

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C.

REVIEW OF NONPOSTAL SERVICES

DOCKET NO. MC2008-1 (PHASE IIR)

**REPLY COMMENTS OF LEPAGE'S 2000, INC., AND LEPAGE'S
PRODUCTS, INC., TO THE COMMISSION'S NOTICE
AND ORDER ESTABLISHING PROCEDURES ON REMAND**

LePage's 2000, Inc., and LePage's Products, Inc. (collectively, "LePage's"), respectfully submit the following reply comments in further response to the Postal Regulatory Commission's (the "Commission") Notice and Order Establishing Procedures on Remand, Order No. 1043 (the "Remand Order").

INTRODUCTION

The United States Postal Service (the "Postal Service" or "USPS"), LePage's, Pitney Bowes Inc. ("Pitney Bowes"), and the Public Representative each submitted Comments in response to the Remand Order. LePage's joins in the comments submitted by the Postal Service, which properly note that under *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011) ("*LePage's*"), the Commission may no longer consider the perceived impacts *LePage's products* have on consumers or on competitors because, under the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) (the "PAEA"), the proper focus is on licensing, not on the products sold as a result of licensing. While Pitney Bowes and the Public Representative may believe that this interpretation of the Act is incorrect, does not properly carry out the intent of the Act, and/or is not sound policy, those arguments were all considered, and rejected by, the District of Columbia Court of

Appeals (the “Court”). Now that the Court has spoken definitively as to what the Commission must focus on in carrying out its obligations under the PAEA, the Commission is bound by the Court’s interpretation of the Act.

Pitney Bowes’s and the Public Representative’s comments also do not assist the Commission in carrying out its obligations on remand. Both Pitney Bowes and the Public Representative urge the Commission to base its conclusions about the Mailing & Shipping program on concerns about consumer confusion and anticompetitive effects. But there is no evidence in the record supporting those concerns, and, more importantly, the Court has already considered, and rejected, those concerns. The Court concludes the *LePage*’s decision by noting, “[t]he Commission has much work to do on remand remedying the abundant inconsistencies in its order,” *id.*, 642 F.3d at 234. Merely readopting the same arguments that Pitney Bowes and the Public Representative raised prior to the appeal does not comport with the Court’s directive. This is not to suggest that the Commission is required to undertake a lengthy post-remand proceeding, however. The Court has already concluded that the Mailing & Shipping program is virtually indistinguishable from both the ReadyPost and the Officially Licensed Retail Products (“OLRP”) programs. The Commission, therefore, has the option of merely treating like programs similarly, as established tenets of administrative law require. It is only if the Commission seeks to continue to treat the Mailing & Shipping program differently from these indistinguishable programs that the significant work referenced by the Court will be required.

DISCUSSION

Response to Pitney Bowes Comments

In the proceedings leading to the issuance of the Phase I Order¹, Pitney Bowes objected to the Postal Service's licensing of the USPS brand for placement on third-party replacement ink cartridges because it was concerned that the Postal Service brand, when placed on these ink cartridges, could confuse consumers and cause unfair competition. Because this ink is used to print postage, which is tantamount to currency, and thus is carefully regulated by the Postal Service, and because the market for this ink is relatively small, Pitney Bowes's concerns were understandable. These concerns do not, however, extend to the Mailing & Shipping program, which operates in a larger market that is not regulated by the Postal Service (and Pitney Bowes offered no evidence to the contrary). Prior to the issuance of the Phase II Order², Pitney Bowes filed a submission with the Commission stating:

On November 18, 2009, the Postal Service filed notice that it had terminated the license agreement for USPS-branded postage meter ink cartridges and postage meter supplies, effective December 17, 2009. Accordingly, Pitney Bowes no longer has a direct and immediate interest in any of the specific licensing arrangements under consideration in Phase II....

Notice Regarding the Status of USPS-Branded Replacement Postage Meter Ink Cartridges and Postage Meter Supplies (Filing ID 65691), at 1. Pitney Bowes also explained that its concerns were heightened, "where the Postal Service is offering licensed products in commercial markets over which it also exercises regulatory

¹ Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, Order No. 154.

² Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, Order No. 392.

authority,” *id.* at 1, which is not the case for the Mailing & Shipping program.

