postal Service fully supports the continuation of the license agreement according to its terms, and requests that the Commission provide such relief. At the same time, the Postal Service must by necessity note that unless otherwise expressly admitted in this motion, the Postal Service does not admit to the facts stated in LePage's Motion or its accompanying declarations (such as, for example, the calculation by LePage's of its damages). In addition, the Postal Service does not admit to the opinions expressed by Mr. Jaffer in his declaration, such as his opinion regarding ReadyPost.

assertion that consumers are very likely to use postal-branded packaging supplies to ship an item with the Postal Service, rather than another shipping provider. See LePage's Motion at 10, 16-17, 22. Indeed, keeping the Postal Service's brand in the forefront of consumers' minds when choosing providers is one of the primary reasons to license the brand.

Moreover, as witness Thuro also discussed, a brand connection between the Postal Service and a licensed mailing and shipping product provides a customer with assurance that the product is a quality product that is suitable for use in the mails. See Thuro Supplemental Statement at 5; Thuro Response to POIR No. 1, Questions 11 and 12. While the Commission discounted this by noting that the record was devoid of any evidence that the LePage's products differed from other commercially available mailing and shipping supplies (Order No. 392 at 24-25), LePage's motion provides details of how certain features of its products apparently distinguish them from non-postal-branded providers. See LePage's Motion at 12-14. In this regard, the Postal Service understands that LePage's has filed numerous patents for technologies in its products, including technologies regarding the security of the mailpiece and the preparation of a mailpiece. These patented technologies differentiate these postal-branded products from other brands not associated with the Postal Service. In addition, the Postal Service agrees with LePage's that one benefit of licensing is that it gives the Postal Service the ability to influence and review product quality in a manner that does not exist for other products that are not associated with the Postal Service.

Second, the other arguments accepted by the Commission in Order No. 392 concerning why the Postal Service should not be allowed to license its brand on mailing and shipping products, while perhaps justifying the termination of licenses like the meter ink cartridge license, do not provide a sufficient foundation for taking the drastic step of ordering the postal-branded mailing and shipping products produced by LePage's to terminate. In Order No. 392, the Commission credited arguments from Pitney Bowes that postal-branded mailing and shipping products can confuse customers and distort the competitive marketplace, and are also inappropriate when competing products are regulated by the Postal Service. See Order No. 392 at 15, 22. These concerns are inapplicable, however, to the specific mailing and shipping products that are produced pursuant to the LePage's agreement.

In endorsing Pitney Bowes' arguments, the Commission repeatedly noted that postal-branded mailing and shipping products are inappropriate because of "the Postal Service's unique position as a government monopoly." Id. at 15. For instance, the Commission noted that any demand for postal-branded mailing and shipping products "arise from the status of the Postal Service as a government entity with a monopoly to carry the mail," which "gives it a perceived expertise over the packaging and preparation of that mail." Id. at 21, 23. The Commission also noted that such products distort the marketplace because "[t]he Postal Service 'is perceived as the authority on all mailing related issues.'" Id. at 19 (citing Pitney Bowes Response to POIR No. 2, Question 6), 26 n.26.

These assertions fail to accurately relay the scope of the Postal Service's monopoly and its position in the marketplace. The Postal Service has a limited monopoly, applying as a general matter to the delivery of non-expedited letters under 12.5 ounces. See 18 U.S.C. 1696; 39 U.S.C. 601; 39 C.F.R. Parts 310 and 320. The Postal Service does not have a monopoly in the delivery of non-letter material, and in fact it is well understood by consumers that there are numerous alternate providers of delivery services for much of the material carried by the Postal Service, such as what is typically sent in parcels, bubble mailers, and photo mailers. Nor is there any evidentiary foundation to the notion that the Postal Service is seen as "the authority" on delivering such matter, such that the presence of its brand on, for example, a parcel box gives that box an unfair competitive advantage over other parcel boxes. Thus, at the very least, this rationale for terminating mailing and shipping licenses would not seem applicable to licensed products that relate to non-monopoly services.

