

Nos. 12-1095, 12-1110 & 12-1157

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELAINE J. MITTLEMAN,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,
UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

VENICE STAKEHOLDERS ASSOCIATION, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent,
UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

PAUL McCLUNG, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent,
UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

ON PETITIONS FOR REVIEW FROM THE
POSTAL REGULATORY COMMISSION

**CONSOLIDATED BRIEF FOR RESPONDENT
POSTAL REGULATORY COMMISSION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

No. 12-1095: The petitioner is Elaine J. Mittleman. The respondent is the Postal Regulatory Commission. The United States Postal Service was the respondent in the administrative appeal before the Commission, and is an intervenor supporting the Commission in this proceeding. John W. Foust and Karl Ritchey participated in the appeal before the Commission, but have not appeared in this proceeding. Jeremy L. Simmons, an officer of the Commission, served as Public Representative in the administrative appeal.

No. 12-1110: The petitioners are the Venice Stakeholders Association, Mark Ryavec, Greta Cobar, Jonathan Kaplan, Sue Kaplan, Jethro Pauker, James Smith, and the Free Venice Beachhead newspaper. The respondent is the Postal Regulatory Commission. The United States Postal Service was the respondent in the administrative appeal before the Commission, and is an intervenor supporting the Commission in this proceeding. Lydia Matkovich and Bill Rosendahl participated as petitioners in the appeal before the Commission, but have not appeared in this proceeding. James F. Callow, an officer of the Commission, served as Public Representative in the administrative appeal.

No. 12-1157: The petitioners are Paul McClung, Gary Walker, Angie Brown, Betty Puckett, and Arlene Ingram. The respondent is the Postal Regulatory

Commission. The United States Postal Service was the respondent in the administrative appeal before the Commission, and is an intervenor supporting the Commission in this proceeding. Melissa Porter participated as a petitioner in the appeal before the Commission, but has not appeared in this proceeding. Manon Boudreault, an officer of the Commission, served as Public Representative in the administrative appeal.

B. Rulings Under Review.

No. 12-1095: Petitioner seeks review of Order No. 1159 of the Commission, which was issued in Docket No. A2011-90 (Pimmit Branch, Falls Church, VA) on January 20, 2012. The Order is reproduced in the Joint Appendix (“JA”) at JA 26-38.

No. 12-1110: Petitioners seek review of Order No. 1166 of the Commission, which was issued in Docket No. A2012-17 (Venice Post Office, Venice, CA) on January 24, 2012. The Order is reproduced at JA 75-83.

No. 12-1157: Petitioners seek review of Order No. 1262 of the Commission, which was issued in Docket No. A2012-68 (Spring Dale Post Office, Spring Dale, WV) on February 27, 2012. The Order is reproduced at JA 114-34.

C. Related Cases.

These cases have not previously been before this Court or any other court. Counsel is not aware of any related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Jeffrey E. Sandberg

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GLOSSARY

APA	Administrative Procedure Act
JA	Joint Appendix
PAEA	Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006)
PRC	Postal Regulatory Commission (or, before 2006, the Postal Rate Commission)
USPS	United States Postal Service

STATEMENT OF JURISDICTION

Petitioners in these consolidated cases seek review of orders of the Postal Regulatory Commission rendered pursuant to 39 U.S.C. § 404(d)(5), which provides for Commission review of determinations of the United States Postal Service to close or consolidate a post office. The Commission decision at issue in *Mittleman v. Postal Regulatory Commission*, No. 12-1095, was entered on January 20, 2012, and the petition for review was filed in this Court on February 14, 2012. The Commission decision at issue in *Venice Stakeholders Association et al. v. Postal Regulatory Commission*, No. 12-1110, was entered on January 24, 2012, and the petition for review was filed on February 22, 2012. The Commission decision at issue in *McClung et al. v. Postal Regulatory Commission*, No. 12-1157, was entered on February 27, 2012, and the petition for review was filed on March 23, 2012.

In each case, petitioners seek to invoke this Court's jurisdiction under 39 U.S.C. § 3663, which generally authorizes a person aggrieved by a final order or decision of the Commission to obtain review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, by filing a petition for review in this Court "within 30 days after such order or decision becomes final," 39 U.S.C. § 3663. As explained in this brief, however, Congress has expressly precluded such review as to Commission decisions rendered under 39 U.S.C. § 404(d)(5).

STATEMENT OF THE ISSUES

1. Whether Congress has expressly precluded petitioners from obtaining judicial review under the APA of Commission orders made under 39 U.S.C. § 404(d)(5).

2. Whether the Commission reasonably determined that it lacks jurisdiction under 39 U.S.C. § 404(d)(5) to review Postal Service decisions to relocate or realign postal facilities within a community, and whether the statutory interpretation upon which that determination is based is entitled to deference.

3. Whether the Commission acted reasonably in applying its established practice that a tie vote has the effect of affirming the Postal Service's underlying determination to close a post office.

PERTINENT STATUTES AND REGULATIONS

Relevant statutes are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

Congress has provided that “[a] 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.” 39 U.S.C. § 404(d)(5). In 2011, following decisions by the Postal Service to make changes to its provision of retail postal services in three communities—Falls Church, Virginia; Venice, California; and Spring Dale, West Virginia—petitioners filed appeals with the Commission under section 404(d)(5) to challenge the Postal Service's respective decisions.

As to two of the appeals, the Commission determined that it lacked jurisdiction because the Postal Service's actions did not involve a "closing or consolidation" within the meaning of 39 U.S.C. § 404(d), but rather, involved only the relocation or realignment of postal services within the community. In the third case, the Commission exercised jurisdiction and conducted a full review in accordance with the provisions of section 404(d)(5). That review resulted in a tie vote, which under established Commission practice had the effect of affirming the Postal Service's closure determination.

Petitioners in each case sought this Court's review. The Commission moved to dismiss each petition as precluded by 39 U.S.C. § 404(d)(5), which provides that the judicial review provisions of the Administrative Procedure Act "shall not apply to any review carried out by the Commission under this paragraph." This Court referred the disposition of those motions to the merits panel.

STATEMENT OF FACTS

A. Statutory Background

In 1970, Congress created the United States Postal Service as an "independent establishment of the executive branch of the Government of the United States."

39 U.S.C. § 201. Among the specific powers granted to the Postal Service was the authority to "determine the need for post offices . . . and to provide such offices . . . as it determines are needed." *Id.* § 404(a)(3); *see also id.* § 403(b)(3) (delegating to the Postal Service the "responsibility" to "establish and maintain postal facilities of such

character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services”).

To encourage the Postal Service to exercise that authority in accordance with the goals of federal postal policy, Congress later established certain procedural requirements regulating the Postal Service’s decision to close or consolidate an existing post office. *See* Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, § 9(a), 90 Stat. 1303, 1310-11 (1976) (codified, as amended, at 39 U.S.C. § 404(d)). In undertaking such a decision, the Postal Service must consider various factors, including the effect on the community served; the effect on postal employees; the goal of “provid[ing] a maximum degree of effective and regular postal services” to rural areas and other communities “where post offices are not self-sustaining”; the economic savings; and “other factors” deemed necessary by the Postal Service. 39 U.S.C. § 404(d)(2)(A)(i)-(v). Any determination by the Postal Service to close or consolidate a post office must be made in writing and must include findings with respect to the foregoing considerations. *Id.* § 404(d)(3). Moreover, certain notice must be given to “persons served” by the post office both before and after a final determination is made to close or consolidate that facility. *Id.* § 404(d)(1), (4).

To ensure compliance with those procedural requirements, Congress has provided an avenue for limited administrative review by a separate agency, the Postal

Regulatory Commission.¹ “A 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,” *id.* § 404(d)(5), which then “review[s] such determination on the basis of the record before the Postal Service,” *ibid.* The Commission is required to set aside the determination if it finds it 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.” *Ibid.* If so, the Commission may “order that the entire matter be returned [to the Postal Service] for further consideration,” but it may not “modify the determination of the Postal Service.” *Ibid.*

In addition to circumscribing the scope of administrative review, Congress has taken steps to ensure that appeals proceed efficiently. In recognition of the need for prompt resolution of appeals, the Commission must issue its decision no later than 120 days after an appeal is received. *Ibid.*; *see also id.* § 404(d)(6). Moreover, the Commission need not comply with the formal hearing requirements of the APA in conducting its review. *Id.* § 404(d)(5) (exempting Commission from compliance with

¹ The Postal Regulatory Commission was established in 2006 as “an independent establishment of the executive branch of the Government of the United States,” 39 U.S.C. § 501. *See* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 601(a)(1), 120 Stat. 3198, 3238 (2006). The Commission is the successor organization to the Postal Rate Commission, which had possessed substantially the same authority to review Postal Service closure and consolidation decisions. *See* 39 U.S.C. § 404(b)(5) (1976).

