

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELAINE J. MITTLEMAN,)	
)	
Petitioner,)	
)	
v.)	No. 12-1095
)	
POSTAL REGULATORY COMMISSION,)	
)	
Respondent,)	
)	
UNITED STATES POSTAL SERVICE,)	
)	
Intervenor.)	

**PETITIONER’S RESPONSE TO
RESPONDENT’S MOTION TO DISMISS**

Petitioner Elaine J. Mittleman hereby respectfully requests that the motion to dismiss of respondent Postal Regulatory Commission (“PRC”) be denied. Petitioner Mittleman brings this petition under 39 U.S.C. § 3663, which provides for appellate review of final orders or decisions of the Postal Regulatory Commission.

The Postal Regulatory Commission has filed similar motions in two other cases, *Venice Stakeholders Association, et al., v. Postal Regulatory Commission*, No. 12-1110 (D.C. Cir.), and *McClung v. Postal Regulatory Commission*, No. 12-1157 (D.C. Cir.).

The United States Postal Service is an intervenor in this proceeding. The Postal Service has authorized respondent PRC to state that the Postal Service supports the respondent's motion to dismiss.

PERTINENT STATUTORY PROVISIONS

39 U.S.C. § 3663. Appellate review.

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia. The court shall review the order or decision in accordance with section 706 of title 5, and chapter 158 [28 USCS §§ 2341 et seq.] and section 2112 of title 28, on the basis of the record before the Commission.

(As amended Dec. 20, 2006, P. L. 109-435, Title II, § 205, 120 Stat. 3217.)

39 U.S.C. § 404. Specific powers.

(d)(5) Any determination of the Postal Service to close or consolidate any post office may be appealed by any person served by such office to the Postal Regulatory Commission within 30 days after such determination is made available to such person under paragraph (3). The Commission shall review such determination on the basis of the record before the Postal Service in the making of such determination. The Commission shall make a determination based upon such review no later than 120 days after receiving any appeal under this paragraph. The Commission shall set aside any determination, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(B) without observance of procedure required by law; or

(C) unsupported by substantial evidence on the record.

The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration, but the Commission may not modify the determination of the Postal Service. The Commission may suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal. The provisions of

section 556, section 557, and chapter 7 of title 5 [5 USCS §§ 556, 557, and 701 et seq.] shall not apply to any review carried out by the Commission under this paragraph.

Amendments:

2006. ... Such Act further designated subsecs. (b) and (c), as added and amended by the Act, as subsecs. (d) and (e) respectively; and inserted new subsecs. (b) and (c).

1976. Act Sept. 24, 1976, P. L. 94-421, §9(a), 90 Stat. 1310, ... inserted “(a)”; and added subsec. (b).

LEGISLATIVE HISTORY

There are several provisions contained in H.R. 22 within the Committee on the Judiciary’s subject matter jurisdiction. Specifically, section 205 of the legislation revises the complaint and appellate review of the Postal Regulatory Commission.

Letter dated May 12, 2005, to Rep. Tom Davis from Rep. F. James Sensenbrenner, Jr.

151 Cong. Rec. H6511, 6521. Regarding H.R. 22 (July 26, 2005)

Section 3663 provides for appeals of any order or decision of the Postal Regulatory Commission to the United States Court of Appeals for the District of Columbia Circuit in accordance with chapter 706 of title 5 and chapter 158 of title 28.

H.R. Rep. No. 108-672 Part 1, at 11. To accompany H.R. 4341 (Sept. 8, 2004)

FACTUAL BACKGROUND

A. United States Postal Service Strategies.

On May 9, 2012, the Postal Service issued press release No. 12-054 (available at http://about.usps.com/news/national-releases/2012/pr12_054.htm).

The press release discusses the new strategy of the Postal Service to preserve post offices. The new plan would keep existing post offices in place, but with modified

retail window hours to match customer use. The press release explained that the Postal Service had implemented a voluntary moratorium on all postal facility closings through May 15, 2012, and that no closings or changes to Post Office operations would occur until after that time.

It is not clear at this time whether the Postal Service will revoke or withdraw the Final Determinations it has issued to close post offices in light of the new strategy to keep post offices in place, but to modify retail window hours.

