

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

Before Commissioners:

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

Review of Nonpostal Services

Docket No. MC2008-1
(Phase II)

ORDER DENYING REQUESTS FOR RECONSIDERATION,
ADDRESSING CONFIDENTIALITY MATTERS,
AND GRANTING A STAY

(August 24, 2010)

I. INTRODUCTION AND SUMMARY

On January 14, 2010, the Commission issued Order No. 392, its decision in Phase II of its Review of Nonpostal Services under the Postal Accountability and Enhancement Act.¹ On February 12, 2010, timely judicial appeals of that decision were filed by LePage's 2000, Inc. and LePage's Products, Inc. (LePage's) and the United States Postal Service.²

¹ Pub. L. 109-435, 120 Stat. 3198 (2006) (PAEA).

² *LePage's 2000, Inc. and LePage's Products, Inc. v. Postal Regulatory Commission*, No. 10-1031 (D.C. Cir. filed February 12, 2010), consolidated with *United States Postal Service v. Postal Regulatory Commission*, No. 10-1033 (D.C. Cir. filed February 12, 2010) (Phase II Appeal).

On July 1, 2010, LePage's filed with the Commission a pleading that includes a request that the Commission reconsider Order No. 392.³ On July 16, 2010, the Postal Service filed a separate request for reconsideration of that order.⁴

The Commission concludes that both Requests are untimely. In addition, the Commission finds that neither Request raises any new evidence nor demonstrates any materially changed circumstance. Accordingly, the Requests are denied.

The Commission does grant LePage's request for a stay of the termination date for its license agreement with the Postal Service (License Agreement) established by Order No. 392 pending resolution of the ongoing petition for review of that order.

II. PROCEDURAL HISTORY

The PAEA prohibits the Postal Service from providing nonpostal services, except that the Postal Service may continue to provide existing nonpostal services if the Commission authorizes continuation, taking into account (1) the public need for the service, and (2) the ability of the private sector to meet the public need for the service. See 39 U.S.C. § 404(e). The statute directs the Commission to review each nonpostal service offered by the Postal Service no later than December 20, 2008. *Id.* § 404(e)(3). Nonpostal services that do not satisfy the two-part inquiry described above are to terminate. *Id.* § 404(e)(4).

³ LePage's 2000, Inc. and LePage's Products, Inc.'s Submission in Support of USPS' Motion for a Stay of Order No. 392, July 1, 2010 (Submission). In support of its Submission, LePage's filed two declarations. Declaration of Sunir Chandaria, July 1, 2010 (Chandaria Declaration); Declaration of Azeezaly S. Jaffer, July 13, 2010 (Jaffer Declaration).

⁴ United States Postal Service Motion for Reconsideration of Order No. 392 Relating to the LePage's License Agreement, July 16, 2010 (Postal Service Motion for Reconsideration). LePage's and the Postal Service's filings are each referred to as a Request and collectively as Requests herein.

A. Phase I

In December 2007, the Commission initiated a review of nonpostal services, pursuant to 39 U.S.C. § 404(e), to determine which should be authorized to continue.⁵ In Order No. 154, issued December 19, 2008, the Commission reviewed 47 Postal Service revenue-generating activities finding, among other things, that 15 qualified as nonpostal services.⁶ Of those 15, the Commission authorized 14 to continue. Order No. 154 at 3.

Order No. 154 authorized the Postal Service to continue commercial licensing of its intellectual property as a nonpostal service. *Id.* at 73. However, finding the record insufficient, the Commission deferred ruling on three services, including on whether the Postal Service could continue licensing its intellectual property to commercial vendors to sell USPS-branded Mailing & Shipping products related to postal operations at retail establishments. *Id.* at 74. LePage's was among the licensees identified by the Postal Service as authorized to sell USPS-branded Mailing & Shipping supplies.⁷

The Postal Service petitioned for review of Order No. 154 in the U.S. Court of Appeals for the District of Columbia Circuit (Court) on January 16, 2009.⁸ *United States Postal Service v. Postal Regulatory Commission*, 599 F.3d 705 (D.C. Cir. 2010), affirmed Order No. 154 on March 30, 2010.