5 U.S.C. §§ 556 and 557). And Congress expressly provided that the judicial review provisions of the APA—“[t]he provisions of . . . chapter 7 of title 5”—“shall not apply to any review carried out by the Commission under this paragraph.” *Ibid.*

B. Factual And Procedural Background

In recent years, the Postal Service has suffered severe financial strain. Among other initiatives, the Postal Service has explored ways to reduce costs by streamlining its network of retail postal facilities, including post offices, branches, and stations. These consolidated proceedings concern decisions by the Postal Service to modify service in three communities: Falls Church, Virginia; Venice, California; and Spring Dale, West Virginia.

1. Pimmit Branch—Falls Church, VA 22043 (*No. 12-1095*).

The Pimmit Branch was a retail postal facility operated by the Postal Service in the Pimmit Hills neighborhood of Fairfax County, Virginia. Pimmit Hills directly adjoins the City of Falls Church, and residents and businesses in that neighborhood have Falls Church mailing addresses.² Pimmit Hills itself is unincorporated, and thus is administered politically by the Fairfax County government. *See* JA 10. Nonetheless, the Pimmit Branch is widely understood as being part of Falls Church. *See* JA 7 (referring to “the Pimmit Branch in Falls Church, VA”); JA 11-12, 13, 24 (same); *see*

² The Pimmit Hills neighborhood includes approximately 1,600 homes and 6,000 total residents. *See* Pimmit Hills Citizens Association, Pimmit Hills Dispatch, <http://phca.roundtablelive.org/pimmit-hills-dispatch> (last visited Feb. 28, 2013).

also Pimmit Hills Citizens Association, About the Pimmit Hills Citizens Association, <http://phca.roundtablelive.org/about-phca> (last visited Feb. 28, 2013) (referring to “the Pimmit Hills neighborhood located in Falls Church, Virginia”).

In April 2009, the Postal Service began considering the feasibility of discontinuing the Pimmit Branch and combining its operations with a proposed new retail facility in Falls Church. *See* JA 30-31. The proposed new facility, which has since opened, is located 1.7 miles southeast of the Pimmit Branch along the same road. JA 32. The new facility also assumed the retail operations of Falls Church’s old post office, which was located 2.2 miles southeast of the Pimmit Branch and also along the same road. JA 32. As part of its evaluation, the Postal Service distributed questionnaires to post office box holders and also made them available to other retail patrons. JA 7, 32.

After extensive review, the Postal Service rendered a final determination to close the Pimmit Branch. JA 6-11. This decision was publicly announced in September 2011 in a letter to Pimmit Branch customers. JA 13. The letter advised patrons that the facility would discontinue operations on November 10, 2011. JA 13. Post office box customers would be required to transfer service to a new facility, but carrier service to neighborhood residents and businesses would continue as normal. JA 7, 13, 33.

In September 2011, petitioner Elaine Mittleman filed an administrative appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal

Service's determination to close the Pimmit Branch. JA 14-16. Petitioner argued that the Postal Service had failed to comply with applicable notice requirements; that closing the branch would hurt the Postal Service financially; and that the new facility in Falls Church was not a convenient alternative for Pimmit Hills residents. JA 15-16. Petitioner also sought to suspend the Postal Service's determination pending the Commission's review, JA 14, but that application was denied. The Pimmit Branch closed as planned in November 2011.³ JA 28.

On January 20, 2012, the Commission dismissed Mittleman's appeal. JA 26-38. Applying a decades-old line of precedent, the Commission determined that 39 U.S.C. § 404(d) did not apply to the Postal Service's discontinuance of the Pimmit Branch because the action was "part of a broader plan to rearrange the postal network" in the community by transferring retail services to a new facility. JA 36. The Commission thus determined that it lacked jurisdiction over the appeal. JA 37.

2. Venice Post Office—Venice, CA 90291 (*No. 12-1110*).

The Venice Post Office is a retail postal facility operated by the Postal Service in Venice, California, a district of the City of Los Angeles. JA 54. Prior to 2012, the Venice Post Office operated in a historic building located at 1601 Main Street and

³ Petitioner states that the branch "closed in November 2011, but the facility is still available." Pet. Br. 12. We are informed that the Postal Service's lease expired in October 2012, and the Postal Service no longer has a legal right to occupy the property.

owned by the Postal Service. The building contains a mural inside its lobby celebrating the history of the Venice area. JA 77.

In 2010, the Postal Service initiated plans to sell the existing Post Office building and to relocate its retail services some 400 feet away to the Venice Carrier Annex, a facility located at 313 Grand Boulevard. *See* JA 74, 76-77, 80. As part of that process, the Postal Service conducted consultations with community members. JA 77. In July 2011, following final approval by its headquarters staff, the Postal Service publicly announced its decision to relocate the Post Office's retail operations to the former Carrier Annex. JA 78.

In August 2011, the Venice Stakeholders Association, a nonprofit civic improvement organization, sent a letter requesting that the Postal Service withdraw its plans. *See* JA 55, 78. The next month, the Postal Service's Vice President, Network Operations responded to the Association's letter by issuing a final decision declining to set aside the Postal Service's planned relocation. JA 55-58, 78.

In October 2011, the Association and another individual filed an administrative appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal Service's decision. JA 59-64. The Association principally argued that the planned transfer of retail operations was not truly a relocation, but rather a partial or constructive "closure" of the Venice Post Office, and that this "closure" failed to comply with the statutory requirements of 39 U.S.C. § 404(d). *See* JA 60-62. Other community members joined in the appeals, expressing concern that the sale of the

existing Post Office building could, among other things, jeopardize public access to the historic mural. *See* JA 69-70, 75 n.1.

The Postal Service moved to dismiss the appeal before the Commission, arguing that 39 U.S.C. § 404(d) did not apply to this dispute. *See* JA 76. The Postal Service explained that its plans “[d]id not involve the discontinuance of a facility,” but instead concerned only “the relocation of the Venice Main Post Office.” JA 79. It also asserted that the transfer would not cause any “reduction in the level of service provided to the Venice community.” JA 79.

The Commission dismissed the petitioners’ appeal in January 2012. JA 75-83. Citing and applying various of its precedents, the Commission reaffirmed that “Postal Service decisions to relocate a post office are not subject to appeal under 39 U.S.C. § 404(d).” JA 80. The Commission also rejected petitioners’ arguments that the relocation amounted to a partial or constructive closure, explaining that the administrative record supplied no basis for concluding that Venice residents would “be left without a retail facility.” JA 81-82.

3. Spring Dale Post Office—Spring Dale, WV 25986 (*No. 12-1157*).

The Spring Dale Post Office is a retail postal facility operated by the Postal Service in Spring Dale, West Virginia, an unincorporated area of Fayette County. *See* JA 121. The post office provides retail services as well as mail delivery for 88 post office box and general-delivery customers. JA 117. The office’s retail workload averages thirty transactions per day, and annual post office receipts are under \$20,000.

JA 117. In May 2009, the postmaster retired, and an officer-in-charge was installed to serve as the post office's sole employee. JA 117, 122-23.

In early 2011, the Postal Service began considering whether to close the Spring Dale Post Office. JA 120. As part of its study, questionnaires were distributed to customers regarding the possible closure. JA 120, 121-22. A community meeting was held in April 2011 to identify and address customer concerns. JA 120, 121-22. Additionally, between May and July 2011, notices were posted at the Spring Dale Post Office and another nearby post office inviting the public to submit comments. JA 120-21.