B. Pimmit Branch Post Office in Northern Virginia.

The Pimmit Branch Post Office is located at 7520 Leesburg Pike, Falls Church, Virginia 22043. Even though it has a Falls Church mailing address, the Pimmit Branch is not in the City of Falls Church. The Pimmit Branch is in the Pimmit Hills community of Fairfax County. Pimmit Hills is located near the burgeoning Tysons Corner area of Fairfax County. *See* Initial Brief of Petitioner Elaine J. Mittleman, PRC Docket No. A2011-90, December 9, 2011, Doc ID 78595, at 20-25. There is substantial further development planned for the Tysons Corner area. *See* Jonathan O'Connell, *Tysons Corner: The building of an American city*, The Washington Post, September 24, 2011 (available at http://www.washingtonpost.com/business/tysons-corner-the-building-of-an-american-city/2011/07/29/gIQAae2atK_story.html).

On September 27, 2011, Elaine J. Mittleman filed a petition with the Postal Regulatory Commission seeking review of the Final Determination of the Postal Service to close the Pimmit Branch, which is located in Northern Virginia. *See* PRC Order No. 1159 Dismissing Appeal in Docket No. A2011-90, January 20, 2012, at 2. The PRC Order is attached as Exhibit A to Respondent's Motion to Dismiss. The Final Determination to Close the Pimmit Branch, signed by Dean J. Granholm, Vice President, Delivery and Post Office Operations, USPS, on June 20, 2011, is attached as Exhibit B to Respondent's Motion to Dismiss.

The Postal Service explained that the discontinuance of the Pimmit Branch was subject to the procedures set forth in Chapter 7 of Handbook PO-101 (August 2004) updated with Postal Bulletin revisions through August 2, 2007 (2007 Handbook PO-101). *See* United States Postal Service Response to Order No. 1005, PRC Docket No. A2011-90, December 2, 2011, Doc ID 78271, at 2. According to the Postal Service, these regulations were carried forward for discontinuance actions commencing before July 14, 2011. *See* 39 C.F.R. 241.3(a)(C)(ii).

The closing or discontinuance of the Pimmit Branch is not a relocation. Further, the Pimmit Branch is not located in the city limits of Falls Church. *See* 39 CFR 241.2(a)(1) (branches are established outside the corporate limits or boundary of the city, town, or village in which the main post office is located). Thus, the determination, pursuant to 39 U.S.C. § 404(d)(2)(A)(1), about the effect on the

community should concern Pimmit Hills, which is part of Fairfax County, and not the City of Falls Church. *See* Final Determination (Ex. B) at page 4, which states that the Pimmit Area is an unincorporated community located in Fairfax County. The community is administered politically by the Fairfax County Government. There are numerous religious institutions and businesses in the community. The Final Determination at page 5 describes alternative locations for postal services as the Falls Church Finance Unit and the Dunn Loring Branch in Vienna, Virginia.

Further, upon information and belief, the main Falls Church post office at 301 W. Broad Street has been closed. However, the Postal Service asserted that information about the location of any main post office in Falls Church, Virginia, is not germane to the discontinuance of the Pimmit Branch. *See* Answer of USPS to request that the record be supplemented concerning the relocation of the main Falls Church post office, January 19, 2012, Doc ID 79807, at 4. It is not clear whether the City of Falls Church still has a main post office or whether it has only the Finance Station located at 800 W. Broad Street.

The PRC refers in its motion at page 7 to a “decades-old line of precedent” in which a discontinuance is considered part of a broader plan to rearrange the postal network in the community. The precedent presumably is derived from previous rulings of the PRC, which may not have any substantive precedential value. Also, that precedent concerns rearrangement of the postal network within a

community. As explained above, the Pimmit Branch is located in Pimmit Hills and not the City of Falls Church. Thus, the closing of the Pimmit Branch is not a rearrangement of the postal network within a community, because the primary alternative location is in the City of Falls Church and not in the community of Pimmit Hills.

Ms. Mittleman, who had sought review of the Final Determination before the PRC, filed a petition for review of PRC Order No. 1159, issued January 20, 2012, in this Court. The petition for review in this Court was timely filed on February 14, 2012, pursuant to 39 U.S.C. § 3663.