⁵ Docket No. MC2008-1, Notice and Order Concerning Review of Nonpostal Services, December 20, 2007 (Order No. 50).

⁶ Docket No. MC2008-1, Review of Nonpostal Services under the Postal Accountability and Enhancement Act, December 19, 2008, at 3 (Order No. 154); *see also* Docket No. MC2008-1, Errata Notice, January 9, 2009.

⁷ *See* Further Response of the United States Postal Service to Order Initiating Phase II Proceedings and Notice of Filing of Sworn Statement, January 30, 2009, at 4.

⁸ Petition for Review, *United States Postal Service v. Postal Regulatory Commission*, No. 09-1032 (D.C. Cir. 2010) (Phase I Appeal).

B. Phase II

On January 9, 2009, the Commission initiated Phase II of this proceeding to consider the deferred issues.⁹ The Commission established procedures to develop a more complete record on these issues, including providing the Postal Service and interested persons an opportunity for hearing. *Id.* at 5.

On March 4, 2009, LePage's filed a letter with the Commission requesting intervention as limited participants.¹⁰ Aside from this filing, LePage's did not participate in Phase II proceedings.

The Postal Service submitted a direct case on the five contracts (including the License Agreement) that licensed Mailing & Shipping products. Order No. 392 at 4. Pitney Bowes submitted a rebuttal case, primarily objecting to the licensing of USPS-branded meter ink cartridges. *Id.* at 5. In response, the Postal Service submitted surrebuttal testimony. *Id.* at 5-6.

No party expressed interest in cross-examining the prepared testimonies. *Id.* at 6. The record also includes responses by the Postal Service and Pitney Bowes to Presiding Officer's Information Requests.¹¹ Briefs and reply briefs were filed on July 21, 2009 and July 31, 2009, respectively. Order No. 392 at 6.

The Commission issued Order No. 392, concluding Phase II.¹² The Commission found that the Postal Service had demonstrated neither a public need for third parties to sell USPS-branded Mailing & Shipping products related to postal operations, nor that the private sector lacked the ability to meet any need served by such products. *Id.* at 12-27.

⁹ Notice and Order Initiating Phase II Proceedings, January 9, 2009 (Order No. 168).

¹⁰ Letter from Denise J. Lewis, Honigman Miller Schwartz and Cohn LLP, to Steven W. Williams, Secretary, Postal Regulatory Commission, March 3, 2009.

¹¹ United States Postal Service Response to Presiding Officer's Information Request No. 1, April 3, 2009; United States Postal Service Response to Presiding Officer's Information Request No. 3, June 15, 2009; Pitney Bowes Inc. Response to Presiding Officer's Information Request No. 2, June 24, 2009.

¹² Docket No. MC2008-1, Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, January 14, 2010 (Order No. 392).

Consistent with 39 U.S.C. § 404(e)(4), the Commission directed the Postal Service to terminate licensing agreements for Mailing & Shipping products, including the License Agreement, when existing inventories are exhausted, but no later than December 31, 2010. *Id.* at 27. The Commission allowed that, if the termination date creates hardship, the Postal Service may seek an extension of that date by filing detailed information explaining the circumstances. *Id.*

C. Post-Order No. 392 Filings

On February 12, 2010, both LePage's and the Postal Service filed separate petitions for review of Order No. 392 with the Court. Phase II Appeal, *supra*, note 2. The Court consolidated both appeals into one proceeding that is currently pending. *Id.*

On February 26, 2010, the Postal Service filed a motion for stay of Order No. 392 until the Court ruled on the Phase I Appeal.¹³ On March 30, 2010, the Court issued its decision denying the Postal Service's petition for review of Phase I.¹⁴ The same day, the Commission dismissed the Motion for Stay as moot.¹⁵