In October 2011, the Postal Service issued a final determination to close the Spring Dale Post Office. JA 88-101. The determination explained that after the closing, retail postal services and post office box delivery would be available at the Meadow Bridge Post Office, located approximately four miles away. *See* JA 89; *see also* JA 117, 123. Additionally, rural route carrier service would be provided to roadside mailboxes located near customers' residences, with individual home delivery available in cases of hardship. *See* JA 91, 93, 116 n.8, 117, 124. The determination identified various concerns expressed by community members about the proposed change, but explained that other factors, including a declining workload and the anticipated economic savings, ultimately weighed in favor of closure. *See* JA 89-100.

In November 2011, petitioner Paul McClung filed an appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal Service's

determination. JA 102-04. McClung, later joined by other petitioners, argued that the Postal Service had failed to comply with the procedural requirements of 39 U.S.C. § 404(d) and had based its financial estimates on unreliable information. *See, e.g.*, JA 102-03; *see also* JA 115 & n.3, 116 & n.10 (citing other filings). In response, the Postal Service explained that its decision to close the Spring Dale Post Office was based on several factors, including the postmaster vacancy; the office's minimal workload and declining revenue; the projected population decline in the area; the expected financial savings from closure; the minimal impact on the community; and the availability of other delivery and retail options for Spring Dale customers. JA 118-19. The Postal Service also asserted that it had followed all statutorily required procedures and that it had adequately considered all concerns raised by petitioners. JA 119, 122.

In February 2012, the Commission's review resulted in a 2-2 tie vote. According to the Commission's established practice, that tie vote indicated the absence of a majority to grant the relief requested by petitioners, thus having the effect of denying that relief. Because petitioners sought to set aside the Postal Service's determination to close the Spring Dale Post Office, the Commission's denial had the effect of affirming the Postal Service's closure determination. *See* JA 115 n.4. Two commissioners opined that the Postal Service had complied with all statutory requirements, *see* JA 114-29, while the remaining commissioners filed separate dissenting opinions, *see* JA 130-33, 134. Although the Postal Service's determination

to close the facility was therefore not set aside, the Spring Dale Post Office remains open at this time.⁴

C. Proceedings In This Court

These petitions followed. In seeking this Court's review, petitioners rely solely upon 39 U.S.C. § 3663, which generally allows any person "adversely affected or aggrieved by a final order or decision" of the Commission to obtain review by this Court "in accordance with section 706 of title 5." 39 U.S.C. § 3663.

The Commission moved to dismiss each petition. It explained that Congress, by expressly providing that the judicial review provisions of the Administrative Procedure Act "shall not apply to any review carried out by the Commission under this paragraph," 39 U.S.C. § 404(d)(5), has precluded petitioners from obtaining review of decisions rendered by the Commission under that statute. In August 2012, a motions panel of this Court referred disposition of the Commission's motions to the merits panel, consolidated the petitions, and directed full briefing by the parties.

⁴ As petitioners note, the Postal Service is currently deciding whether to carry out the closure, or instead to keep the post office open with limited hours of service. *See* Pet. Br. 24, 54-55. To the best of the Commission's knowledge, the Postal Service has not yet made that decision, and it has not rescinded the final determination that was the subject of the Commission's review.

SUMMARY OF ARGUMENT

Congress has precluded judicial review of the agency's decisions. The statute empowers the Commission to review "determination[s] of the Postal Service to close or consolidate any post office." 39 U.S.C. § 404(d)(5). In vesting that authority in the Commission, Congress has also expressly precluded review under the Administrative Procedure Act of the Commission's ensuing decisions. *See ibid.* (providing that "[t]he provisions of . . . chapter 7 of title 5 shall not apply to any review carried out by the Commission under this paragraph"). That sentence precludes the petitioners from obtaining the APA review they would otherwise receive under the general provisions of 39 U.S.C. § 3663.

Even if this Court were to conclude that judicial review is available, petitioners' claims nonetheless fail. With respect to the Pimmit Branch and Venice appeals, the Commission reasonably determined that it lacks jurisdiction because those cases do not concern the elimination of a post office from the community, but rather the relocation or realignment of postal facilities within the community. The Commission's interpretation that such relocations do not constitute "closing[s]" within the meaning of 39 U.S.C. § 404(d) is plainly reasonable and is entitled to *Chevron* deference by this Court.

With respect to the Spring Dale appeal, the Commission exercised jurisdiction and reviewed whether the Postal Service's closure determination complied with all relevant requirements of 39 U.S.C. § 404(d)(5). Petitioners have not argued that the

Commission's resulting decision was incorrect or unreasonable. Instead, petitioners challenge only the Commission's treatment of the 2-2 vote as an "affirmance." But it was entirely reasonable for the Commission to conclude that a majority vote is required to set aside a Postal Service determination, and that a tie vote therefore has the effect of letting that determination stand. Nor is there any basis for petitioners' contention that the Commission was required to promulgate its tie-vote rule as a formal regulation.

STANDARD OF REVIEW

In cases where judicial review is available under the Administrative Procedure Act, a court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. CONGRESS HAS PRECLUDED JUDICIAL REVIEW OF COMMISSION ORDERS ISSUED UNDER 39 U.S.C. § 404(d)(5).

A. Congress Has Barred APA Review Of Commission Decisions Relating To Post Office Closure Or Consolidations.

1. Through 39 U.S.C. § 404(d)(5), Congress established a form of appellate oversight over Postal Service determinations to close or consolidate post offices by permitting affected customers to seek speedy review of those determinations by the

Postal Regulatory Commission. But Congress also took care to ensure that the Postal Service's management decisions would not become the subject of protracted and burdensome litigation. Indeed, although Congress had considered the possibility of allowing for judicial review of post office closures and consolidations, *see* 122 Cong. Rec. 27,100-27,109 (1976) (debate on Senate amendment), the conference committee ultimately rejected that approach, instead deciding to provide exclusively for review by an expert agency. *See* H.R. Rep. No. 94-1444, at 18 (1976) (Conf. Rep.) (noting committee's decision to provide for Commission review "instead" of judicial review); 122 Cong. Rec. 28,565 (1976) (statement of Sen. Randolph) (similar).

Thus, the statute expressly declares that "[t]he provisions of . . . *chapter 7 of title 5* shall not apply to any review carried out by the Commission under this paragraph." 39 U.S.C. § 404(d)(5) (emphasis added). Chapter 7 of Title 5, entitled "Judicial Review," is part of the Administrative Procedure Act. Among other provisions, Chapter 7 of the APA includes a partial waiver of the United States' sovereign immunity from suit, 5 U.S.C. § 702; a cause of action for review of "final agency action," *id.* § 704; and an enumeration of the bases upon which such agency action may be held unlawful and set aside by a court, *id.* § 706. By expressly exempting the Commission's decisions under section 404(d)(5) from these provisions of Chapter 7—and by channeling customer complaints about post office closures to a speedy, expert

administrative process—Congress manifested its intent to conserve judicial resources and preclude the type of additional review that the petitioners seek here.⁵

2. An analogy to a similar provision in the same chapter of Title 39 underscores this interpretation. That provision, 39 U.S.C. § 410(a), states (in relevant part) that “no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the Postal Service.” 39 U.S.C. § 410(a) (emphasis added). This Court has repeatedly recognized that section 410(a) exempts the Postal Service from “traditional APA review.” *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1172 (D.C. Cir. 2003); *see also Carlin v. McKean*, 823 F.2d 620, 622-24 (D.C. Cir. 1987) (generally observing that “the APA is not applicable ‘to the exercise of the powers of the Postal Service’” and concluding that section 410(a)

⁵ The number of customer appeals filed under section 404(d)(5) varies significantly from year to year, depending upon the number of facilities discontinued by the Postal Service. In 2011 and 2012, the Commission collectively ruled on more than 200 appeals. *See* Postal Regulatory Commission, Dockets: Appeal-P.O. Closing, <http://www.prc.gov/prc-pages/library/dockets.aspx?activeview=DocketView&docketType=AppealPOClosing> (last visited Feb. 28, 2013). As petitioners note, *see* Pet. Br. 10-12, the Postal Service generally stopped pursuing new closures in 2012, and only a few such appeals are currently pending before the Commission. Nonetheless, if the Postal Service were to undertake further rounds of closures, as has been previously considered, a large number of post office appeals could again be filed. *See* U.S. Gov’t Accountability Office, GAO-12-100, U.S. Postal Service: Action Needed To Maximize Cost-Saving Potential of Alternatives to Post Offices, at 21, 30 (2011), *available at* <http://www.gao.gov/new.items/d12100.pdf> (noting Postal Service’s September 2011 announcement that it would “review as many as 15,000 post offices for possible closure” by 2015).