ARGUMENT

I. The plain language of 39 U.S.C. § 3663 provides for review in this Court of a final order of the Postal Regulatory Commission.

The Postal Accountability and Enhancement Act of 2006 (“PAEA”), Pub. L. No. 109-435, 120 Stat. 3198, included provisions to address the functions of the Postal Service and oversight of the Postal Service by the Postal Regulatory Commission. One of the provisions, 39 U.S.C. § 3663, provides review in this Court of a final order or decision of the Postal Regulatory Commission.

There is a strong presumption that Congress intends that the federal courts review agency action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). If there is substantial doubt about congressional intent concerning judicial review, the general presumption

favoring judicial review of administrative action is controlling. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351, 104 S.Ct. 2450, 2457, 81 L.Ed.2d 270 (1984). The standard for determining whether “a particular statute precludes judicial review is determined not only from the express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and nature of the administrative action involved.” *Id.* at 345, 104 S.Ct. at 2453.

This Court has previously considered appeals of orders of the Postal Regulatory Commission. See *United States Postal Service v. Postal Regulatory Commission*, 599 F.3d 705 (D.C. Cir. 2010); *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011); *United States Postal Service v. Postal Regulatory Commission*, 2012 WL 1292571 (D.C. Cir. April 17, 2012); *LePage’s 2000, Inc. v. Postal Regulatory Commission*, 642 F.3d 225 (D.C. Cir. 2011); *LePage’s 2000, Inc. v. Postal Regulatory Commission*, 674 F.3d 862 (D.C. Cir. 2012).

It is clear that Congress intended that a final order of the PRC can be appealed to this Court. In a letter dated May 12, 2005, to Rep. Tom Davis from Rep. F. James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, there was a discussion about provisions involving the subject matter jurisdiction within the Committee on the Judiciary. Rep. Sensenbrenner wrote that:

There are several provisions contained in H.R. 22 within the Committee on the Judiciary's subject matter jurisdiction. Specifically, section 205 of the legislation revises the complaint and appellate review of the Postal Regulatory Commission.

151 Cong. Rec. H6511, 6521. Regarding H.R. 22 (July 26, 2005).

The Report for an earlier version of this legislation plainly states that:

Section 3663 provides for appeals of any order or decision of the Postal Regulatory Commission to the United States Court of Appeals for the District of Columbia Circuit in accordance with chapter 706 of title 5 and chapter 158 of title 28.

H.R. Rep. No. 108-672 Part 1, at 11. To accompany H.R. 4341 (Sept. 8, 2004).

Thus, there is no doubt that an appeal to this Court of a final order of the PRC is permitted. There is no language in this statute which precludes an appeal. To the contrary, there is language in 39 U.S.C. § 3663 which specifically permits a "person ... adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission" to file a petition for review in this Court.

II. This appeal is from an order of the Postal Regulatory Commission and not from an order of the United States Postal Service.

The appeal in this case is from an order of the Postal Regulatory Commission. It is not an appeal from an order or decision of the United States Postal Service. The PRC in its motion appears to assume that this is an appeal from an order of the United States Postal Service or that the cases concerning the Postal Service are pertinent. For example, the PRC cited cases involving the Postal Service in its motion at pages 10-12.

The PRC discussed what it described as a similar provision in 39 U.S.C. § 410(a). However, that provision concerns whether federal laws should apply to the exercise of the powers of the Postal Service. This Court has indicated that § 410(a) exempts the Postal Service from notice and comment rulemaking procedures of the Administrative Procedure Act (“APA”). *See Aid Association for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1172 (D.C. Cir. 2003), *citing Nat’l Easter Seal Soc’y for Crippled Children & Adults v. USPS*, 656 F.2d 754, 766 (D.C. Cir. 1981).

There are numerous reasons why that argument is simply not applicable here. First, the question of judicial review in that case concerned the Postal Service and not a final order of the PRC. Second, judicial review in that case concerned litigation in a district court, not a petition for review in this Court pursuant to 39 U.S.C. § 3663. Finally, this Court held that judicial review was available in that case. *Aid Association for Lutherans v. USPS*, 321 F.3d at 1168. Thus, that case provides no support for the PRC’s argument that a final order of the PRC is not reviewable in this Court.

