

ORDER NO. 1326

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Robert G. Taub

Review of Nonpostal Services

Docket No. MC2008-1
(Phase II R)

ORDER RESOLVING ISSUES ON REMAND

(Issued April 30, 2012)

I. EXECUTIVE SUMMARY

LePage's 2000, Inc. and LePage's Products, Inc. (together, LePage's), and the Postal Service petitioned¹ for review of the Commission's Order concluding Phase II of Docket No. MC2008-1.² On June 7, 2011, the United States Court of Appeals for the

¹ See Petition for Review of Final Order of the Postal Regulatory Commission, *LePage's 2000, Inc. and LePage's Prods., Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011) (No. 10-1033, consolidated); Petition for Review, *LePage's 2000, Inc. and LePage's Prods., Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011) (No. 10-1033, consolidated).

² See Docket No. MC2008-1 (Phase II), Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, January 14, 2010 (Order No. 392).

District of Columbia Circuit (Court) issued an opinion granting the petitions for review, vacating Order No. 392, and remanding to the Commission for further proceedings.³

This Order reconciles the inconsistencies identified by the Court, and determines that Postal Service licensing of intellectual property for use on mailing and shipping products sold by third parties may continue as a nonpostal service. This service is referred to in this Order as “Mailing and Shipping Licensing.” The Commission concludes that consistent with its earlier findings, Mailing and Shipping Licensing may continue because it serves a public need that the private sector cannot meet.

II. COURT’S OPINION

In its opinion, the Court found that the Commission had not adequately justified its conclusions in Order No. 392 regarding Mailing and Shipping Licensing. The Court instructed the Commission to explain a departure in rationale in Order No. 392 from conclusions it had previously reached in a prior order.⁴ The Court directed the Commission to provide a reasoned rationale for: (1) classifying Mailing and Shipping Licensing as a nonpostal service; (2) determining that there is no public need for Mailing and Shipping Licensing; and (3) determining that the private sector could meet any public need for Mailing and Shipping Licensing. 642 F.3d at 232-34.

The Commission issues this Order on remand to reconcile the inconsistencies identified by the Court. At the outset, the Commission clarifies that it examines the *activity* the Postal Service offers when (1) classifying a service as postal or nonpostal, and (2) determining whether a nonpostal service should continue under 39 U.S.C. § 404(e)(3). The Commission explains its rationale for classifying Mailing and Shipping Licensing as a nonpostal service. It concludes that Mailing and Shipping Licensing may

³ *LePage’s 2000, Inc. and LePage’s Prods., Inc. v. Postal Regulatory Comm’n*, 642 F.3d 225, 234 (D.C. Cir. 2011).

⁴ Docket No. MC2008-1, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008 (Order No. 154); see also Docket No. MC2008-1, Errata Notice, January 9, 2009.

continue as a nonpostal service because it serves a public need that the private sector cannot meet.

In addition to Mailing and Shipping Licensing, Order No. 392 considered whether the Warranty Repair Program and sale of CDs and DVDs should be permitted to continue under section 404(e). Order No. 392 at 28-37. In Order No. 392, the Commission concluded that (1) the Warranty Repair Program should be terminated, and (2) CD and DVD sales could continue if certain requirements were met. *Id.* at 3.

Neither of these determinations was challenged on appeal, and neither of these determinations is impacted by the clarification provided in this Order. Thus, the Commission's conclusions reached in Order No. 392 with respect to the Warranty Repair Program and the sale of CDs and DVDs remain undisturbed.

III. BACKGROUND AND PROCEDURAL HISTORY

In December 2006, Congress enacted the Postal Accountability and Enhancement Act (PAEA),⁵ which made significant changes to the laws governing the Postal Service. The PAEA limits the Postal Service's authority to provide "nonpostal services" to those that it offered as of January 1, 2006. 39 U.S.C. § 404(e)(2). The PAEA defines "postal service" to mean "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]" *Id.* § 102(5). "Nonpostal service" is defined as "any service that is not a postal service defined under section 102(5)." *Id.* § 404(e)(1).

The PAEA requires the Commission to "review each nonpostal service offered by the Postal Service" on the date that the PAEA was enacted (December 20, 2006) to determine whether it should continue. *Id.* § 404(e)(3). In its analysis, the Commission must take into account "(A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service." *Id.*

⁵ Pub L. No. 109-435, 120 Stat. 3198 (2006).

On December 20, 2007, the Commission initiated its review of nonpostal services under the PAEA.⁶ The Commission directed the Postal Service to file “a complete listing and comprehensive description of each nonpostal service provided as of December 20, 2006, including all existing agreements (contracts, arrangements, or however characterized) that generate revenues (or for which the Postal Service otherwise receives compensation) regardless of the statutory authority claimed for such agreements.”⁷ The Commission also provided the Postal Service with an opportunity to request that any service the Postal Service considered to be nonpostal be classified as postal. *Id.*

In response, the Postal Service provided a comprehensive list of 47 revenue-generating activities that it characterized as “the universe, so to speak, of revenue generating activities that are not postal services.”⁸ The Postal Service subsequently requested that five activities be characterized as “postal services.”⁹ Interested persons participated in the proceeding by submitting briefs, reply briefs, and numerous motions. See Order No. 154, Appendix II.

A. Phase I—Order No. 154

On December 19, 2008, the Commission issued Order No. 154, completing the first phase of its review of nonpostal services under 39 U.S.C. § 404(e) (Phase I). The Commission analyzed the 47 revenue-generating activities identified by the Postal Service to determine (1) whether they qualified as “services” subject to review under

⁶ Docket No. MC2008-1, Notice and Order Concerning Review of Nonpostal Services, December 20, 2007 (Order No. 50).

⁷ Docket No. MC2008-1, Order Granting Motion to Compel and Revising the Procedural Schedule, April 29, 2008, at 14 (Order No. 74).

⁸ Docket No. MC2008-1, Initial Response of the United States Postal Service to Order No. 74, June 9, 2008, at 1-2 (Postal Service Initial Response).

⁹ Docket No. MC2008-1, Further Response of the United States Postal Service to Order No. 74, and Notice of Filing of Sworn Statements, June 23, 2008, at 3 (Postal Service Further Response).

section 404(e); (2) whether they were “postal” or “nonpostal” services; and (3) in the case of nonpostal services, whether they should be permitted to “continue.”

The Commission created an eight-step decision tree to implement its review under section 404(e). The decision tree included, as relevant to the present analysis, the following inquiries:

1. Does the revenue-generating activity constitute a service? If not, the inquiry is at an end since the activity is not subject to review under 39 U.S.C. § 404(e).
2. If the revenue-generating activity is a service, is it postal or nonpostal?
3. If the service is a nonpostal service subject to review under section 404(e), should it be authorized to continue, taking into account (a) the public need for the service, and (b) the private sector’s ability to meet that need?