On March 31, 2010, LePage's filed in support of the Motion for Stay indicating an intention to submit a "detailed submission" to the Commission "shortly."¹⁶

On June 21, 2010, the Postal Service requested a stay of Order No. 392 pending Commission action on an anticipated motion for reconsideration to be filed by LePage's.¹⁷ While acknowledging that its position was "complicated by the fact that while LePage's [had] announced its intention to file a motion several months ago, it

¹³ United States Postal Service Motion for a Stay of Order No. 392 Related to Mailing and Shipping Licenses, February 26, 2010 (Motion for Stay).

¹⁴ *United States Postal Service v. Postal Regulatory Commission*, 599 F.3d at 705.

¹⁵ Order Dismissing Motion to Stay, March 30, 2010 (Order No. 432).

¹⁶ 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 to File a Further Submission, March 31, 2010, at 1-2 (LePage's Notification).

¹⁷ United States Postal Service Motion for an Expedited Stay of Order No. 392 Relating to the LePage's License Agreement, June 21, 2010, at 1-2 (Motion for Expedited Stay).

ha[d] not yet done so”, the Postal Service explained that, absent a stay, it soon should begin formal steps to terminate the License Agreement by the December 31, 2010 deadline in Order No. 392. *Id.* at 4-5.

On June 24, 2010, LePage’s endorsed the Motion for Expedited Stay, urging the Commission to grant the stay “while the [Commission] reviews LePage’s soon to be filed submission.”¹⁸

Concurrently, LePage’s filed two motions with the Court, seeking (1) to hold the Phase II Appeal in abeyance pending a Commission decision on LePage’s forthcoming reconsideration request, and (2) to delay the filing of the initial briefs that were due July 1, 2010.¹⁹ The Commission consented to the motions assuming that LePage’s would file a reconsideration request soon, which it promised to submit no later than June 30, 2010.²⁰

III. REQUESTS FOR RECONSIDERATION

On July 1, 2010, LePage’s filed a pleading, styled as a Submission in Support of USPS’s Motion for a Stay of Order No. 392, in redacted and non-redacted form. Submission at 1. LePage’s requests that the Commission reconsider its decision in Order No. 392 to terminate the License Agreement and allow it to continue under its terms and conditions. *Id.* at 3, 27. By its terms, the License Agreement would continue until its termination date in 2017. See LePage’s Notification at 2. Alternatively, LePage’s asks the Commission, at a minimum, to stay Order No. 392 until the D.C. Circuit rules on the Phase II Appeal. Submission at 3, 27.

¹⁸ LePage’s 2000, Inc. and LePage’s Products, Inc.’s Concurrence in the USPS’ Motion for an Expedited Stay of Order No. 392 Relating to the LePage’s License Agreement, June 24, 2010, at 2.

¹⁹ Phase II Appeal, Petitioner’s Unopposed Motion to Hold in Abeyance, June 24, 2010, at 1 (Abeyance Motion); Petitioner’s Unopposed Motion for Extension of Time to File Opening Brief, June 24, 2010, at 1 (Motion for Extension of Time).

²⁰ Abeyance Motion at 2-3; Motion for Extension of Time at 2. LePage’s apparently had difficulty in filing its pleadings electronically on June 30, 2010.

LePage's requests the Commission to find that the License Agreement meets the "public needs test" under 39 U.S.C. § 404(e) in light of information contained in the Submission. *Id.* at 2, 17-18. The Submission details the history of LePage's relationship with the Postal Service. *Id.* at 4-7. It outlines key terms in the License Agreement that it claims distinguish it from other licensees. *Id.* at 7-11. It describes its USPS-branded products and innovations, including its participation in pilot programs for retail self-service shipping stations. *Id.* at 12-16. LePage's also alleges that both it and the Postal Service would suffer financial harm if the License Agreement were terminated early. *Id.* at 3, 23-26.