Moreover, the PRC asserts in its motion at p. 11 that every Circuit to have addressed the question has concluded that § 410(a) bars judicial review of Postal Service actions under the Administrative Procedure Act. The PRC did cite several cases in which the argument about judicial review of Postal Service actions was

considered waived. One of those cases cited by the PRC is *Top Choice Distribs., Inc. v. U.S. Postal Serv.*, 138 F.3d 463 (2d Cir. 1998). In that case, the Postal Service had conceded that judicial review of final agency actions pursuant to the Administrative Procedure Act is appropriate. *Id.* at 465 n. 1.

Further, in discussing the language of § 404(d)(5) in the motion at pp. 12-13, the PRC states that the statutory language was that the APA shall not apply to Commission decisions reviewing post office closure or consolidation determinations. The PRC does not correctly describe the statutory language, which is that “[t]he provisions of section 556, section 557, and chapter 7 of title 5 [5 USCS §§ 556, 557, and 701 et seq.] shall not apply to any review carried out by the Commission under this paragraph.” The statutory provision involving the APA concerns “any review carried out by the Commission” and not “Commission decisions.” A fair reading indicates that the identified provisions of the APA do not apply to the procedures used during the review process conducted by the PRC. By contrast, the APA does apply to the review in this Court of a final order or decision of the PRC.

The PRC notes the holding in *Lundeen v. Mineta*, 291 F.3d 300, 305-11 (5th Cir. 2002), which discussed the specific language in 23 U.S.C. § 134(f)(2) that precludes judicial review. That statute provides that “[t]he failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this

title, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a transportation improvement plan, a project or strategy, or the certification of a planning process.” The language of that provision explicitly states that the failure to consider any specified factor “shall not be reviewable by any court.” That language is a sharp contrast to § 404(d)(5), which provides that certain provisions of title 5 “shall not apply to any review carried out by the Commission.”

The PRC points to the comment that reading the text of § 217(g) of the statute “in a vacuum” would seem to support APA review. However, the court explained that reading § 217(g) in the context of other provisions, statutory structure, legislative history and the nature of the administrative remedy indicates that § 217(g) does not permit judicial review. *Id.* at 310-11. Utilizing that method of thorough statutory analysis in this case confirms that judicial review is available pursuant to 39 U.S.C. § 3663.

The PRC again confuses the meaning of § 404(d)(5) in its argument at p. 14 about general and specific statutory provisions. The PRC states that “Congress retained the provision precluding APA review of Commission decisions under 39 U.S.C. § 404(d)(5)” when it amended portions of § 404(d). However, the provision in § 404(d)(5) does not preclude APA review of PRC decisions, as the PRC claims. The provision indicates that certain sections of the APA shall not

apply to any review carried out by the PRC. Thus, there is no issue of seemingly inconsistent provisions in the same statute. The language of § 404(d)(5) and § 3663 refer to different situations. Those provisions are not contradictory or inconsistent.

This Court recently discussed the status of certain proceedings before the PRC. In *LePage's 2000, Inc. v. Postal Regulatory Commission*, 674 F.3d at 868, there was a question about the type of proceedings before the PRC for the determination of attorneys' fees. The proceedings before the PRC in that case, which were governed by 39 U.S.C. § 404(e)(3), did not require a hearing. Thus, the proceedings were not considered an "adversary adjudication" for purposes of awarding attorneys' fees. This Court further explained that the generic provisions of chapter 5 of title 5 may apply even if the formal adjudication provisions of § 554 do not.

Similarly, in this case, even if certain provisions of title 5 do not apply to proceedings before the PRC, generic provisions of title 5 may apply. Moreover, these provisions concern proceedings before the PRC and not petitions for review by this Court of a final order of the PRC. The statutory provision of 39 U.S.C. § 3663 states that this Court shall review the PRC order in accordance with section 706 of title 5 on the basis of the record before the PRC. It is clear that a final order of the PRC can be reviewed by this Court.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner Mittleman respectfully requests that respondent's motion to dismiss be denied.

Respectfully submitted,

/s/ Elaine J. Mittleman

Elaine J. Mittleman, Esq.
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2012, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Respectfully submitted,

/s/ Elaine J. Mittleman

Elaine J. Mittleman