barred judicial review of decision dismissing Postmaster General); *Nat'l Easter Seal Soc'y for Crippled Children & Adults v. U.S. Postal Serv.*, 656 F.2d 754, 766-67 (D.C. Cir. 1981) (generally construing section 410(a) as “exempt[ing] the Postal Service from the APA”).⁶ Every other Circuit to address the question has similarly concluded that section 410(a) bars judicial review of Postal Service actions under the APA. *See Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004); *Boober v. U.S. Postal Serv.*, 843 F.2d 943, 944-45 (6th Cir. 1988); *Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1155 (4th Cir. 1988); *see also Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1191-92 (7th Cir. 1981) (noting Postal Service’s “exemption from the provisions of the [APA],” but finding alternative basis for judicial review); *cf. Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (observing that “actions by the USPS are not normally subject to APA review,” but finding the argument waived); *Top Choice Distribs., Inc. v. U.S. Postal Serv.*, 138 F.3d 463, 465 n.1 (2d Cir. 1998) (also finding the argument waived); *UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621, 629 n.8 (3d Cir. 1995) (same).⁷ Under this reasoning, 39 U.S.C.

⁶ In *Aid Association for Lutherans*, this Court ultimately concluded that the statutory bar of 39 U.S.C. § 410(a) did not prevent a federal district court from adjudicating a claim that the Postal Service had “exceeded its statutory authority” and “act[ed] *ultra vires*.” 321 F.3d at 1172-73; *see also Northern Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012). But petitioners have identified no basis for applying that limited exception here, and instead argue only that this Court should apply the standards of the APA. *See* Pet. Br. 25-26.

⁷ In *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*,
Continued on next page.

§ 404(d)(5)—which similarly provides that “*chapter 7 of title 5 shall not apply* to any review carried out by the Commission under this paragraph,” 39 U.S.C. § 404(d)(5) (emphasis added)—should likewise be read as demonstrating Congress’s intent to foreclose APA review of orders made by the Commission as part of its “review carried out” under that section.

Petitioners respond that section 410(a) cannot *directly* apply here because “[t]he petitions for review in this appeal are from orders of the Postal Regulatory Commission” rather than from those of the Postal Service. Pet. Br. 28-29. But the Commission does not contend that section 410(a) itself governs. Rather, the courts’ consistent interpretation of section 410(a) as foreclosing judicial review under the APA provides compelling evidence that the analogous language of section 404(d)(5) should be interpreted similarly, consistent with the principle that when Congress uses the same or similar words in related statutes, it intends that they be interpreted consistently. See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (noting this principle); cf. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (interpreting analogous provisions of welfare and child support statutes to bear same meaning); *Adena Reg’l*

498 U.S. 517 (1991), the Supreme Court declined to decide whether section 410(a) barred judicial review under the APA, holding that the government had waived the argument. See *id.* at 523 n.3. Three Justices concurred in the judgment, but solely on the grounds that the statute indeed precluded APA review: “There is no ambiguity in the text of 39 U.S.C. § 410(a). That section of the Postal Reorganization Act provides that the judicial review provisions of the Administrative Procedure Act (APA) do not apply to the exercise of the powers of the Postal Service.” *Id.* at 531 (Stevens, J., concurring in the judgment).

Med. Ctr. v. Leavitt, 527 F.3d 176, 180 (D.C. Cir. 2008) (construing Medicare provision harmoniously with analogous Medicaid provision).⁸

B. Section 3663 Does Not Afford This Court A Basis To Conduct APA Review Of Post Office Closure Appeals.

1. Petitioners urge that they are entitled to judicial review of the Commission's decisions under 39 U.S.C. § 3663. *See* Pet. Br. 1, 24, 26-28. But that statute can afford no basis for judicial review under these circumstances. Section 3663 provides:

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 and section 2112 of title 28, on the basis of the record before the Commission.*

39 U.S.C. § 3663 (emphasis added). While section 3663 thus ordinarily authorizes actions in this Court to review Commission decisions under the APA, Congress has made clear that the APA “shall not apply” to Commission decisions reviewing post office closure or consolidation determinations.⁹ *Id.* § 404(d)(5). Section 3663 must

⁸ Petitioners also attempt to distinguish 39 U.S.C. § 410(a) on the theory that “§ 410(a) exempts the Postal Service from notice and comment rulemaking procedures” rather than from judicial review. Pet. Br. 29. Petitioners overlook that section 410(a) exempts the Postal Service *both* from notice-and-comment rulemaking under APA chapter 5 *and* from judicial review under APA chapter 7. *See* 39 U.S.C. § 410(a) (providing that “the provisions of *chapters 5 and 7 of title 5*” shall not apply to the Postal Service) (emphasis added).

⁹ Section 3663's reference to Chapter 158 of Title 28, known as the Hobbs Act,
Continued on next page.

yield to Congress's contrary directive precluding APA review within that specific context. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (recognizing that where a specific statute expressly precludes what a general statute would allow, "the specific provision is construed as an exception to the general one"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) ("[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). Here, the only way to give effect to both the final clause of section 404(d)(5) and section 3663 is to construe the former provision as an exception to the latter one. *Cf., e.g., Lundeen v. Mineta*, 291 F.3d 300, 305-11 (5th Cir. 2002) (concluding that statute specifying that certain agency conduct "shall not be reviewable by any court *under . . . chapter 7 of title 5*," precluded APA review notwithstanding that another provision would generally seem to permit APA review) (emphasis added).

The circumstances of section 3663's enactment provide further evidence that Congress did not intend it to override section 404(d)(5). Section 3663 was enacted in 2006 as part of the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, § 205, 120 Stat. 3198, 3216-17 (2006)—a law which, among other

does not establish an alternative basis for review. "While the Hobbs Act specifies the form of proceeding for judicial review of [certain agency] orders, it is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial review[.]" *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (internal citation omitted); *see also, e.g., BNSF Ry. Co. v. U.S. Dep't of Transp.*, 566 F.3d 200, 203 (D.C. Cir. 2009) (conducting Hobbs Act review using the "standards set forth in the APA").

things, replaced the Postal Rate Commission with the Postal Regulatory Commission. In the same enactment, Congress transferred the Postal Rate Commission's authority to review post office closure or consolidation determinations to the Postal Regulatory Commission, *see id.* § 604(a), 120 Stat. at 3241, and enacted a new provision specifying when an administrative appeal under section 404(d)(5) is deemed to be "received" by the Commission, *id.* § 1006(a), 120 Stat. at 3258 (codified at 39 U.S.C. § 404(d)(6)).¹⁰

"[G]eneral language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) (quotation marks omitted). By amending or redesignating portions of section 404(d)—even as it repealed or replaced many other provisions of Title 39, *see, e.g.*, Pub. L. No. 109-435, §§ 201(a)-(b), 205, 404(a), 503(a), 1002(a)—Congress evinced its intent that the terms of section 404(d)(5) that remained unchanged should continue to be given effect. *See, e.g., United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus., AFL-CIO v. Reno*, 73 F.3d 1134, 1140 (D.C. Cir. 1996) (rejecting "partial repeal" argument and emphasizing need to "reconcile two seemingly inconsistent provisions in the same legislation" by allowing specific, not general, provision to control). Most importantly, as relevant here, Congress

¹⁰ The PAEA also restructured Title 39 in certain respects. For example, prior to the PAEA, the substantive provisions codified at 39 U.S.C. § 404(d)(5) had appeared at 39 U.S.C. § 404(b)(5). *See* PAEA § 1010(e), 120 Stat. at 3261 (redesignating 39 U.S.C. § 404(b), as amended, as 39 U.S.C. § 404(d)).

retained the provision precluding APA review of Commission decisions under 39 U.S.C. § 404(d)(5).

C. Petitioners' Other Arguments In Favor Of Judicial Review Are Similarly Unavailing.

Petitioners make several further arguments in favor of their claim to review, but none of them has merit. First, petitioners emphasize that “[t]his Court has previously considered appeals of orders of the Postal Regulatory Commission.” Pet. Br. 27. That observation is true, but beside the point. It is common ground that 39 U.S.C. § 3663 generally authorizes this Court to review final orders or decisions rendered by the Commission where no exception is otherwise provided by law.¹¹ But as explained above, 39 U.S.C. § 404(d)(5) creates an express exception to the review otherwise authorized by section 3663. None of the cases or legislative history cited by petitioners (Pet. Br. 27-28) can be read to imply otherwise.