On July 16, 2010, the Postal Service filed a motion for reconsideration of Order No. 392. It alleges that the rationale for rejecting Mailing & Shipping licenses in Order No. 392 does not justify terminating Mailing & Shipping licenses, including the License Agreement, for products relating to non-monopoly services. Postal Service Motion for Reconsideration at 5. In particular, it contends that concerns about confusing customers and distorting the competitive marketplace are inapplicable to the USPS-branded products produced under the License Agreement. *Id.* at 4. In support, the Postal Service refers to its previous testimony and information provided in the Submission. *Id.* at 2-3. It concludes that the License Agreement is consistent with the standards in 39 U.S.C. § 404(e) and that it should proceed according to its terms to prevent hardship to LePage's. *Id.* at 7-8. It also contends that the Commission should revise Order No. 392 to allow the Postal Service to license its brand on products unrelated to its monopoly, including Mailing & Shipping products. *Id.* at 8.

IV. COMMISSION ANALYSIS

The Commission determines that the Requests are untimely and raise nothing that could not have been raised during the proceeding. The Requests do not identify newly available evidence or demonstrate materially changed circumstances pertinent to Order No. 392. Reconsideration is also unwarranted in light of the long history of this

proceeding, LePage's failure to participate actively in it, and the substantial delay by LePage's and the Postal Service in seeking reconsideration.

Preliminarily, the Postal Service erroneously suggests that the Commission invited requests for reconsideration of the issues resolved in Phase II in the event of hardship. Postal Service Motion for Reconsideration at 1.²¹ As noted above, Order No. 392 established December 31, 2010 as the termination date for Mailing & Shipping licensing agreements, providing parties to those agreements almost one full year to sell off their inventories. However, the Commission noted, that if that date created a hardship, the Postal Service may seek an extension "by filing detailed information explaining the circumstances." Order No. 392 at 27.

Thus, the opportunity to request an extension of the termination date related only to the hardship that might be caused if, for example, inventories could not be exhausted by the December 31, 2010 termination date. The order did not extend an invitation to seek reconsideration of the merits on grounds of hardship.

The order also specifically concluded that an extension of sales until termination of Mailing & Shipping license agreements seven years into the future would be contrary to the intent manifested in the PAEA requiring the termination of services that fail the inquiry under 39 U.S.C. § 404(e): "Permitting sales until 2017 would be inconsistent with the intent of the PAEA to order termination where the provisions of section 404(e) are not met." *Id.* Thus, the Commission already addressed and rejected the contention that hardship would permit a delay in the License Agreement termination date until 2017.

A. The Requests Are Untimely

Neither title 39 nor the Commission's rules contain provisions governing requests for reconsideration. However, from time to time, such requests have been filed with the

²¹ Although LePage's has made similar representations to the Court, see Abeyance Motion at 2, LePage's pleadings before the Commission acknowledge that Order No. 392 provided only that "to the extent that the early termination of the contract by December 31, 2010 created a hardship, the USPS was allowed to request an extension by filing 'detailed information explaining the circumstances.'" Submission at 19.

Commission. In the absence of specific statutory or regulatory limits, the Commission holds that requests for reconsideration should be filed within a short and reasonable time period.²² Here, LePage's and the Postal Service had ample opportunity to contemporaneously request reconsideration of Order No. 392, which was issued on January 14, 2010. Neither party pursued such a course. In contrast to their timely petitions for review with the Court, which LePage's and the Postal Service both filed within 30 days, the parties filed their requests for reconsideration 168 days and 183 days, respectively, after Order No. 392 was issued.²³

On March 31, 2010, LePage's filed its first substantive pleading with the Commission in support of the Postal Service's Motion for Stay that, the day before, the Commission had already dismissed as moot. Order No. 432 at 2. In that pleading, which itself was submitted 76 days after Order No. 392 was issued, LePage's indicated that it would "shortly" file a "comprehensive submission [setting forth] various facts that previously were not available, or were not presented to the Commission...." LePage's Notification at 2. Despite this statement, that subsequent pleading was not filed until July 1, 2010, 92 days after the representation was made that it would be filing "shortly" and 168 days after Order No. 392 was issued.²⁴ When it finally requested reconsideration, LePage's did not offer mitigating circumstances or adequate explanations for the delay in filing its Request. In short, LePage's has failed to act with reasonable diligence, and consideration of its Request would undermine the prompt and orderly resolution of proceedings before this Commission.