While Pitney Bowes’s Comments attempt to extend its original concerns to the Mailing & Shipping program, it does not appear to be the case that Pitney Bowes objects to all licensing arrangements engaged in by the Postal Service. After all, Pitney Bowes did not previously object (and does not now appear to object) to the ReadyPost, Greeting Card, Customized Postage, and OLRP programs, all of which involve licensing by the Postal Service. Indeed, Pitney Bowes uses the Postal Service brand to help drive sales of certain of its own products. For instance, in connection with its sale of online postage stamps, Pitney Bowes displays the Postal Service brand on its website and touts itself as “an approved licensed vendor.” The below graphic is from the webpage www.pb.com/online-postage-stamps/:



Similarly, in connection with Pitney Bowes’s sale of customized postage products (“Custom Postage By Pitney Bowes”), it again displays the following USPS intellectual property on its website (www.zazzle.com/pb/line/id-cs):



Pitney Bowes does not explain why it is permissible for it to use the Postal Service brand in connection with its own private sales of postal-related products, but not permissible for LePage’s to do the same. In *LePage’s*, the Court has required, if the Commission wishes to draw this distinction, to explain it in a reasoned and non-arbitrary manner. In this regard, Pitney Bowes’s comments fail to provide any useful guidance.

In its Comments, Pitney Bowes focuses much attention on its interpretation of the “legislative history” of the PAEA and argues that the Commission should terminate the Mailing & Shipping program in order to carry out Congress’s intent in passing the PAEA - which Pitney Bowes believes is to eliminate non-core postal services. But this interpretation of the PAEA is not supported by the text of the Act itself, which does not require the Commission to make a “core” versus “non-core” analysis. And the Commission cannot adopt an interpretation of the PAEA which is inconsistent with the language of the Act itself. See, e.g., *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (“The best evidence of [the purpose of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous ... we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”); *Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States*, 617 F.3d 1357, 1361 (Fed. Cir. 2010) (“While our decisions recognize that legislative history can shed light on congressional intent, we have never held that legislative history trumps clear text.... Rather, we must presume that Congress says in statute what it means and means in a statute what it says.”).

Moreover, as the Commission previously noted, “[t]he legislative history of the PAEA itself is sparse. No committee or conference reports were issued for the enacted bill.” Phase I Order at 16. Thus, even if it were true that in the 11 years prior to the passage of the PAEA there was a general movement to limit the Postal Service to “core services,” that goal was not expressly adopted in the PAEA. To the contrary, the PAEA was passed as a compromise measure, requiring the termination of nonpostal activities

engaged in by the Postal Service *after* January 1, 2006, but allowing for the grandfathering of nonpostal services engaged in prior to that date regardless of whether they are “core” or not. In other words, the Act as passed only requires the Commission to determine whether there is: (a) a public need for the service; and (b) whether the private sector can meet that public need, *see* 39 U.S.C. § 404(e)(3), not whether “the service” under review is a core postal function or not.

Pitney Bowes also argues that the Commission must make reference to the “end product or group of end products” in conducting the Section 404(e)(3) analysis. Pitney Bowes Comments at 16. But this approach is one that the Court expressly prohibited. *See LePage’s*, 642 F.3d at 232 (“[t]he Act requires the Commission to assess the ‘public need’ for the service ‘offered by’ the Postal Service.... Yet the service offered by the Postal Service in the [Mailing & Shipping] program is, of course, the licensing of intellectual property. The Commission’s focus on the economic effect of the products that result from licensing, then, would seem to depart from the Act’s plain language.”); 233-34 (“under the Act, the Commission must assess the activity the Service offers. In the case of commercial licensing—whether for mailing and shipping supplies or for other products—***that activity is licensing***. Therefore, ***for the Commission to review the private sector factor by assessing ability of the private sector to provide similar products would bring the Commission into conflict ... with the Act***”) (emphasis added).

Pitney Bowes’s and the Public Representative’s concerns are also based on the faulty assumption that if the Mailing & Shipping program is permitted to continue, the Postal Service will fail to exercise its licensing authority sensibly and in a manner that

will not harm or mislead its customers. But the Postal Service is a highly-sophisticated entity which can and should be expected to exercise sound business judgment. Thus, merely because the Postal Service has the authority to license its brand under the PAEA does not mean that it will engage in “a virtually limitless range of new nonpostal activities through the expediency of licensing arrangements.” Pitney Bowes Comments at 6. Furthermore, because the only issue on remand is whether the Postal Service can license its brand for use on mailing and shipping products (with all other activities already having been reviewed earlier in this proceeding), which the Postal Service is already doing in connection with both the ReadyPost and OLRP ancillary services programs, allowing the Mailing & Shipping program to continue will not increase the Postal Service’s reach in any meaningful way.

Next, Pitney Bowes argues that the OLRP program was properly grandfathered (even though this program has little connection to the Postal Service’s core mission), but that the Mailing & Shipping program should be terminated, because “mailing and shipping services are widely available in the private sector and ... the Postal Service’s licensing activities would not expand the range or quality of the mailing and shipping supplies available to consumers.” Pitney Bowes Comments at 8. The Commission focused much of its appellate arguments on this point, and the point was expressly rejected by the Court, which found that “assessing ability of the private sector to provide similar products would bring the Commission into conflict ... with the Act” *Id.* at 234. In other words, it is also the case that the private sector can manufacture teddy bears, key chains, and postal scales, but the nature of the product is not the correct focus.

