

In Order No. 1043, the Commission requested comments from interested parties on the issues raised by the *LePage*'s court.³ These comments respond to that request.

II. ISSUES RAISED BY THE *LEPAGE*'S COURT

In Order No. 1043, the Commission identifies three issues that the *LePage* court raised for consideration on remand.⁴ In particular, the court requests that the Commission explain its departure from its findings in Phase I of this proceedings with respect to (1) the classification of licensing of intellectual property for use on Mailing and Shipping products as nonpostal; (2) the public need for licensing the Postal Service's intellectual property for use on Mailing and Shipping products, and (3) the private sector's ability to meet that need. These comments address the first two issues.⁵

A. Basis for Classifying Mailing and Shipping Products as Nonpostal – Identity of the Seller

In its opinion, the court found that the Commission did not adequately explain why, in Phase I of this case, it classified certain services such as ReadyPost and greeting cards as "postal services" while concluding in Phase II that the licensing of its trademarks and copyrights for use on Mailing and Shipping products was a nonpostal service. The Court stated "the position the Commission presses now is inconsistent with the position it took below, where it assessed whether the *products* at issue – as opposed to the activity offered by the Service – could "reasonably be viewed as

³ Order No. 1043 at 3-5.

⁴ Order No. 1043 at 2.

⁵ As the court points out, if the Commission does not find an appropriate "public need" for a nonpostal service, it need not reach the issue of whether the private sector can meet that need before ordering it to terminate such service. See *LePage*'s 642 F.3d at 233.

ancillary to the carriage of mail.” *LePage’s*, 642 F.3d at 231.⁶ It remanded the case back to the Commission to “explain its departure from the Phase I order and adopt a reasoned rationale for classifying the [mailing and shipping] program as a ‘nonpostal service.’” *Id.* at 232.

In adopting a “reasoned rationale” for classifying the mailing and shipping program as a nonpostal service per the court’s request, the Public Representative directs the Commission’s attention to another portion of the court’s opinion. The court noted that the Commission argued on appeal that an acceptable distinction might be the seller’s identity. In particular, the court stated, “the Commission may well be correct that the crucial distinction is the seller’s identity. But whatever the merits of this position, we cannot consider it because the Commission did not consider it below.” *LePage’s*, 642 F.3d at 231.

As a result, the Public Representative urges the Commission to clearly explain on remand that the seller’s identity is the crucial distinction between ReadyPost and greeting cards being classified as postal services and the licensing of the Postal Service’s copyrights and trademarks to third parties to create mailing and shipping products being nonpostal services.

In Phase I of this case, the Commission determined that licensing was a nonpostal service. It also allowed the Postal Service to continue the nonpostal service of licensing. Such determinations were either not challenged or upheld on appeal. See *USPS v. PRC*, 599 F.3d 705 (D.C. Cir. 2010). However, the Commission initiated Phase II of this case because it determined that more evidence was needed with

⁶ Of course, there is nothing *per se* arbitrary or capricious about an agency changing its mind. *Am. Farm Bureau Fed v. EPA*, 559 F.3d 512, (D.C. Cir. 2009). An agency is not irrevocably committed to a particular position. An agency will receive judicial deference even “if the relevant facts have changed or the [agency] has reasonably made a different policy judgment” if it explains such changes. *Id.* at 521. See also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances.”).

respect to whether to allow licensing to continue as a nonpostal service with respect to licensing for use on items related to postal operations. In other words, Phase II considered whether it was appropriate to carve out an exception for licensing related to postal operations.⁷

As the Public Representative discussed in Phase II, “[w]ith respect to licenses dealing with postal operations, in essence, the public will not perceive a difference between items that are manufactured and sold by the Postal Service and those sold by licenses using the Postal Service’s brand or trademarks.” Public Representative Initial Brief at 5. While there would not be anything inherently inappropriate with such an arrangement with respect to postal services, the fact that the activity being reviewed here is a subset of licensing makes it a nonpostal service.

Title 39 U.S.C. 404(e)(3) requires the Commission to review each activity “offered by” the Postal Service to determine whether it is postal or nonpostal. On the other hand, ReadyPost and the greeting card program are “postal services” because the Postal Service is the entity selling such items at its retail locations and on its website. The seller’s identity is the key distinction here.

This is important because the Commission’s oversight with respect to the Postal Service is primarily with respect to the Postal Service’s actions and whether the Postal Service is in compliance with applicable requirements of Title 39. The Commission’s oversight authority with respect to whether other entities are following the requirements of Title 39 is virtually nonexistent. Allowing the Postal Service to license its mailing and shipping products and then effectively escape much of the oversight and regulation envisioned under the statutory scheme would turn the statute on its head. The Commission implicitly recognized this problem in its Phase II order. It should more explicitly discuss this concern in its final order on remand.

⁷ Indeed, it is difficult to comprehend how an activity (licensing) can be considered a “nonpostal service” while a subset of that activity (licensing trademarks and copyrights for use on mailing and shipping supplies) could be considered a “postal service.”

B. Public Need for Licensing Postal Copyrights Mailing and Shipping and Trademarks on Products

The court pointed out that in the Commission's Phase II Order, it found "no public need for the program because 'any benefits are outweighed by the disadvantages of selling USPS-branded products that can confuse consumers and disrupt markets.'" *LePage's*, 642 F.3d at 233. The court explained that in the Commission's Phase I order, the Commission determined that "commercial licensing, as a general matter, served a public need because it generated revenue, benefitted mailers, and gave recognition to the Service's brand." *Id.* However, the court discussed that in Phase II, the Commission found such benefits were "without sufficient evidentiary support" for licensing copyrights and trademarks for use on mailing and shipping products. *Id.* The court also states that in its Phase I Order, the Commission considered a variety of factors in analyzing the public need: "the demand for the service, its availability, its usefulness, whether it is a customary business practice, or serves the efficiency of operations." *Id.* at 234. It also found "some merit" in the argument that the PAEA does not permit the Commission to take into account "economic effects" of a product in accessing its public need. *Id.* at 233.

The court appears to be asking the Commission to better explain its rationale for finding no public need for the carved out exception to commercial licensing. To do so, in its final order on remand, the Commission should carefully clarify that the same benefits that would accrue to commercial licensing as a whole would also accrue to commercial licensing with respect to intellectual property to be used on mailing and shipping supplies. However, the Commission should find that the potential harm to the public with respect to "consumer confusion" outweighs these benefits in the case of the carved out exception. This should satisfy the reviewing court while not taking into

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account what the court appears to consider an inappropriate metric – the economic effects of the product.⁸

Respectfully Submitted,

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⁸ “Consumer confusion” should be considered an appropriate metric for determining the public need of a product since it would fall under the category of the product’s “usefulness” which the court appears to believe is an appropriate factor to consider in determining a product’s public need. *Id.* at 233.