Order No. 154 at 2.

The Commission noted that while the PAEA defines the terms “postal service” and “nonpostal service,” it does not define the term “service.” *Id.* at 1. After obtaining the views of participants, the Commission defined “service,” for purposes of its review under section 404(e), as “[a]ny ongoing, commercial activity offered to the public for the purpose of financial gain.” *Id.* at 15. The Commission concluded that 21 revenue-generating activities are “services” subject to section 404(e). It classified 6 services as postal and 15 services as nonpostal. *Id.* at 3.

1. Postal Services

Order No. 154 marked the first occasion for the Commission to construe the PAEA’s definition of “postal service.” Reviewing the statutory definition, the Commission observed that “if a service relates to any of these functions, broadly, the carriage of mail, it may properly be classified as a postal service. It may also be classified as a postal service if it serves ‘other functions ancillary’ to the carriage of mail.” *Id.* at 30. The Commission also examined pre-PAEA precedents to gain further

guidance into the meaning of “postal service.” It examined a prior Commission precedent determining that special services are postal services because they “enhance the value of service rendered” by providing such features as added security, added convenience or speed, indemnity against loss, and correct address information.¹⁰ The Commission also examined a prior judicial decision that found special services to be postal services because they are “very closely related to the delivery of mail.” Order No. 154 at 31 (citation omitted).

Based on these considerations, the Commission classified six services as postal. Three of these postal services were discussed in the Court’s opinion: ReadyPost, Greeting Cards, and Customized Postage. ReadyPost is an activity in which the Postal Service sells branded mailing and shipping products to customers at postal retail locations.¹¹ *Id.* at 32. The evidence on record showed that most ReadyPost products are mailed. The Commission thus determined that the Postal Service’s sale of ReadyPost products is a postal service because the products are likely to be mailed, are designed to meet customers’ mailing needs, provide ease of access to the mailstream, and reduce the Postal Service’s handling and transportation costs. *Id.* at 33.

The Commission similarly concluded that the Postal Service’s sale of Greeting Cards (which include note cards and other stationery items) is a postal service because the products are likely to be mailed and are designed to be mailed. *Id.* at 34.

¹⁰ *Id.* (citing Docket No. R76-1, PRC Op. R-76-1, Vol. I, June 30, 1976, at 266-67 (footnote omitted)). Special services are services that are ancillary to the carriage of mail, which includes the collection, transmission, and delivery of mail matter. PRC Op. R-76-1, Vol. I, June 30, 1976, at 266 n.1.

¹¹ LePage’s asserts that “as a factual matter, ReadyPost products are sold not just directly by the Postal Service, but also by private parties at privately-operated CPUs [contract postal units].” Comments of LePage’s 2000, Inc. and LePage’s Products, Inc. to the Commission’s Notice and Order Establishing Procedures on Remand, January 13, 2012, at 19 (LePage’s Comments). CPUs are subordinate postal units usually located in a business operated by a contractor who provides postal services to the public. Publication 32, Glossary of Postal Terms at 49 (April 2011). The Postal Service is the seller of ReadyPost products sold at CPUs. CPU operators serve as agents for the Postal Service by selling ReadyPost products on the Postal Service’s behalf.

In the case of Customized Postage, customers may obtain Postal Service-authorized postage consisting of customer-supplied images aligned with postage prepayment indicia. *Id.* at 36. Finding that Customized Postage essentially represents a form of postage prepayment, a core function of the Postal Service, the Commission concluded that Customized Postage is a postal service. *Id.*

2. Nonpostal Services

In determining whether to permit nonpostal services to continue, the Commission evaluated the “public need for the service” and “the ability of the private sector to meet the public need for the service.” *Id.* at 39 (citing 39 U.S.C. § 404(e)(3)). When assessing the “public need” for a nonpostal service, the Commission considered a number of factors, such as the demand for the service, its availability, its usefulness, whether the service is a customary business practice, and whether the service improves the efficiency of postal operations. *Id.* at 39. In determining the private sector’s ability to meet the public need for a nonpostal service, the Commission again examined a number of factors, such as public convenience, the quality of the service, the availability and characteristics of alternatives, and economic impact. *Id.* at 40.

Of the 15 services that it found to be nonpostal, the Commission authorized 14 to continue.¹² In its opinion, the Court focused on two nonpostal services: the Officially Licensed Retail Products (OLRP) program and Licensing Programs Other Than OLRP. Under the OLRP program, the Postal Service sells Postal Service-licensed retail merchandise in postal retail locations. The Commission found a public need for the OLRP program because it “leverages the Postal Service’s brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service’s core mission.” *Id.* at 49. The Commission found that the private sector cannot meet the public need for the OLRP program because the private sector is unable

¹² One nonpostal service, Stored Value Cards, was not offered as of January 1, 2006 and thus was not eligible for grandfathering under section 404(e)(2). *Id.* at 46-48.

to provide products bearing Postal Service intellectual property. Thus, the Commission authorized the OLRP program to continue as a nonpostal service. *Id.* at 50.

The Commission then evaluated other intellectual property licensing activities identified by the Postal Service to determine whether they should continue under section 404(e). *Id.* at 68-69. The Commission grouped these activities under the name “Licensing Programs Other Than OLRP.” *Id.*, Appendix I, Part B. As relevant to this remand proceeding, Licensing Programs Other Than OLRP includes licensing of intellectual property for use on consumer products sold by third parties. The types of licenses that were before the Commission during Phase I were for the following products: apparel, art, cards and stationary, fabric, fashion accessories, food, gifts and collectibles, mailing and shipping supplies, pet products, and toys and games. *Id.* at 69.

The Commission concluded that Licensing Programs Other Than OLRP is a nonpostal service. It stated, “When the Postal Service acts as a licensor, it is granting the right to use its intellectual property on consumer goods. This service (licensing) is not a postal service.” *Id.* at 71. The Commission found a public need for Licensing Programs Other Than OLRP because it generates revenues, benefits mailers, supports the universal service obligation, and promotes the Postal Service brand. *Id.* at 73. Given that only the Postal Service can license its unique intellectual property, the Commission stated that the private sector could not meet the public need for Licensing Programs Other Than OLRP. The Commission therefore authorized Licensing Programs Other Than OLRP to continue as a nonpostal service and classified it as competitive. *Id.*

The Commission, however, stated that this conclusion was “not unqualified.” *Id.* at 74. It bifurcated licensing of intellectual property for use on consumer products sold by third parties into two categories: (1) licenses for products *unrelated* to the Postal Service’s operations (Promotional Licensing), and (2) licenses for products *related* to the Postal Service’s operations (Mailing and Shipping Licensing). *See id.* The Commission found that Promotional Licensing is uncontroversial and could continue as

a nonpostal service. However, it stated that Mailing and Shipping Licensing raised a number of legal and factual issues that were not sufficiently developed on the record.¹³ *Id.* at 74.