This fact applies with particular force to the LePage's agreement. As noted previously in this proceeding, the licensed products that are sold by LePage's primarily involve materials to mail non-monopoly matter, including shipping cartons, bubble mailers, bubble wrap, photograph mailers, tape, wrapping paper, and like materials. See Thuro Response to POIR No. 1, Question 5. As such, these materials are unrelated to the Postal Service's monopoly.<sup>3</sup> Rather, the only effect of preventing the Postal Service from

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<sup>3</sup> With this in mind, there is no impediment to addressing the Commission's concerns about misleading consumers (Order No. 392 at 19-20, 24) by simply ordering that the packaging clearly convey the manufacturer and the nature of the warranty. In other words, there is no rational connection between the concern that customers who "casually inspect[ ]" the product (id. at 21)

licensing its brand on these materials is to prevent the Postal Service from vigorously competing for business in competition with other delivery service providers, using a tool (the licensing of its brand) that is freely available to those alternate providers. The inability to seek to influence consumer behavior through branding, commensurate with the authority enjoyed by alternate providers, imposes a hardship on the Postal Service, in addition to the hardship imposed by its inability to receive royalty payments from the agreement to which it would otherwise be due.<sup>4</sup> See, e.g., SEN. REP. NO. 108-318 at 27 (2004) (noting that the PAEA intended a level playing field between the Postal Service and its competitors).

Furthermore, while the Commission noted that “any advantages of retailing mailing and shipping supplies under license are ameliorated by the success of the recently authorized postal service, ReadyPost, which offers essentially similar products at postal facilities throughout the country” (Order No. 392 at 3, 16), this fails to account for the fact that ReadyPost as currently authorized by the Commission in the Mail Classification Schedule (MCS) is subject to limitations as to where it can be sold. ReadyPost products therefore have no current utility in influencing consumer behavior in other locations. The ability to influence behavior in such locations, through materials such as the branded products at issue here, is of particular importance as the Postal Service and other parties explore ways to encourage consumers to access postal

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would not be able to determine the product warranty, and the draconian conclusion that the sale of those products must be permanently terminated.

<sup>4</sup> These royalty payments were discussed in the Supplemental Sworn Statement of Gary A. Thuro, filed on February 26, 2010.

services in those other locations.<sup>5</sup> Furthermore, the fact that ReadyPost is a competitive product underscores the fact that it is incorrect to characterize the licensed LePage's materials as being an inappropriate use of the Postal Service's monopoly.

Finally, even if the Commission's competition concerns as to the Postal Service's monopoly were still theoretically applicable to the LePage's agreement, there is no record evidence demonstrating that the LePage's agreement has in any way distorted the market. Rather, the only evidence on the record concerned statements from Pitney Bowes regarding the postage meter ink market. Also, unlike the postage meter situation, the Postal Service does not regulate the mailing and shipping materials that are the subject of the LePage's agreement, beyond the basic mailability standards in the Domestic Mail Manual.

The continuation of the LePage's agreement is therefore fully consistent with the standards of section 404(e). The factors that lead the Commission to reject mailing and shipping licenses in Order No. 392, despite having accepted other licensing agreements in Order No. 154, do not justify or necessitate the termination of the LePage's agreement. Rather, the agreement supports the Postal Service's ability to vigorously compete in its provision of postal services. Continuation of the agreement would also preclude the imposition of hardship

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<sup>5</sup> One potential approach is through self-service shipping stations provided by private parties. While the Postal Service has not developed any strategy regarding such stations, or its involvement with such stations, it has allowed a private third party the use of Postal Service branding on a small number of self-service shipping stations provided by that third party as part of a pilot test in one prominent national retail chain. This agreement was entered into in January 2010. The Postal Service understands that LePage's has an agreement with that third party to place its postal-branded supplies next to the self-service shipping stations offered by the third party, in that retail chain as well as in at least one other retail entity that has third-party shipping stations that are not Postal Service branded.

upon LePage's, which should be given the benefit of continuing the license agreement that it negotiated with the Postal Service, and subsequently relied on, especially considering this agreement was signed prior to the passage of the PAEA, and well prior to any indication that the Postal Service could not, paradoxically, seek to license its brand on shipping supplies. The Commission should therefore allow the agreement to proceed according to its terms. For the same reasons, the Commission should also revise Order No. 392 so as to allow the Postal Service to license its brand on products that do not relate to its monopoly.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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