²² Cf. *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) ("We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time" citing *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972)).

²³ Because a timely motion for reconsideration tolls the time for filing a petition for review, see, e.g., *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987), and because the PAEA requires aggrieved persons to petition for review of a Commission order within 30 days, 39 U.S.C. § 3663, it would be arguably anomalous to regard as timely a reconsideration request filed more than 30 days after a Commission order.

²⁴ In the meantime, on May 17, 2010, the Court established a briefing schedule setting July 1, 2010 as the due date for petitioners' briefs in the Phase II Appeal. Order Establishing Briefing Schedule, May 17, 2010.

The same considerations apply to the Postal Service's filing. Only after LePage's filed its Submission did the Postal Service submit its request for reconsideration. The Postal Service also failed to provide any justification for its failure to promptly request administrative relief. The Postal Service has had occasion to file similar requests previously with the Commission.²⁵ Never has it been so tardy in filing for such relief.²⁶

The Commission, therefore, denies the Requests as untimely.

B. The Requests Do Not Identify New Evidence or Demonstrate Changed Circumstances

The Requests fail to raise matters that could not have been presented in a timely fashion during Phase II. Neither LePage's nor the Postal Service identifies new evidence or changed circumstances material to Order No. 392. In its Request, the Postal Service contends that "[t]he concerns expressed in Order No. 392 do not justify the termination of the postal-branded mailing and shipping products produced by LePage's." Postal Service Motion for Reconsideration at 2. In support of this contention, the Postal Service reiterates statements made in witness Thuro's testimony filed January 30, 2009 and revised on March 20, 2009. It then cites LePage's Submission for corroboration of those statements. *Id.* at 2-3. The Postal Service arguments present nothing new for the Commission to consider.

LePage's Submission offers information unique to LePage's, such as background on the company, its products, and the history and nature of the License Agreement.

²⁵ See, e.g., Docket No. MC2009-16, United States Postal Service Motion for Reconsideration of Order No. 183, February 24, 2009 (filed 5 days after the initial order); Docket No. MC2004-3, United States Postal Service Motion for Leave to File Memorandum on Reconsideration and for Proposed Procedures, March 7, 2005 (filed 19 days after the final decision); Docket No. C2001-1, Response of the United States Postal Service to Order No. 1307, and Motion for Reconsideration, April 10, 2001 (filed 21 days after the initial order); Docket No. A2000-1, United States Postal Service Motion for Reconsideration of Order No. 1296, June 23, 2000 (filed 7 days after the initial order).

²⁶ In Docket No. MC2004-3, the Postal Service Motion for Leave to File a Memorandum was submitted 19 days after the Commission's decision became final. It explained why it needed additional time to prepare its reconsideration request. *Id.* at 4, n.2. The Commission granted the time requested by the Postal Service to prepare its pleadings. Docket No. MC2004-3, Opinion and Further Recommended Decision, April 21, 2006, ¶ 2005.

Submission at 4-16.²⁷ LePage's had the opportunity to present this information during Phase II and chose to forego it. None of the information provided identifies new evidence or changed circumstances.

LePage's has been on notice of this proceeding and the issues involved since at least March 4, 2009, the date of its requested intervention. Throughout Phase II, LePage's had ample opportunity to present evidence and argument concerning its License Agreement. However, it elected not to participate actively in the proceeding. Only well after Order No. 392 was issued, and when the date for filing its brief on judicial review of that order was imminent, did LePage's file substantive pleadings with the Commission. LePage's offers no justification for its failure to participate actively in Phase II or for its delay in submitting evidence to the Commission.