The Commission concluded that it could not, on the record before it, determine whether Mailing and Shipping Licensing should continue as a nonpostal service. Accordingly, the Commission deferred evaluating whether Mailing and Shipping Licensing should continue as a nonpostal service to the second phase of these proceedings (Phase II), but permitted it to continue in the interim. *Id.* at 74-75.¹⁴

B. Clarification and Appeal of Order No. 154

1. Order No. 171

On January 12, 2009, Pitney Bowes moved to clarify Order No. 154.¹⁵ Pitney Bowes acknowledged that “Order No. 154 appears to be a final order with respect to the holding that the commercial licensing activities of the Postal Service constitute nonpostal services.”¹⁶ *Id.* at 3. But it sought clarification as to whether the determination that Mailing and Shipping Licensing may continue was “a final order or whether the determination is interim, preliminary, or interlocutory.” *Id.*

¹³ Concerns about Mailing and Shipping Licensing surfaced late in Phase I and generated participant challenges that could not be fully considered within the statutory deadline for issuing Order No. 154. See 39 U.S.C. § 404(e)(3) (requiring the Commission to complete its review of nonpostal services by December 20, 2008).

¹⁴ The Commission also deferred considering whether the Warranty Repair Program and the sale of CDs and DVDs should be permitted to continue. *Id.* at 35, 85.

¹⁵ Docket No. MC2008-1 (Phase II), Pitney Bowes Inc. Motion for Clarification of Order Nos. 154 and 168, January 12, 2009 (Motion for Clarification).

¹⁶ Pitney Bowes uses the term “commercial licensing” to refer to licensing “related to postal operations,” which includes Mailing and Shipping Licensing. See *id.*

On January 16, 2009, the Commission issued Order No. 171, affirming its conclusion that Mailing and Shipping Licensing is a nonpostal service.¹⁷ The Commission clarified that Order No. 154 was “interim and interlocutory” as to Mailing and Shipping Licensing but “final as to other licensing activities.” *Id.* at 2.

2. Petition for Review

On January 16, 2009, the Postal Service filed a petition with the Court seeking review of Order No. 154.¹⁸ The Postal Service appealed two determinations that the Commission made in Order No. 154: (1) section 404(e)(3) authorizes the Commission to review nonpostal services permitted under separate grants of authority; and (2) leasing and licensing of property constitutes a “service” under section 404(e)(3).¹⁹ The Court determined that the Commission’s interpretation of section 404(e)(3) was in both instances “reasonable” and denied the Postal Service’s petition. *Id.* at 710-11. No other party challenged any other determination in Order No. 154. The window for any person adversely affected or aggrieved by Order No. 154 to file a timely appeal expired on January 18, 2009. See 39 U.S.C. § 3663.

C. Phase II—Order No. 392

On January 9, 2009, the Commission initiated Phase II to consider the three issues that it deferred from Phase I (1) whether Mailing and Shipping Licensing should be permitted to continue under section 404(e)(3); (2) whether the Warranty Repair Program should be permitted to continue under section 404(e); and (3) whether the sale

¹⁷ Docket No. MC2008-1 (Phase II), Order on Motion for Clarification, January 16, 2009, at 4 (Order No. 171).

¹⁸ Petition for Review, *United States Postal Service v. Postal Regulatory Commission*, 599 F.3d 705 (D.C. Cir. 2010) (No. 09-1032).

¹⁹ *United States Postal Serv. v. Postal Regulatory Comm’n*, 599 F.3d 705, 708 (D.C. Cir. 2010).

of CDs and DVDs should be permitted to continue under section 404(e).²⁰ LePage's intervened in Phase II, but otherwise did not participate in the proceedings.²¹

In Order No. 392, the Commission determined that (1) Mailing and Shipping Licensing should be terminated; (2) the Warranty Repair Program should be terminated; and (3) CD and DVD sales could continue if certain requirements were met. Order No. 392 at 3.

The Commission made two principal findings regarding Mailing and Shipping Licensing. First, it found that the public need for this nonpostal service had not been demonstrated. *Id.* at 14. Second, the Commission stated that assuming there was a public need, the Postal Service had not demonstrated that the private sector is unable to meet that need. *Id.* at 24. Pursuant to section 404(e)(4), the Commission directed the Postal Service to terminate its Mailing and Shipping Licensing arrangements. *Id.* at 26-27.

D. Phase II Appeal

The Postal Service and LePage's filed petitions in the Court seeking review of the Commission's determination that Mailing and Shipping Licensing should be terminated. See n.1, *supra*. No party challenged the Commission's determinations with respect to the Warranty Repair Program and the sale of CDs and DVDs.

Both the Postal Service and LePage's challenged the Commission's conclusions that (1) the public need for Mailing and Shipping Licensing had not been shown, and (2) the Postal Service had not demonstrated that the private sector is unable to meet the public need for Mailing and Shipping Licensing. See 642 F.3d at 229-30. In

²⁰ Docket No. MC2008-1 (Phase II), Notice and Order Initiating Phase II Proceedings, January 9, 2009, at 2-4 (Order No. 168).

²¹ Docket No. MC2008-1 (Phase II), Request for Intervention of *LePage's 2000, Inc.* and *LePage's Products, Inc.*, March 4, 2009.

addition, LePage's argued that the Commission erred in classifying Mailing and Shipping Licensing as a nonpostal service rather than as a postal service. *Id.* at 230.

The Court granted the petitions for review, vacated Order No. 392, and remanded for further proceedings consistent with its opinion. *Id.* at 226. It found that the Commission had not adequately justified its findings regarding Mailing and Shipping Licensing in Order No. 392. It instructed the Commission to explain (1) the classification of Mailing and Shipping Licensing as a nonpostal service; (2) the public need for Mailing and Shipping Licensing; and (3) the private sector's ability to meet that need. *Id.* at 232-34.

E. Procedures on Remand

On December 13, 2011, the Commission instituted the present stage of this proceeding by issuing Order No. 1043, which established procedures on remand and provided interested persons with the opportunity to comment on the three issues raised by the Court's opinion.²² Initial comments were due by January 13, 2012, and reply comments were due by January 23, 2012. *Id.* at 6. The Commission received four initial comments and four reply comments.