Alternatively, petitioners suggest that Congress’s directive that “chapter 7 of title 5 shall not apply to any review carried out by the Commission,” 39 U.S.C. § 404(d)(5), should be read as precluding the *Commission* from applying “chapter 7 of

¹¹ See, e.g., *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 676 F.3d 1105 (D.C. Cir. 2012) (reviewing Commission order requiring Postal Service to increase cost coverage for a particular product pursuant to 39 U.S.C. § 3653(b)); *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011) (reviewing Commission order denying Postal Service request to exceed annual cap for postal rate increases established pursuant to 39 U.S.C. § 3622); *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 599 F.3d 705 (D.C. Cir. 2010) (reviewing Commission order determining that certain Postal Service activities were “nonpostal services” subject to possible termination under 39 U.S.C. § 404(e)(3)).

title 5” to its *own* review of Postal Service closure determinations, rather than as precluding this Court’s review of Commission decisions. *See* Pet. Br. 30, 32. That reading is not only implausible, but would render the phrase wholly without meaning. As explained, Chapter 7 of Title 5, entitled “Judicial Review,” contains a detailed set of instructions to *courts* concerning how and under what circumstances federal agencies may be sued, and the relief that may be awarded in such litigation. *See* 5 U.S.C. §§ 701-706. That chapter does not establish principles for administrative adjudication, such as the type of review performed by the Commission under 39 U.S.C. § 404(d)(5). And because Chapter 7 is inapplicable within an agency’s process of adjudication, Congress would not have any reason to direct the Commission not to apply that chapter of the APA. Petitioners’ reading of the final clause of section 404(d)(5) thus fails to give it any effect.

Relatedly, petitioners speculate that if Congress had intended to preclude judicial review, it would have drafted the statute so as to bar Chapter 7 of Title 5 from applying to “Commission *decisions*,” Pet. Br. 31 (emphasis added), instead of using the phrase “any *review carried out* by the Commission,” 39 U.S.C. § 404(d)(5) (emphasis added). But the text that Congress adopted is at least as expansive as the alternative language that petitioners suggest. The “review carried out by the Commission” necessarily includes the orders or decisions made during such review. *See ibid.* (requiring Commission to “review” the Postal Service’s closure or consolidation decision, and then “make a determination” whether to set aside the decision “based

upon such review”). In any event, the fact that petitioners can identify alternative language to accomplish a particular legislative result does not render ambiguous the language that Congress actually chose.

Petitioners also urge this Court to look beyond the plain language and consider “the structure of the statutory scheme, its objectives, its legislative history, and [the] nature of the administrative action involved,” Pet. Br. 26 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)), but each of those factors further confirms the Commission’s interpretation. As explained above, Congress enacted section 404(d)(5) to allow affected postal customers to invoke a limited measure of *administrative* oversight over post office closures and consolidations. Congress did not intend to allow judicial review of such closures, which could burden the Postal Service’s exercise of its statutory authority to “determine the need for post offices” and “provide such offices . . . as it determines are needed,” 39 U.S.C. § 404(a)(3), and its capacity to “manage its operations in a professional, businesslike manner,” *Mail Order Ass’n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 519 (D.C. Cir. 1993). *Cf.* 39 U.S.C. § 404(d)(5), (6) (requiring the Commission to resolve post office closure or consolidation appeals within 120 days).

Moreover, the legislative history specifically confirms Congress’s decision to preclude judicial review under the APA. Although Congress considered the possibility of allowing for judicial review of post office closures and consolidations, *see* 122 Cong. Rec. 27,100-27,109 (1976) (debate on Senate amendment allowing for

judicial review), the conference committee ultimately rejected that approach, instead providing exclusively for review by the Postal Rate Commission (a predecessor to the present Commission). *See* H.R. Rep. No. 94-1444, at 18 (1976) (Conf. Rep.); 122 Cong. Rec. 28,565 (1976) (statement of Sen. Randolph). At the same time, to make clear that the Commission's review should be final, the conference committee added to the bill a clause providing that "chapter 7 of title 5 shall not apply to any review carried out by the Commission," *see* H.R. Rep. No. 94-1444, at 9-10—the statutory language now at issue.

Finally, petitioners suggest that even if section 404(d)(5) prevents them from obtaining review of the Commission's decision under the APA, other "generic provisions of title 5 may apply." Pet. Br. 32. But to the extent that Congress has precluded application of "chapter 7 of title 5," there can be no APA review regardless of whether other provisions of Title 5 unrelated to judicial review might apply to the Commission. Petitioners cite *Le Page's 2000, Inc. v. Postal Regulatory Commission*, 674 F.3d 862, 868 (D.C. Cir. 2012), *see* Pet. Br. 31, but that case concerned whether certain Commission oversight proceedings constituted an "adversary adjudication" for the purpose of awarding attorney's fees, *see* 5 U.S.C. §§ 504, 554, not whether or under what circumstances Commission decisions are subject to judicial review in this Court.

II. THE COMMISSION CORRECTLY DETERMINED THAT IT LACKS JURISDICTION OVER RELOCATIONS OR REALIGNMENTS OF FACILITIES WITHIN A COMMUNITY.

In two of the three consolidated cases, petitioners seek review of the Commission's determinations that it lacked jurisdiction because the respective appeals did not concern post office closings within the meaning of 39 U.S.C. § 404(d)(5). In *Venice*, the Commission found that the challenged Postal Service action consisted of "mov[ing] its retail facility in Venice, California[,] 400 feet across the street." JA 80. The Commission held that it lacked jurisdiction because "Postal Service decisions to relocate a post office are not subject to appeal under 39 U.S.C. § 404(d)." *Ibid.* In *Mittleman*, the Commission found that the challenged Postal Service action was closing the Pimmit Branch as part of a broader realignment of postal services within the community of Falls Church, Virginia. *See* JA 37. Reaffirming that it "has consistently held that the requirements of section 404(d) do not apply to such rearrangements," the Commission determined that it lacked jurisdiction over the appeal. *Ibid.*

As explained below, the Commission's longstanding interpretation of 39 U.S.C. § 404(d)(5) is consistent with the text and history of the statute and warrants deference, and the Commission's determinations that the Postal Service actions here at issue concerned such relocations are fully supported by the administrative record.

A. The Commission Has Consistently And Reasonably Interpreted Section 404(d)(5) As Precluding Its Jurisdiction Over Relocations And Realignments Of Retail Postal Facilities.

1. The Commission and its predecessor, the Postal Rate Commission, have long understood section 404(d) as addressing only the “closing or consolidation” of the retail postal facilities serving a particular community. 39 U.S.C. § 404(d)(1).¹² The statute does *not* apply to the relocation or realignment of facilities within a community under circumstances where post offices continue to serve the community and provide substantially the same level of service. And because the statute does not mandate that relocations or realignments comply with the procedural requirements of section 404(d), the Commission has determined that it lacks jurisdiction to review such actions for compliance with those requirements.¹³

¹² The Commission has understood the term “consolidation” as referring to “a change in the management structure of a post office which includes the elimination of the postmaster position.” PRC Order No. 696, at 2 n.1, Docket No. A86-13 (Wellfleet, MA) (June 10, 1986); *accord* 122 Cong. Rec. 6314 (1976) (statement of Sen. Randolph) (describing consolidation as the conversion of post offices into “branches” subject to oversight by postmasters located elsewhere). Because no party contends that any of these appeals involve a consolidation, the meaning of the term “consolidation” is not at issue in these proceedings.

¹³ Petitioners acknowledge the Postal Service’s view that section 404(d) “does not apply” to the relocation of retail services within a community, but suggest that the Postal Service may not regard that principle as jurisdictional. *See* Pet. Br. 39-40. To the contrary, the Postal Service shares the Commission’s understanding that, because section 404(d) does not apply under these circumstances, the Commission lacks jurisdiction. *See, e.g.*, USPS Motion To Dismiss Proceedings, at 3, PRC Docket No. A2012-17, Filing ID# 77148 (Oct. 27, 2011) (“The Postal Regulatory Commission

Continued on next page.