In its Submission, LePage's claims to offer information not before the Commission in Phase II, including information about the quality of its products and the success of its pilot programs for retail self-service shipping stations. Information purporting to demonstrate the quality of LePage's products was available years before Phase II began and should have been properly presented during the proceeding. LePage's notes that, in December 2003, it was recognized before the Postal Service Board of Governors for the quality of its products. Submission at 12; Chandaria Declaration, ¶ 11. At that time, a Postal Service vice president declared that LePage's products appeared to be superior in quality compared to other retail products, as well as the ReadyPost brand. Jaffer Declaration, ¶ 5. LePage's also claims that it has worked

²⁷ The parties' suggestion that it may be possible to distinguish LePage's from other licensees is unavailing. The public need test under 39 U.S.C. § 404(e)(3) concerns the nonpostal service at issue generally—in this case Mailing & Shipping products—not individual license agreements. In Order No. 154, the Commission accepted the Postal Service's arguments that it should not treat each individual license as a separate nonpostal service. Order No. 392 at 11. Indeed, the Postal Service itself argued that the Commission should look to Mailing & Shipping activities in general for purposes of meeting the grandfather clause and other requirements of the PAEA. For instance, the Postal Service stated, "As such, the Commission's consistent interpretation of 'nonpostal service' as applying to broader nonpostal activities, rather than each individual transaction in which that activity is performed, is clearly correct..." Initial Brief of the United States Postal Service, July 21, 2009, at 9. The Postal Service contends that determining whether individual license agreements qualify as "nonpostal services" is an inappropriate way to interpret that statutory term. *Id.* at 9, n.9.

to improve the quality of its products from the time it began its relationship with the Postal Service. Chandaria Declaration, ¶ 18. LePage's could have presented this information during Phase II, but did not do so. Thus, information concerning the quality of LePage's products is not new evidence or indicative of changed circumstances.

LePage's also claims to have empirical data demonstrating the success of its pilot programs for retail self-service shipping stations, Submission at 14, 15, n.9, data it claims would show that USPS-branded products increase the use of the Postal Service for Mailing & Shipping services. *Id.* at 16-18, 26. However, LePage's began participating in such pilot programs in early 2009. *Id.* at 14. Discussions about these types of arrangements had occurred years before. *Id.* at 15. Information about pilot test programs was available during Phase II and, if relevant, should have been presented during the proceeding. A second pilot program apparently began shortly before Order No. 392 was issued, but LePage's does not allege it provided materially different results than the first test.²⁸ At the least, LePage's could have notified the Commission in a timely fashion about the existence of the pilot programs if the data had not yet been fully developed. Information about the pilot programs therefore does not constitute new evidence or demonstrate changed circumstances that justify reopening the record.

Accordingly, the Commission denies the Requests.

V. REQUESTS FOR CONFIDENTIALITY

On June 30, 2010, pursuant to Order No. 480²⁹ and 39 CFR 3007.21, the Postal Service submitted a copy of the Licensing Agreement and an application for non-public

²⁸ As described by LePage's, these programs test a marketing technique. No suggestion is made that this marketing program would be any less successful if it were undertaken using LePage's products that did not bear the USPS brand.