IV. COMMENTS

A. Initial Comments

1. Postal Service

The Postal Service takes essentially three positions. First, it argues that the Commission may not properly consider the licensed products under section 404(e).²³ It

²² Docket No. MC2008-1 (Phase II), Notice and Order Establishing Procedures on Remand, December 13, 2011 (Order No. 1043).

²³ United States Postal Service Initial Comments on Remand, January 13, 2012, at 3 (Postal Service Comments).

asserts that the Commission must consider the service offered by the Postal Service when analyzing both the public need and the private sector's ability to meet that need. *Id.* at 3, 5. The Postal Service contends that Mailing and Shipping Licensing is indistinguishable from other licensing activities and should continue as a nonpostal service. *Id.* at 5-6.

Second, the Postal Service asserts that if the Commission does analyze the licensed products, it must conclude that Mailing and Shipping Licensing is a postal service. *Id.* at 7. It argues that the products resulting from Mailing and Shipping Licensing may be classified as postal services even if the Postal Service's involvement is restricted to licensing. *Id.* at 9. Third, it contends that the record lacks evidence that Postal Service-branded mailing and shipping products distort the market and cause consumer confusion. *Id.* at 11-18.

2. LePage's 2000, Inc. and LePage's Products, Inc.

LePage's argues that Mailing and Shipping Licensing is a postal service because it offers the same benefits that the Commission found ReadyPost, Greeting Cards, and Customized Postage provide. LePage's Comments at 9-14. These benefits include meeting customer's mailing needs, easing access to the mailstream, and improving customer convenience. *Id.* LePage's contends that in determining whether Mailing and Shipping Licensing is a postal or nonpostal service, the Commission must analyze LePage's products, rather than the Postal Service's licensing activity, to be consistent with the approach that the Commission used in analyzing ReadyPost, Greeting Cards, and Customized Postage. *Id.* at 14-16. LePage's contends that this approach is consistent with the statutory definition of "postal service," which, in its view, permits the Commission to look past the Postal Service's activity (*i.e.*, licensing) to determine whether there is a sufficient nexus to the carriage of mail. *Id.* at 15 n.8.

LePage's asserts that the Commission may not distinguish between postal and nonpostal services based on the seller's identity and notes that this distinction would be

inconsistent with the Postal Service's plan for future growth. *Id.* at 16-24. It concludes that a more complete record is necessary before the Commission may conclude that Mailing and Shipping Licensing is not a postal service. *Id.* at 24-26.

Alternatively, LePage's argues that Mailing and Shipping Licensing serves a public need that the private sector cannot meet and that it should therefore be permitted to continue. *Id.* at 27-30, 36-38, 42-45. It contends that the record lacks "substantial evidence" showing that Mailing and Shipping Licensing is anti-competitive or that it causes consumer confusion. *Id.* at 30-34. LePage's asserts that the Commission may not consider economic factors as part of its "public need" inquiry. *Id.* at 34-36. It states that the Commission must reopen the record before finding that there is no public need for Mailing and Shipping Licensing. *Id.* at 38-42.

3. Pitney Bowes Inc.

Pitney Bowes Inc. (Pitney Bowes) contends that the Commission properly classified Mailing and Shipping Licensing as a nonpostal service.²⁴ It observes that LePage's raised this issue for the first time in its appeal of Phase II. *Id.* at 13. It asserts that ReadyPost is distinguishable from Mailing and Shipping Licensing because ReadyPost involves the direct sale of products by the Postal Service. *Id.* at 14. Pitney Bowes argues that the Commission properly applied different criteria when evaluating ReadyPost and Mailing and Shipping Licensing. *Id.* at 14-15. In its view, the PAEA requires the Commission to examine the product when analyzing postal services and the activity when analyzing nonpostal services. *Id.*

Second, Pitney Bowes argues the Commission should affirm its finding that there is no public need for Mailing and Shipping Licensing. *Id.* at 4. It asserts that Order No. 392 appropriately distinguished between licenses for promotional products and licenses for mailing and shipping products based on the purpose of the license. *Id.*

²⁴ Comments of Pitney Bowes Inc., January 13, 2012, at 4 (Pitney Bowes Comments).

at 7-11. Pitney Bowes contends that the Commission should refine its initial approval of licensing “as a general service” in Order No. 154. *Id.* at 5.

Third, Pitney Bowes urges the Commission to narrow the scope of the “public need” test under section 404(e)(3). It asserts that the public need should not focus exclusively on the Postal Service’s needs. *Id.* at 15. Pitney Bowes further contends that public need must be assessed in relation to some end product rather than in the abstract. *Id.* at 16.

4. Public Representative

The Public Representative urges the Commission to distinguish ReadyPost and other postal services from Mailing and Shipping Licensing based upon the seller’s identity.²⁵ The Public Representative suggests that the Commission clarify its rationale for finding no public need for Mailing and Shipping Licensing. The Public Representative recommends that the Commission acknowledge that Mailing and Shipping Licensing provides the same benefits as other licensing activities, but find that the potential harm to the public with respect to “consumer confusion” outweighs these benefits. *Id.* at 5.

B. Reply Comments

1. Postal Service

The Postal Service concludes that neither the Public Representative nor Pitney Bowes provides a reasoned rationale for reaffirming the Commission’s analysis of Mailing and Shipping Licensing in Order No. 392 consistent with the Court’s opinion.²⁶ It argues that the Public Representative’s comments are inconsistent with the statute,

²⁵ Public Representative Comments in Response to Order No. 1043, January 13, 2012, at 3 (PR Comments).

²⁶ United States Postal Service Reply Comments on Remand, January 23, 2012, at 15 (Postal Service Reply Comments).

Commission precedent, and the Court's opinion. *Id.* at 2. The Postal Service asserts that the Court's opinion precludes the Commission from considering a licensed product's usefulness or potential consumer confusion under section 404(e)(3). *Id.* at 3. It contends that the seller's identity is not dispositive in determining whether a service is postal or nonpostal, and a service may be classified as postal even if the Postal Service's activity is limited to licensing. *Id.* at 4-5. The Postal Service indicates that it can impose conditions on licensees subject to Commission oversight as appropriate. *Id.* at 6.

The Postal Service contends that Pitney Bowes's comments disregard the Court's opinion and fail to reconcile Order No. 392 with that opinion. *Id.* at 6-7, 11-13. In the Postal Service's view, Pitney Bowes's criticisms of Order No. 154 regarding the approval of licensing and the "public need" analysis either ignore or are inconsistent with the Court's opinion. *Id.* at 8-11. The Postal Service states that the discussion of postal services in Pitney Bowes's comments is flawed. *Id.* at 13-15.