That principle has been recognized within the Commission's jurisprudence for over thirty years. In the *Oceana Station* case, the Postal Rate Commission dismissed for lack of jurisdiction an appeal challenging the Postal Service's decision to close the Oceana Station, a retail postal facility in Virginia Beach, Virginia. *See* PRC Order No. 436, Docket No. A82-10 (Oceana Station, Virginia Beach, VA) (June 25, 1982) ("*Oceana Station*").¹⁴ The Commission found that the closure was part of a systematic realignment of the "network of postal facilities" in the community, including, among other things, the opening of a new main post office four miles away, the expansion of another facility one-quarter of a mile away, and improvements to retail service at several other nearby facilities. *Id.* at 3, 4-5. In light of that realignment, the Commission determined that discontinuance of the Oceana Station would not constitute "closure" of the community's post office within the meaning of the statute, but rather the "relocation of facilities *within* the community." *Id.* at 6 (emphasis added). The Commission explained that "[t]he requirements of section 404[(d)] do not pertain to the *specific building* housing the post office[,] but rather are concerned with the *provision of a facility*" to the community to be served. *Ibid.* (emphasis added).

does not have jurisdiction to consider an appeal of a Post Office relocation under 39 USC § 404(d).").

¹⁴ The Commission orders cited in this brief are provided in an accompanying addendum, and also are available on the Commission's website at <http://www.prc.gov/prc-pages/library/default.aspx?view=dockets>.

It thus concluded that the Commission has “no jurisdiction to hear appeals” concerning “where retail facilities are to be located within the community.” *Id.* at 7.

The Commission has applied that doctrine on numerous occasions since *Oceana Station*. For example, in *Wellfleet*, the Commission reaffirmed that section 404(d)(5) does not apply where “the Postal Service is only relocating a post office within a community,” because “[t]he meaning of ‘closing a post office’ as used in the statute is the elimination of a post office from a community.” PRC Order No. 696, at 2, Docket No. A86-13 (Wellfleet, MA) (June 10, 1986) (“*Wellfleet*”). It therefore dismissed for lack of jurisdiction an appeal challenging the Postal Service’s decision to move a post office to another nearby location. *Id.* at 2-3. In *San Francisco*, the Commission reaffirmed that “[c]hanging a building housing the post office is different from eliminating the post office,” and that section 404(d)(5) is intended to provide a right of appeal to the Commission only in the latter situation. PRC Order No. 891, at 6, Docket No. A91-4 (San Francisco Main Post Office, CA) (July 8, 1991) (“*San Francisco*”). More recently, in *Ecorse*, the Commission dismissed for lack of jurisdiction an appeal concerning the Postal Service’s decision to close one branch office while opening a new, larger retail facility less than two miles away. *See* PRC Order No. 37, Docket No. A2007-1 (Ecorse Classified Branch, Ecorse, MI) (Oct. 9, 2007). The Commission explained that a “closing” does not occur within the meaning of 39 U.S.C. § 404(d) where a new facility within the community is “designed . . . to take

over and replace the workload and retail services offered” at an older facility that has been slated for discontinuance. *Id.* at 6.¹⁵

The Commission’s interpretation of the term “closing” within section 404(d) is consistent with Congress’s intent in enacting the statute. When Congress first enacted section 404(d), it was primarily concerned with preserving access to retail postal services in rural areas and small towns—places in which the closure of a post office would effectively eliminate retail postal facilities from the community. *See, e.g.*, 122 Cong. Rec. 6314 (1976) (statement of Sen. Randolph) (“Congress does not want indiscriminate closing of our rural and small town post offices. . . . We must not remain silent while established postal services for people in rural areas are dismantled.”); 122 Cong. Rec. 27,108 (1976) (statement of Sen. McGovern) (voicing support for section 404(d) because it protects “our rural areas and small communities” and “establish[es] a fair and orderly process for considering rural closings where none now exists”); *cf.* 122 Cong. Rec. 27,092, 27,101 (1976) (statement

¹⁵ *See also* PRC Order No. 1588, at 4-5, Docket No. A2013-1 (Santa Monica Post Office, Santa Monica, CA) (Dec. 19, 2012); PRC Order No. 804, at 3-4, Docket No. A2011-21 (Ukiah Main Post Office, Ukiah, CA) (Aug. 15, 2011); PRC Order No. 477, at 6-8, Docket No. A2010-3 (East Elko Station, Elko, NV) (June 22, 2010); PRC Order No. 448, at 4-6, Docket No. A2010-2 (Sundance Post Office, Steamboat Springs, CO) (Apr. 27, 2010); PRC Order No. 1387, at 5-6, Docket No. A2003-1 (Birmingham Green, AL) (Dec. 3, 2003). *Cf.* PRC Order No. 1317, at 6-7, Docket No. A2012-108 (South Valley Station Post Office, Yerington, NV) (Apr. 18, 2012) (denying motion to dismiss where Postal Service’s actions could not fairly be understood as constituting a relocation or realignment of retail services); PRC Order No. 1480, at 6-7 & n.27, Docket No. A2006-1 (Observatory Finance Station, Pittsburgh, PA) (Sept. 29, 2006) (distinguishing *Oceana Station* line of decisions).

of Sen. McGee) (opposing proposal but nonetheless recognizing the “importance of rural post offices”). The sponsors of section 404(d) devised the statute to ensure that those kinds of closures would only be undertaken after a careful and thorough consideration of five specified factors. *See* 122 Cong. Rec. 27,101 (1976) (statement of Sen. Randolph) (explaining that the provision which became § 404(d)(5) was intended as “a further assurance . . . to these small post offices in the rural areas that there will be set procedures on closings”). Indeed, among those five factors is “whether such closing or consolidation is consistent with the policy . . . that the Postal Service shall provide a maximum degree of effective and regular postal services to *rural areas, communities, and small towns* where post offices are not self-sustaining.” 39 U.S.C. § 404(d)(2)(A)(iii) (emphasis added); *cf.* 122 Cong. Rec. 6315 (1976) (statement of Sen. Randolph) (emphasizing this provision); *id.* at 27,101 (same).

By contrast, section 404(d) does not compel the Postal Service to consider any particular factors in deciding how and where retail postal facilities should be located *within* a community. The Commission has thus reasonably interpreted section 404(d) as not extending to the relocation or realignment of existing facilities under circumstances where the Postal Service’s action will not effectively deprive the community of access to retail postal services. *See San Francisco*, Order No. 891, at 5 (recognizing that section 404(d) “appl[ies] only when the Postal Service is proposing to remove all retail facilities”); PRC Opinion Remanding Determination, at 9, Docket No. A83-30 (Knob Fork, WV) (Jan. 18, 1984) (“The statute is concerned with only

two types of changes: a closing which eliminates a community's post office or a particular consolidation of management of an office."). Indeed, although Congress has occasionally considered proposals to amend the statute to expressly cover relocations of postal facilities within a community, it has not enacted any of these proposals. *See, e.g.*, Post Office Relocation Act of 1997, H.R. 1231, 105th Cong. (1997) (proposing to expand Commission's review authority to cover "determination[s] of the Postal Service to *renovate, relocate*, close, or consolidate any post office") (emphasis added).¹⁶

The Commission's interpretation is also consonant with Congress's intent that the Postal Service be afforded latitude and discretion with respect to the siting of postal facilities. *See* 39 U.S.C. § 403(b)(3) (instructing Postal Service to "establish and maintain postal facilities of such character and in such locations, that postal patrons . . . will . . . have ready access to essential postal services"); 39 U.S.C. § 404(a)(3) (vesting Postal Service with power to "determine the need for post offices . . . and to provide such offices . . . as it determines are needed"). If the Commission were to construe its jurisdiction under section 404(d) too broadly, it thus would "not merely

¹⁶ *See also* Community and Postal Participation Act of 1998, S. 2035, 105th Cong. (1998) ("determination[s] . . . to *relocate*, close, or consolidate a post office") (emphasis added); Post Office Community Partnership Act of 1999, S. 556, 106th Cong. (1999) ("determination[s] . . . to *relocate*, close, consolidate, *or construct* a post office") (emphasis added); Guidelines for the Relocation, Closing, Consolidation or Construction of Post Offices: Hearing Before the Subcomm. on Int'l Security, Proliferation, and Federal Servs. of the S. Comm. on Govtl. Affs., S. Hrg. No. 106-432, 106th Cong. (1999) (considering S. 556).

create an inconvenience for postal management,” but would also “violate a basic policy of the [statutes]” governing the Postal Service. PRC Opinion Dismissing Appeal at 17, Docket No. A78-1 (Gresham, SC, Route #1) (Aug, 16, 1978) (citing S. Rep. No. 91-912, at 2-3 (1970)); *see also San Francisco*, Order No. 891, at 3 (crediting view that if section 404(d) procedures had to “be followed every time the Postal Service wants to move out of a particular building,” that “would seriously damage its ability to operate”); *Oceana Station*, Order No. 436, at 8 (rejecting view that section 404(d) would apply “[i]f the Postal Service had decided to close the Oceana station and build a new facility across the street”).