²⁹ Preliminary Order on Postal Service's Motion for Expedited Stay, June 25, 2010 (Order No 480).

treatment of redacted parts of the Agreement.³⁰ The Postal Service states that the redacted materials include matters concerning renewal, royalty payments, insurance, advertising, assignment, termination, licensed properties, the sell-off period, dispute resolution, and other negotiated terms. Notice at 3. It contends that the redactions protect commercially sensitive portions of the License Agreement and that it would likely suffer commercial harm if the redacted portions were publicly disclosed. *Id.*

On June 29, 2010, LePage's filed a motion requesting that the Commission provide its yet-to-be-filed Submission *in camera* treatment and protect it from public disclosure under 39 CFR 3001.31a.³¹ LePage's contends that certain information to be included with the Submission is confidential, commercially sensitive, and proprietary. *Id.* This information includes the License Agreement, market data, analysis of current retail pilot programs, and financial information relating to potential hardship. *Id.* LePage's claims that disclosing this information would likely cause commercial harm to it and the Postal Service. *Id.*

Commission rules provide protection for information considered to be commercially sensitive so long as an application for non-public treatment is filed. See 39 CFR 3007.1(b). The Motion for Protective Conditions will be treated as an application for non-public treatment under rule 3007.22. No one replied to this document and the disposition of the Requests does not require disclosure of the materials at issue. The materials identified by the Motion for Protective Conditions will accordingly be treated as non-public pursuant to 39 CFR 3007.

³⁰ Notice of the United States Postal Service of the Filing of the LePage's License Agreement and Application for Nonpublic Treatment, June 30, 2010 (Notice). LePage's filed the same redacted version of the License Agreement with the Submission. Submission, Attachment B, at 5.

³¹ LePage's 2000, Inc. and LePage's Products, Inc.'s Motion for Protective Conditions and *In Camera* Designation of Its PRC Submission, June 29, 2010 (Motion for Protective Conditions). LePage's states that the Postal Service concurs in relief sought. *Id.* at 2.

VI. MOTION FOR STAY OF ORDER NO. 392

In its Motion for Expedited Stay, the Postal Service asks the Commission to stay Order No. 392 until the Commission issues its decision on pleadings to be filed by LePage's and the Postal Service. Motion for Expedited Stay at 2. In a preliminary order, the Commission stated that it would consider the Motion for Expedited Stay if and when a request for reconsideration of Order No. 392 is filed with the Commission. Order No. 480 at 2. As an alternative basis for relief, LePage's also asks the Commission to stay Order No. 392 until the Phase II Appeal is resolved. Submission at 1, 27.

Order No. 392 provided LePage's and the Postal Service until December 31, 2010 to exhaust existing inventories and wind down operations under the License Agreement. That timeframe was designed to balance the need "to avoid further potential for consumer confusion and market impact with the desire to mitigate potential economic loss to the licensees." Order No. 392 at 27. The order provided, however, that upon a detailed showing the Commission would consider amending its timeframe if warranted.

As discussed above, LePage's Submission does not provide new evidence or identify changed circumstances relevant to the Commission's review under section 404(e), and therefore does not warrant reopening of the Commission's proceedings. The evidence cited by LePage's does, however, illustrate the difficulty that LePage's and the Postal Service would face in resuming operations under the License Agreement should Order No. 392 be set aside. Although the Commission strongly believes that Order No. 392's analysis is correct, to preserve the opportunity for effective judicial review the Commission will grant LePage's request to stay Order No. 392 pending the Court's resolution of the Phase II Appeal.³²

³² In light of this order's denial of the requests for reconsideration, the parties' motions for a stay pending resolution of those requests are denied as moot.

The stay is limited solely to this License Agreement and does not affect any other aspect of Order No. 392. If the Court denies the pending petitions for review of Order No. 392, the Postal Service is to terminate the License Agreement as specified in the Order within 180 days of issuance of the Court's mandate.

It is Ordered:

1. LePage's 2000 Inc. and LePage's Products, Inc.'s Submission in Support of USPS' Motion for a Stay of Order No. 392, filed July 1, 2010, is denied.
2. The United States Postal Service Motion for Reconsideration of Order No. 392 Relating to the LePage's License Agreement, filed July 16, 2010, is denied.
3. Order No. 392, as it applies to the License Agreement between the Postal Service and LePage's, is stayed pending Court of Appeals resolution of the Phase II Appeal.

By the Commission.

Shoshana M. Grove
Secretary