2. LePage's 2000, Inc. and LePage's Products, Inc.

LePage's asserts that Pitney Bowes does not explain why Pitney Bowes may use the Postal Service brand with its own product sales, but LePage's may not.²⁷ LePage's critiques Pitney Bowes's analysis of the PAEA's legislative history as inconsistent with the text of the statute. *Id.* at 5-6. It argues that Pitney Bowes does not provide any guidance for distinguishing Mailing and Shipping Licensing from ReadyPost, Greeting Cards, Customized Postage, and the OLRP program. *Id.* at 7-8.

LePage's argues that the Public Representative does not adequately explain why the seller's identity matters when classifying a service as postal or nonpostal, or why the Commission must regulate the market for mailing and shipping products. *Id.* at 9. It

²⁷ Reply Comments of LePage's 2000, Inc. and LePage's Products, Inc. to the Commission's Notice and Order Establishing Procedures on Remand, January 23, 2012, at 4 (LePage's Reply Comments).

contends that the record lacks evidence substantiating “consumer confusion” concerns. *Id.* at 9-10. It concludes that neither Pitney Bowes nor the Public Representative provides the Commission with a viable framework for addressing the Court’s opinion. *Id.* at 10.

3. Pitney Bowes Inc.

Pitney Bowes asserts that the purpose of the remand is for the Commission to fully explain how Order No. 392 modified Order No. 154 and justify its conclusions about Mailing and Shipping Licensing in Order No. 392.²⁸ It argues that the Commission appropriately considered the purpose of the licensing activity when assessing whether different types of licensing activities may continue. *Id.* at 3-6. It contends that the Commission reasonably distinguished between the direct sale of products versus licensing activities, which supports classifying Mailing and Shipping Licensing as a nonpostal service. *Id.* at 6-9. It disputes claims by the Postal Service and LePage’s that the record lacks evidence regarding consumer confusion, market distortion, and unfair competition. *Id.* at 10-15.

4. Public Representative

The Public Representative agrees with Pitney Bowes’s initial comments that the Commission must assess the public need for a nonpostal service in relation to some other end product or group of products.²⁹ He asserts that LePage’s and the Postal Service cite to an inappropriate legal standard for evaluating the public need for Mailing and Shipping Licensing. *Id.* at 3-5. He contends that the record contains a basis for the Commission to find the existence of consumer confusion. *Id.* at 5-8. He concludes that

²⁸ Reply Comments of Pitney Bowes Inc., January 24, 2012, at 2 (Pitney Bowes Reply Comments).

²⁹ Public Representative Reply Comments in Response to Order No. 1043, January 23, 2012, at 2-3 (PR Reply Comments).

postal and nonpostal services are mutually exclusive categories and that LePage’s improperly requested to conduct discovery and reopen the record. *Id.* at 8-9.

V. COMMISSION ANALYSIS

A. The Commission Examines the Activity the Postal Service Offers

The Court’s opinion and the comments filed on remand indicate a need to clarify the Commission’s analysis of postal and nonpostal services. There appears to be uncertainty about whether the Commission should examine the *activity*, the end *product*, or the *seller’s identity* when (1) classifying a service as postal or nonpostal, and (2) determining whether a nonpostal service may continue under section 404(e)(3).³⁰ The Commission clarifies that in both instances, it evaluates the *activity* the Postal Service offers.

1. Classifying a Service as Postal or Nonpostal

The Commission confirms that when classifying a service as postal or nonpostal, the touchstone of the analysis is the *activity* the Postal Service offers. An activity-level analysis is evident in the eight-step decision tree that the Commission established in Order No. 154. Under the decision tree, the Commission first determines whether each revenue-generating “activity” identified by the Postal Service qualifies as a “service.” Order No. 154 at 2. The Commission defined “service” to mean “[a]ny ongoing, commercial *activity* offered to the public for the purpose of financial gain.” *Id.* at 15 (emphasis added). Thus, by definition, when the Commission classifies a service as postal or nonpostal, it necessarily evaluates the activity the Postal Service offers.

Moreover, the statutory definition of “postal service” supports this analysis. “[P]ostal service” is defined as “the delivery of letters, printed matter, or mailable

³⁰ See, e.g., Pitney Bowes Comments at 14; LePage’s Comments at 14-20; PR Comments at 3; Postal Service Comments at 7.

packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto....” 39 U.S.C. § 102(5). The statute defines “postal service” with words that denote activities: delivery, acceptance, collection, sorting, and transportation.³¹

However, the Court stated that the Commission, in Order No. 154, classified ReadyPost and Greeting Cards as postal services by analyzing the *products* at issue rather than the *activity* the Postal Service offers. 642 F.3d at 231. The Commission agrees that the analysis in Order No. 154 must be clarified in this respect. With ReadyPost and Greeting Cards, the activity the Postal Service offers is the direct sale of those products. To determine whether the sale of those products is postal or nonpostal, the Commission, in Order No. 154, did not evaluate the Postal Service activity (selling) in a vacuum. Rather, it necessarily examined the products themselves to determine whether the sale of those products could “reasonably be viewed as ancillary to the carriage of mail.” Order No. 154 at 33.

Further, the Court observed that “the Commission seems to assert that so long as it is the [Postal] Service itself that sells mailing and shipping supplies, it is a ‘postal service.’” 642 F.3d at 231. It is true that the Commission considers the identity of the seller insofar as it examines the activity the *Postal Service* offers. However, the identity of the seller is not a dispositive factor when classifying a service as postal or nonpostal. Were the Postal Service to sell a product wholly unrelated to its core postal operations, the Commission would not find that activity to be a postal service merely because the Postal Service acts as the seller.³²

³¹ Pitney Bowes contends that a product-level analysis is consistent with the PAEA. It cites to the definition of “product” and provisions discussing revisions to the product lists. Pitney Bowes Comments at 14-15 (citing 39 U.S.C. §§ 102(6), 3642). Pitney Bowes conflates the technical definition of “product” in the PAEA with the ordinary meaning of “product” as a manufactured item or good. In this Order, the word “product” refers to its ordinary meaning.

³² For example, Order No. 392 did not classify the sale of CDs and DVDs as a postal service even though the Postal Service sells those items. See Order No. 392 at 32-37.