2. The record amply supports application of these principles here. In *Venice*, the Postal Service decided to sell the building in which the Venice Post Office was housed and to transfer its retail operations to another building located 400 feet away. *See* JA 76-77, 80. The Commission reasonably held that these actions constituted the relocation of a post office within an existing community, *see* JA 80, and petitioners do not dispute that conclusion. Rather, they, too, characterize the relevant action as a “relocation” rather than a closure. *See* Pet. Br. 16-18, 22, 45.

The Commission similarly acted properly in applying those principles in *Mittleman*. The Postal Service undertook the closure of the Pimmit Branch as part of a realignment of services in Falls Church. The Postal Service explained in April 2009 that “[a] new facility [was] being proposed for the Main Post Office at Falls Church,” and undertook an investigation to “determine the feasibility of eliminating the Pimmit

Branch and *combining its operations with the proposed new retail facility* for the main office.” JA 30-31 (emphasis added; citation omitted). After surveying the record, the Commission found that “the closure of the [Pimmit Branch] [was] part of a broader plan to rearrange the postal network” in the Falls Church community, JA 36, and in fact that the “Postal Service [had] entered into a long-term lease for the facilities at 800 West Broad Street with the expectation of closing the Pimmit Branch,” JA 37; *see also ibid.* (noting petitioner’s acknowledgment that closing the Pimmit Branch was “presumably an integral part of the planning for the relocation of retail services to 800 W. Broad Street”). The record thus supports the Commission’s conclusion that the discontinuance of the Pimmit Branch was not a “closing” under the statute, but rather, the relocation of retail facilities within a community. *Cf., e.g., Oceana Station*, Order No. 436, at 7 (dismissing appeal for lack of jurisdiction where “[t]he Postal Service’s decision constitutes a *moving* of facilities within the community rather than [their] *elimination*”) (emphasis added).

Petitioner Mittleman argues that the Commission’s dismissal of her appeal was arbitrary and capricious because the Pimmit Branch was sited just outside the corporate limits of the City of Falls Church, and in petitioner’s view was therefore in a “different community.” Pet. Br. 42-43. But the Commission’s contrary conclusion was plainly reasonable. The Pimmit Hills neighborhood, in which the Pimmit Branch is located, directly adjoins the City of Falls Church; possesses Falls Church mailing addresses; and is understood by the Postal Service, the Commission, and the public at

large as part of Falls Church. *See* JA 7, 11-12, 13, 24.¹⁷ Petitioner has offered no support for her assumption that a “community” within the meaning of 39 U.S.C. § 404(d) must necessarily be coextensive with the formal jurisdictional boundaries of local political units. Indeed, the Commission has considered and rejected such assertions in the past. *See Wellfleet*, Order No. 696 at 2-3 (rejecting argument that a post office relocation amounted to a closing because the relocated office would be located “across the line . . . which divides Wellfleet from South Wellfleet,” and finding that that relocation did not meaningfully affect Wellfleet residents’ access to retail postal services).¹⁸

Even if the neighborhood of Pimmit Hills were regarded as its own “community,” petitioner cannot show that its residents have effectively been deprived

¹⁷ *See also, e.g.*, Pimmit Hills Citizens Association, About the Pimmit Hills Citizens Association, <http://phca.roundtablelive.org/about-phca> (last visited Feb. 28, 2013) (referring to “the Pimmit Hills neighborhood located in Falls Church, Virginia”); Tom Jackman, *Falls Church’s Pimmit Hills Neighborhood Has the First ‘Passive House’ in Fairfax County*, Wash. Post, Nov. 19, 2012, http://www.washingtonpost.com/blogs/the-state-of-nova/post/falls-churchs-pimmit-hills-neighborhood-has-the-first-passive-house-in-fairfax-county/2012/11/16/fb231254-2f44-11e2-9f50-0308e1e75445_blog.html (referring to the “Pimmit Hills neighborhood” of Falls Church).

¹⁸ Similarly, the Postal Service does not rely upon the formal jurisdictional boundaries of local political units as dispositive for the purposes of making ZIP Code assignments. *See, e.g.*, Nye Stevens, Cong. Research Serv., RL33488, Changing Postal ZIP Code Boundaries, at 2 (2006), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/2873.pdf> (observing that “ZIP Codes are based on the location of delivery post offices” and “often do not correspond to political jurisdiction boundaries”).

of access to retail postal services. To the contrary, the record shows that former Pimmit Branch customers continue to enjoy convenient access to postal services. In addition to the Falls Church post office at 800 West Broad Street, the Dunn Loring Branch is located just two miles away, *see* JA 9, and numerous other post office locations are available within a four-mile radius, *see* JA 18-23, 32-33. Customers seeking post office box delivery or counter service may use any of those facilities.¹⁹ Thus, even if the closure of the Pimmit Branch resulted in the “loss of *a* retail outlet in the community,” Pet. Br. 34 (quoting JA 9) (emphasis added), it did not have the effect of eliminating convenient access to retail postal services for Pimmit Hills residents. The Commission’s decisions dismissing the *Venice* and *Mittleman* appeals were therefore reasonable.

B. The Commission’s Interpretation Is Entitled To Deference.

Petitioners contend that the Commission lacks the interpretive authority to conclude that section 404(d) does not extend to the relocation or realignment of facilities within a community. *See* Pet. Br. 35-40, 46. Contrary to petitioners’ assertions, the Commission is not only empowered to interpret the statute through adjudication, but those interpretations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁹ Additionally, three different stamps-on-consignment locations are located within roughly one mile of the Pimmit Branch. *See* JA 11, 25.

As the Supreme Court has explained, “*Chevron* deference is appropriate ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033-34 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Congress has expressly charged the Commission with reviewing the Postal Service’s compliance with 39 U.S.C. § 404(d). *Cf. U.S. Postal Serv. v. Postal Regulatory Comm’n*, 599 F.3d 705, 710 (D.C. Cir. 2010) (affording *Chevron* deference to the Commission where the statutory “provision was clearly delegated to the Commission to implement[,] and thereby to interpret”) (emphasis added). And the Commission’s interpretation of section 404(d) was promulgated through a structured adjudicatory process established by Congress and further elaborated by Commission regulations.²⁰ As the Supreme Court has explained, *Chevron* deference is warranted where Congress “provides for a relatively formal administrative procedure tending to foster the

²⁰ The basic framework for the Commission’s review is supplied by the governing statute, *see* 39 U.S.C. § 404(d)(5), but the Commission has promulgated additional procedures pursuant to its express rulemaking authority under 39 U.S.C. § 503. *See* 39 C.F.R. pt. 3025 (2012) (rules governing post office closure appeals effective beginning March 12, 2012); 39 C.F.R. §§ 3001.110-3001.117 (2011) (rules effective prior to March 12, 2012); *cf.* 39 U.S.C. § 503 (permitting Commission to “promulgate rules and regulations and establish procedures . . . and take any other action [it] deem[s] necessary and proper to carry out [its] functions and obligations”).

fairness and deliberation that should underlie a pronouncement” carrying the “force [of law].” *Mead Corp.*, 533 U.S. at 230.²¹

In such cases, a two-step analysis applies in determining whether deference is due. *See Chevron*, 467 U.S. at 842-43. First, if Congress has “directly spoken to the precise question at issue,” then the Court and the agency must “give effect to the unambiguously expressed intent of Congress.” *Ibid.* If the statute is “silent or ambiguous with respect to the specific issue,” the Court must uphold the agency’s interpretation as long as it is based upon a “permissible construction of the statute.” *Id.* at 843; *see also U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1266-67 (D.C. Cir. 2011) (summarizing principles).