Pitney Bowes also does not give the Commission any guidance as to how to

distinguish the ReadyPost, Greeting Card, Customized Postage, and OLRP programs from the Mailing & Shipping program. Pitney Bowes observes that ReadyPost is sold by the Postal Service (it does not mention that it, and not the Postal Service, sells Customized Postage products), but it fails to explain why this distinction matters. Pitney Bowes also argues that ReadyPost need not satisfy the public need and private sector tests because it is a “postal service.” While that may be true, the Court has nevertheless required that the Commission provide a reasoned explanation as to why one definition of “postal service” should apply to ReadyPost and a different definition should apply to the Mailing & Shipping program.

Lastly, Pitney Bowes argues that the “public need” test should be narrowed and that the Commission should not look at the needs of the Postal Service in assessing the public need. This suggested interpretation of the Act is in tension with the terms of the Act, which do not say that the Commission should consider the needs of “postal consumers” or “users of postal services,” but rather speak more generally about the needs of the “public,” which include all persons who benefit from the existence of the Postal Service. Concluding that the needs of the public are at odds with the needs of the Postal Service can lead to unintended consequences because if the Postal Service is unable to generate sufficient revenue, it may be unable to continue delivering the mail, in which case the public’s needs are clearly no longer being served. Thus, while a postal consumer may not have a need for the Postal Service to license its brand, the public does to the extent that licensing is an important way for the Postal Service to generate revenue, advertise, enhance its image, create efficiencies through standardization, and communicate with its customers. The Commission already found

as much in the Phase I Order, and there is no reason for the Commission to change its definition of “public need” now.

The Public Representative’s Comments

The Public Representative urges the Commission to adopt the distinction that selling by the Postal Service makes something a “postal service,” but selling by third-parties makes it a “nonpostal service.” The Public Representative does not, however, adequately explain why the identity of the seller matters. Moreover, the notion that something is a “postal service” simply because it is sold by the Postal Service is unworkable and has already been rejected by the Commission. See LePage’s Comments at 16-20.

The Public Representative also argues that the Commission should not allow the licensing of Mailing & Shipping products because the Commission cannot regulate those products. But the Public Representative does not explain why the Commission *needs* to regulate in this market. As the Postal Service notes, this is tantamount to the proverbial remedy in search of a problem.

Lastly, while the Public Representative acknowledges that the Commission may no longer consider “economic considerations,” Public Representative Comments at 5-6, it argues that the Commission should terminate the Mailing & Shipping program because of “consumer confusion” concerns. But as LePage’s has previously noted, not only is there no evidence in the record substantiating that any consumers are in fact confused by the Mailing & Shipping program, but the Commission already found that this problem would be adequately addressed and resolved by the Postal Service’s representation to the Commission that it was working on modifying its licensed

packaging “to indicate the ‘Product Guarantee’ is the manufacturer’s rather than the Postal Service’s warranty.” Phase II Order at 21. The Commission found, “Clarifying the guarantee on the packaging might reduce somewhat the misunderstanding in the minds of consumers about this aspect of the product being purchased....” *Id.* It is therefore far from clear that the consumer confusion issue continues to be a concern. More importantly, the Public Representative does not explain why it is appropriate to consider “consumer confusion” as a factor when the Court expressly found that it is impermissible to focus on the products being sold, and their impact, rather than on the activity of the Postal Service.

CONCLUSION

Neither Pitney Bowes nor the Public Representative provide the Commission with a viable framework for addressing the Court’s concerns in *LePage’s*. To the contrary, they largely urge the Commission to readopt the same arguments and findings that were expressly rejected by the Court. The only result the Commission will achieve if it were to follow their suggestions is further appeals and possibly further adverse rulings. Instead, the Commission should adopt the reasoning and findings of the Court and should recognize that the Mailing & Shipping program provides the same benefits as the ReadyPost, Greeting Card, Customized Postage, and OLRP programs. For all of these reasons, the Commission should find that the Mailing & Shipping program should be permitted to continue.

Respectfully submitted,

**LEPAGE'S 2000, INC. AND LEPAGE'S
PRODUCTS, INC.**

By their attorneys,

/s/ David Himelfarb _____

Daniel J. Kelly

dkelly@mccarter.com

David Himelfarb

dhimelfarb@mccarter.com

Bonnie A. Vanzler

bvanzler@mccarter.com

McCarter & English, LLP

265 Franklin Street

Boston, MA 02110

Tel. 617.449.6500

Fax 617.326.3086

January 23, 2012