LePage's contends that if the Commission analyzes the activity the Postal Service offers when classifying a service as postal or nonpostal, the Commission would need to apply the same analysis to ReadyPost, Greeting Cards, and Customized Postage. LePage's Comments at 15-16. LePage's argues that with respect to ReadyPost and Greeting Cards, the Commission would need to analyze both Postal Service activities of (1) licensing Postal Service trademarks to manufacturers who produce these products and (2) selling these products to consumers. *Id.* With respect to Customized Postage, LePage's claims that the only activity the Postal Service offers is licensing. *Id.*

LePage's analysis slices the Postal Service's activities too finely. With ReadyPost and Greeting Cards, the Postal Service grants manufacturers a license to use its intellectual property when producing goods that the Postal Service sells. The license, however, is incidental to the activity the Postal Service offers: the *sale* of ReadyPost products and Greeting Cards.

Likewise, the Postal Service's license agreements with Customized Postage providers are not relevant to whether Customized Postage is postal or nonpostal. The Commission found that Customized Postage is a postal service because it represents a form of postage prepayment, a core function of the Postal Service. Order No. 154 at 36. Customized Postage providers act as agents for the Postal Service by providing a core function on the Postal Service's behalf.

2. Determining Whether a Nonpostal Service May Continue

The Commission is required to review "each nonpostal service offered by the Postal Service" to determine whether it should continue. 39 U.S.C. § 404(e)(3). There appears to be no dispute that section 404(e)(3) requires the Commission to analyze the Postal Service activity rather than the end product. As the Court observed, the PAEA requires the Commission to "assess the *activity* the [Postal] Service offers." 642 F.3d at 233 (emphasis added). Likewise, in their comments, participants agree that when

analyzing whether a nonpostal service may continue, the Commission must examine the activity the Postal Service offers.³³

The Commission agrees. Accordingly, it examines the activity the Postal Service offers in determining whether a nonpostal service may continue under section 404(e)(3).

B. Mailing and Shipping Licensing is a Nonpostal Service

The Court directed the Commission to provide a reasoned rationale for classifying Mailing and Shipping Licensing³⁴ as a nonpostal service. 642 F.3d at 232. The Commission considered this issue during Phase I and resolved it in Order No. 154 by classifying Mailing and Shipping Licensing as a nonpostal service. In response to the Court's directive, the Commission also provides a reasoned rationale for this finding.

1. Order No. 154 Classified Mailing and Shipping Licensing as a Nonpostal Service

Throughout Phase I and Phase II, none of the participants sought to classify Mailing and Shipping Licensing as a postal service. In Order No. 74, the Commission directed the Postal Service to provide a complete listing of "each nonpostal service provided as of December 20, 2006, including all existing agreements (contracts, arrangements, or however characterized) that generate revenues...." Order No. 74 at 14. In response, the Postal Service provided a comprehensive listing of 47 revenue-generating activities that it characterized as "the universe, so to speak, of revenue generating activities that are not postal services." Postal Service Initial Response at 1-2. The list included "licensing programs." *Id.* at 20-23. The Postal Service subsequently requested that five activities be characterized as postal services. Postal Service Further Response at 3. Licensing programs were not among the five.

³³ Postal Service Comments at 3; LePage's Comments at 15; Pitney Bowes Comments at 14; PR Comments at 4.

³⁴ As stated above, "Mailing and Shipping Licensing" means Postal Service licensing of intellectual property for use on mailing and shipping products sold by third parties. See Part I, above.

In Order No. 154, the Commission determined that each of the five activities that the Postal Service requested to be characterized as postal were “postal services” within the meaning of the statute. Order No. 154 at 27-38.³⁵ Similarly, for the six services the Postal Service claimed to be nonpostal, the Commission explicitly determined that five were nonpostal services.³⁶ Lastly, with respect to activities that the Postal Service characterized as unreviewable, the Commission explicitly determined which activities that qualified as “services” were postal and nonpostal.³⁷

Phase I resolved the issue of whether Mailing and Shipping Licensing is a postal or nonpostal service. The Commission explicitly determined that Mailing and Shipping Licensing is a nonpostal service and put that determination on the record when it issued Order No. 154 on December 19, 2008. See *id.* at 71. Subsequent filings also placed participants on notice that Mailing and Shipping Licensing is a nonpostal service. In its Motion for Clarification, Pitney Bowes noted that “Order No. 154 appears to be a final order with respect to the holding that the commercial licensing activities of the Postal Service constitute nonpostal services.”³⁸ The Commission confirmed its finding in Order No. 171. Order No. 171 at 4.

The classification of Mailing and Shipping Licensing as a postal service was not at issue during Phase II. No participant raised it during the proceeding. The issue was

³⁵ See *id.* at 32 (“Thus, the Commission finds Address Management Services to be a postal service.”); *id.* at 33-34 (“[T]he Commission finds ReadyPost to be a postal service.”); *id.* at 35 (“the Commission concludes that, under the PAEA, greeting cards and stationery may be classified as a competitive postal service...”); *id.* at 36 (“Accordingly, customized postage is a postal service.”); *id.* at 38 (“Accordingly, the Commission finds that [International Money Transfer Service] may be classified as a competitive postal service...”).

³⁶ See *id.* at 41 (Passport Photo Service); *id.* at 44 (Photocopying Service); *id.* at 47 (Stored Value Cards); *id.* at 49 (OLRP); *id.* at 51 (Electronic Postmark).

³⁷ See *id.* at 61-62 (Philatelic Services, nonpostal); *id.* at 63-64 (Stamp Fulfillment, postal); *id.* at 67 (Leasing agreements, including (1) real property, (2) Fed Ex Drop Boxes, (3) Meter Manufacturers Warranty Program, and (4) Training Facilities, all nonpostal); *id.* at 71 (Licensing Programs Other Than OLRP, non-postal); *id.* at 78-79 (Web-based linking agreements, nonpostal); *id.* at 81 (MoverSource Program, nonpostal); *id.*, Appendix I, Part B (Warranty Repairs, nonpostal).

³⁸ Motion for Clarification at 3. Pitney Bowes uses the term “commercial licensing” to refer to licensing “related to postal operations,” which includes Mailing and Shipping Licensing. See *id.*

only raised, for the first time, over 2 years after Order No. 154 was issued in LePage's brief to the Court. LePage's contends that pursuant to section 404(e)(3), the Commission was obligated to "review each nonpostal service offered by the Postal Service" and that "[a] necessary prerequisite to making this determination is determining whether or not a service is 'postal' or 'nonpostal.'"³⁹ This is precisely what the Commission did in Phase I. See Order No. 154 at 71. LePage's raises an issue that the Commission considered during Phase I and resolved in Order No. 154.

2. The Commission Confirms that Mailing and Shipping Licensing Is a Nonpostal Service

The Court remanded Order No. 392 to the Commission to explain its departure from Order No. 154 and adopt a reasoned rationale for classifying Mailing and Shipping Licensing as a nonpostal service. 642 F.3d at 232. The Commission responds to the Court's directive. As previously discussed, when classifying a service as postal or nonpostal the Commission examines the *activity* offered by the Postal Service. See Section V.A.1, above. With Mailing and Shipping Licensing, the relevant activity is the Postal Service licensing of intellectual property for use on mailing and shipping products sold by third parties. 642 F.3d at 233.

Mailing and Shipping Licensing is not a postal service. As the Commission stated, "[w]hen the Postal Service acts as a licensor, it is granting the right to use its intellectual property on consumer goods. This service (licensing) is not a postal service."⁴⁰ The underlying activity (licensing) does not enhance the delivery of mail, meet the needs of mailers, improve access to the mailstream, or otherwise relate to the carriage of mail. *Id.* at 30-31 (describing characteristics of postal services). Because

³⁹ Brief for Petitioners LePage's 2000, Inc. and LePage's Products, Inc. at 28 (citing 39 U.S.C. § 404(e)(3)), *LePage's 2000, Inc. and LePage's Prods., Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011) (No. 10-1033 consolidated).

⁴⁰ Order No. 154 at 71. This conclusion applies to Licensing Programs Other Than OLRP.

Mailing and Shipping Licensing is not a postal service, it is by definition a nonpostal service.⁴¹

In its comments, LePage's contends that Mailing and Shipping Licensing should be classified as a postal service because it provides the same benefits that the Commission found ReadyPost, Greeting Cards, and Customized Postage provide: meeting customer mailing needs, easing access to the mailstream, and improving customer convenience. LePage's Comments at 11-14. However, to reach this conclusion, LePage's improperly analyzes the licensed products rather than the Postal Service activity (licensing) at issue. Applying the correct analysis, Mailing and Shipping Licensing is properly classified as a nonpostal service.

C. Mailing and Shipping Licensing Is Authorized to Continue

Having confirmed that Mailing and Shipping Licensing is a nonpostal service, the Commission next evaluates whether it should be authorized to continue taking into account the public need for the service and the private sector's ability to meet that need.⁴² 39 U.S.C. § 404(e)(3). The Commission again examines the activity the Postal Service offers. With Mailing and Shipping Licensing, that activity is licensing.

The Commission finds that Mailing and Shipping Licensing serves a public need that the private sector cannot meet. It is authorized to continue as a nonpostal service covered by the proposed Mail Classification Schedule (MCS) language for Licensing of Intellectual Property Other Than OLRP.

1. Mailing and Shipping Licensing Serves a Public Need

In Order No. 154, the Commission found a public need for Promotional Licensing because it generates revenues, benefits mailers, supports the universal service

⁴¹ *Id.* at 11 ("Any service that is not a postal service is a nonpostal service.").

⁴² Mailing and Shipping Licensing is eligible for grandfathering because it was offered as of January 1, 2006. *Id.* at 71; see 39 U.S.C. § 404(e)(2).

obligation, and promotes the Postal Service brand. Order No. 154 at 73. However, in Order No. 392, the Commission found that with respect to Mailing and Shipping Licensing, these benefits are “outweighed by the disadvantages of selling USPS-branded products that can confuse consumers and disrupt markets.” Order No. 392 at 15. The Commission accordingly concluded that the public need for Mailing and Shipping licenses “has not been demonstrated.” *Id.* at 14.

The Court found that the Commission’s public need analysis in Order No. 392 improperly departed from the Commission’s public need analysis in Order No. 154. 642 F.3d at 232-33. The Court found that the Commission’s consideration of the potential disadvantages of Mailing and Shipping Licensing (1) improperly focused on the licensed *products* rather than the licensing *activity* and (2) improperly considered economic impact as part of the public need analysis. *Id.* at 233.⁴³

Pursuant to the Court’s directive, the Commission has carefully reconsidered whether Mailing and Shipping Licensing serves a public need under section 404(e)(3). Consistent with Order No. 154, the Commission finds that there is a public need for Mailing and Shipping Licensing. It offers the same benefits as Promotional Licensing by generating revenues, benefitting mailers, supporting the universal service obligation, and promoting the Postal Service brand. See Order No. 154 at 73. As the Court observed, Mailing and Shipping Licensing also provides benefits similar to those that the OLRP program provides by leveraging the Postal Service’s brand and supporting the Postal Service’s core business. See 642 F.3d at 232 (citing Order No. 154 at 49).

Pitney Bowes and the Public Representative argue that Mailing and Shipping Licensing does not serve a public need. The Public Representative recommends that the Commission acknowledge that Mailing and Shipping Licensing provides the same benefits as other licensing activities, but find that the potential harm to the public with

⁴³ The Court used the term “economic impact” to mean the disadvantages that the Commission identified in Order No. 392, such as consumer confusion and market distortion. See *id.* at 232.

respect to “consumer confusion” outweighs these benefits. PR Comments at 5. Pitney Bowes asserts that the benefits of Mailing and Shipping Licensing are outweighed by its disadvantages, such as potential consumer confusion, market distortion, and unfair competition. Pitney Bowes Comments at 10-11.

The Postal Service offers assurances that the Commission can address these concerns if and when they arise. It states that “the Commission has continuing authority to regulate Postal Service licensing, pursuant to 39 U.S.C. § 404(e)(5).” Postal Service Reply Comments at 8. The Postal Service indicates that it can impose conditions on licensees subject to Commission oversight as appropriate.⁴⁴

Both Pitney Bowes and the Public Representative argue that the Commission must assess the public need for a nonpostal service in relation to some end product or group of products. Pitney Bowes Comments at 16; PR Reply Comments at 2-3. Pitney Bowes contends that Order No. 154 “implicitly considered the effects of the licensed goods in the market” because the benefits associated with licensing depend on the product or service being licensed. Pitney Bowes Reply Comments at 4-5. It asserts that analyzing public need in relation to an end product enables the Commission to consider the direct and indirect consumer and economic effects of the nonpostal services being offered. Pitney Bowes Comments at 16. These effects include potential consumer confusion, market distortion, and unfair competition. *Id.*

Both the Postal Service and LePage’s counter that the Commission would run afoul of the Court’s instructions if it were to assess public need by looking to the end product. Postal Service Reply Comments at 10; LePage’s Reply Comments at 6. In the Postal Service’s view, assessing the end product is unnecessary because the act of

⁴⁴ The Postal Service states, “the Postal Service, which is directly regulated by the Commission, can impose conditions on those licensees if such conditions are appropriately deemed by the Commission, acting within the constraints of its statutory authority, to be necessary for the Postal Service to comply with specific requirements of title 39. This is true regardless of whether these licenses are considered to be ‘postal services’ or ‘nonpostal services,’ since under either designation they are regulated under the provisions of chapter 36.” *Id.* at 6.

licensing will confer the benefits found by the Commission in Order No. 154 regardless of the licensed product. Postal Service Reply Comments at 10.

In Order No. 154, the Commission stated that, in determining whether there is a public need for a nonpostal service, it would consider a variety of factors, such as the demand for the service, its availability, its utility, whether it is a customary business practice, and whether it serves the efficiency of postal operations. Order No. 154 at 39. As the Court noted, the Commission never indicated during Phase I that it was going to consider economic impact as part of the public need analysis. 642 F.3d at 233. Regardless of whether it is necessary, in some instances, for the Commission to consider the end product, it does not follow that the Commission must also consider the economic effects that flow from the Postal Service offering that nonpostal service. To maintain consistency in its review of the public need for grandfathered nonpostal services, the Commission will continue to perform its analysis in the manner described in Order No. 154 and will thus not analyze public need by looking to economic impact. To the extent economic impact issues are present, they can be addressed through other facets of the regulatory process.

Pitney Bowes also suggests that the Commission should now adopt a narrower definition of “public need.” Pitney Bowes Comments at 15. Pitney Bowes argues that some of the factors that the Commission considered in Order No. 154—namely, supply, demand, and utility—appropriately address the public need for a service. *Id.* But it contends that other factors that the Commission considered, such as whether a service serves the efficiency of postal operations, improperly substituted the needs of the Postal Service for the needs of the public. *Id.* For example, Pitney Bowes notes that the Commission, in finding a public need for the OLRP program, relied almost exclusively on the “efficiency of postal operations” factor when it concluded that the OLRP program “leverages the Postal Service brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service’s core mission.” *See id.* (citing Order No. 154 at 49).

Pitney Bowes’s proposal would define “public need” too narrowly. The Postal Service’s needs often harmonize with the needs of the public. In this instance, the benefits of Mailing and Shipping Licensing that accrue to the Postal Service will help to sustain a viable, effective universal mail system that meets a widely-recognized public need for postal services. See 39 U.S.C. § 101(a). Moreover, a narrow construction of “public need” that ignores the efficiency of postal operations would repudiate that portion of Order No. 154 whereby the Commission indicated that it would consider the efficiency of postal operations in evaluating the public need for a nonpostal service. See Order No. 154 at 39.

Pitney Bowes would, in essence, have the Commission depart from the definition of public need that it adopted in Phase I—one that considered the efficiency of postal operations. To do so, the Commission must offer a reasoned explanation for why it should now ignore the efficiency of postal operations as part of the public need analysis.⁴⁵

The only reason that Pitney Bowes offers for ignoring the efficiency of postal operations is its assertion that Congress, in enacting the PAEA, intended to “foreclos[e] any new nonpostal services and [limit] the Postal Service’s ability to offer existing nonpostal services.” See Pitney Bowes Comments at 15. Pitney Bowes’ broad statement of Congressional intent does not support the contention that the Commission should exclude efficiency of postal operations from its public need analysis under section 404(e)(3). Section 404(e) already implements Congressional intent by limiting the Commission’s review to existing nonpostal services and prohibiting the Postal Service from offering new nonpostal services.⁴⁶

⁴⁵ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *ANR Pipeline Co. v. Fed. Energy Regulatory Comm’n*, 71 F.3d 897, 901 (D.C. Cir. 1995).

⁴⁶ See 39 U.S.C. § 404(e)(3) (requiring the Commission to “review each nonpostal service offered by the Postal Service *on the date of enactment of [the PAEA]....*” (emphasis added)); *id.* § 404(e)(2) (“Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except [for those] offered as of January 1, 2006....”).

Thus, in determining whether there is a public need for a nonpostal service, the Commission will continue to consider the factors that it set forth in Order No. 154. See Order No. 154 at 39. Consistent with those factors, the Commission finds that there is a public need for Mailing and Shipping Licensing.

2. The Private Sector Cannot Meet the Public Need for Mailing and Shipping Licensing

In Order No. 154, the Commission stated that the private sector could not meet the public need for Promotional Licensing. *Id.* at 73. However, in Order No. 392, the Commission found that the Postal Service had not demonstrated that the private sector is unable to meet the public need for Mailing and Shipping Licensing. Order No. 392 at 24. The Court rejected this conclusion, finding that the Commission improperly altered its analytic framework from the Postal Service’s activity to the licensed products. 642 F.3d at 233.

On remand, the Commission reconsiders whether the private sector can meet the public need for Mailing and Shipping Licensing. The Commission examines the activity (licensing) rather than the products. The Commission previously found that the private sector is unable to meet the public need for the OLRP program and Promotional Licensing because only the Postal Service can license its intellectual property. Order No. 154 at 50, 73. This finding applies to Mailing and Shipping Licensing as well. The Commission accordingly concludes that the private sector is unable to meet the public need for Mailing and Shipping Licensing.

3. Mailing and Shipping Licensing May Continue as a Subset of Licensing of Intellectual Property Other Than OLRP

Order No. 154 directed the Postal Service to file MCS language for Licensing Programs Other Than OLRP, which the Commission had authorized to continue as a nonpostal service. See Order No. 154 at 90. The Postal Service filed proposed MCS language, but renamed the nonpostal service as “Licensing of Intellectual Property

Other Than OLRP.”⁴⁷ The proposed MCS language is under review in Docket No. MC2010-24, which considers the Postal Service’s proposed MCS language for its authorized nonpostal services.

This Order authorizes Mailing and Shipping Licensing to continue as a nonpostal service. Mailing and Shipping Licensing shall therefore be covered by the proposed MCS language for Licensing of Intellectual Property Other Than OLRP.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Postal Service licensing of intellectual property for use on mailing and shipping products sold by third parties may continue as a nonpostal service covered by the proposed MCS language for Licensing of Intellectual Property Other Than OLRP.
2. That portion of the Warranty Repair Program, also known as the Fee for Services Program, to repair, for reimbursement, equipment of original equipment manufacturers owned by others is a nonpostal service that was not offered as of January 1, 2006, and shall be terminated.
3. Only licensed CDs and DVDs that otherwise comply with the requirements of the OLRP program are authorized for sale under the OLRP program. CDs and DVDs may be sold as part of the Philatelic Sales program, a nonpostal service, if packaged with philatelic materials.

⁴⁷ Docket No. MC2009-20, United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Nonpostal Activities in Response to Order No. 154, March 10, 2009, at 17.

4. All outstanding motions are hereby denied.

By the Commission.

Shoshana M. Grove
Secretary