The relevant language of 39 U.S.C. § 404(d) is ambiguous. Congress has not defined the meanings of “close” and “closing”—or “closure” and “consolidation”—as those terms are used within 39 U.S.C. § 404(d). As particularly relevant here, Congress did not decide whether the relocation of a postal facility within the community would constitute a “closing.” Congress thus did not “directly sp[ea]k to

²¹ This Court has repeatedly recognized the principle that an agency decision interpreting the statute that it administers warrants *Chevron* deference even where that interpretation implicates the boundaries of the agency’s own jurisdiction. *See, e.g., Celco P’ship v. F.C.C.*, 700 F.3d 534, 541 (D.C. Cir. 2012) (noting that Court has “repeatedly” rejected argument that “*Chevron* deference does not extend to interpretive questions . . . that implicate the scope of an agency’s jurisdiction” and collecting cases); *see also City of Arlington v. F.C.C.*, No. 11-1545 (S. Ct.) (cert. granted Oct. 5, 2012; argument held Jan. 16, 2013).

the precise question at issue,” *Chevron*, 467 U.S. at 842, but rather has left this matter for resolution by the Commission.

The Commission’s reading of the statute fully accords with the text and purpose of 39 U.S.C. § 404(d), reflects three decades of consistent agency practice, and appropriately balances the competing statutory goals of respecting the Postal Service’s managerial independence while also affording a forum for postal customers to obtain review of certain kinds of serious changes in service. The Commission’s interpretation therefore warrants *Chevron* deference.

III. PETITIONERS’ OTHER ARGUMENTS ARE WITHOUT MERIT.

A. The Commission Reasonably Decided That A Tie Vote Has The Effect Of Affirming The Postal Service’s Closure Determination.

With respect to the Spring Dale appeal, the Commission determined that it had jurisdiction and proceeded to evaluate the Postal Service’s closure determination on its merits. The Commission decided, by a 2-2 vote, that the Postal Service’s determination should not be set aside. *See* JA 114-29. The Commissioners who voted in favor of affirmance explained that the Postal Service had complied with the requirements of 39 U.S.C. § 404(d) by giving timely notice of its intent to close the post office, by considering the effect of closure on the community and on postal employees, by weighing the goal of providing a maximum degree of regular postal service to rural communities, and by evaluating the economic savings of closure. *See* JA 120-28.

Petitioners do not challenge the sufficiency of that reasoning.²² *See* Pet. Br. 3-4 (enumerating issues for review). Rather, they challenge only the Commission's application of its own voting procedures by arguing that the Commission "should not have affirmed the determination based on a tie vote." Pet. Br. 25; *see also id.* at 50-55.

As explained above, petitioners are not entitled to judicial review of the Commission's decision declining to set aside the Postal Service's determination to close the Spring Dale Post Office. *See supra* at pp. 15-26. But even if the Commission's decision were reviewable, it would readily satisfy the standards of the APA. As the Commission explained in its decision, "[i]n the absence of a majority, the [Postal Service's] Final Determination stands." JA 115 n.4; *accord* U.S. Postal Regulatory Commission, Annual Report to the President and Congress: Fiscal Year 2012 ("Commission FY 2012 Annual Report"), at 42 n.4, *available at* http://prc.gov/Docs/86/86069/PRC_2012_Annual_Report_w-links.pdf ("In the absence of a majority vote the status quo is maintained and for purposes of post office closing appeals, Postal Service determinations are affirmed."). The soundness of that reasoning is self-evident.

²² Nor could any such challenge succeed. Here, the Commission considered an extensive record including several rounds of comments, *see* JA 84-86 (certified index), and issued a sixteen-page order extensively analyzing both the substance and process of the Postal Service's closure determination, *see* JA 114-129. Under deferential APA review, this Court could not conclude that the Commission—which is itself bound to be similarly deferential to the Postal Service's decision, *see* 39 U.S.C. § 404(d)(5) (enumerating limited bases for Commission's review)—acted improperly in declining to "substitut[e] its judgment for that of the Postal Service." JA 120.

Petitioners criticize the Commission's use of the term "affirmance" to refer to the effect of a 2-2 tie decision, *see* Pet. Br. 25, 52, 53, 54, but do not squarely argue that a tie vote should instead have the *opposite* effect, i.e., to vacate or set aside the Postal Service's underlying determination. Rather, petitioners suggest that tie votes "present unresolved issues," Pet. Br. 53, and that "[t]here is no basis" for assuming "that the two votes in favor of affirming . . . should be given more weight than the two votes in favor of remanding," Pet. Br. 52. But petitioners' suggestion that a different voting rule *could* be adopted does nothing to call into question the reasonableness of the voting rule that the Commission has *actually* decided, unanimously, to adopt.²³ Indeed, Congress vested the Commission with the discretion to "promulgate [such] rules and regulations and establish procedures" as the Commission "deem[s] necessary and proper." 39 U.S.C. § 503. Thus, the Commission was fully empowered to determine for itself what voting rule should be employed.²⁴

²³ The two Commissioners who dissented on the merits of the Spring Dale closure determination did not object to the Commission's treatment of the tie vote as an affirmance. *See* JA 130-33, 134.

²⁴ Although Congress at one time imposed a majority-vote requirement for any final acts of the Rate Commission, it subsequently removed that restriction. *Compare* 39 U.S.C. § 3604(a) (1970) ("All final acts of the Commissioners shall be by a vote of an absolute majority thereof."), *with* 39 U.S.C. § 3604(a) (1976) (containing no such requirement). The successor provision governing the Postal Regulatory Commission, codified at 39 U.S.C. § 504(a), does not contain a majority-vote requirement.

Moreover, the tie-vote rule adopted by the Commission is consonant with standard practice in many other multi-member adjudicatory bodies. As petitioners themselves acknowledge, appellate courts generally treat tie votes as having the effect of affirming the judgment below.²⁵ See, e.g., *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011); *Ginsburg, Feldman & Bress v. Federal Energy Admin.*, 591 F.2d 752 (D.C. Cir. 1978) (en banc). Similarly, among other administrative agencies, the most common approach is to treat a tie outcome as effectively an affirmance in cases where, as here, the decision under review is one that would have independent effect absent vacatur or reversal. See Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1185 (2000); see also, e.g., *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8 (4th Cir. 1995) (collecting cases); *Ford Motor Co. v. I.C.C.*, 714 F.2d 1157, 1163 (D.C. Cir. 1983) (noting that a tie vote of the full Interstate Commerce Commission left the decision of a subordinate panel as the “Commission’s final judgment”); *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 497 F.2d 608, 615 (D.C. Cir. 1973) (explaining that a

²⁵ Petitioners question the relevance of this analogy by asserting that “if courts affirm on a tie vote, they typically do not issue an opinion showing the views of the various judges,” but rather issue “a simple statement that the judgment is affirmed for the reasons stated below.” Pet. Br. 52. In fact, judges on equally divided courts may issue opinions explaining the reasons for their votes, just as members of the Commission did here. See, e.g., *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc); *United States v. Page*, 167 F.3d 325 (6th Cir. 1999) (en banc); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1272 (6th Cir. 1996) (en banc) (Boggs, J., dissenting) (collecting additional examples).

2-2 vote on a motion for rehearing left the original administrative decision as “authoritative”).

Petitioners also suggest that the Commission’s decision was improper because the Commission “did not cite any statutes, regulations or rules when it treated the tie vote as affirmance,” Pet. Br. 53, and assert that “it is advisable for commissions to have a policy or rule for considering tie votes,” Pet. Br. 54. As explained, however, the Commission *does* have a tie-vote policy, and it has been routinely and consistently employed. *See* JA 115 n.4; Commission FY 2012 Annual Report at 42 n.4. And despite petitioners’ apparent demand that the Commission be required to further formalize that policy, they are without authority to compel the Commission to promulgate any particular voting procedures or rules in the absence of any express statutory directive. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (holding that a claim to “compel agency action unlawfully withheld” may succeed only where the “agency failed to take a *discrete* agency action that it is *required to take*”). In any event, because the tie-vote rule adopted by the Commission is plainly reasonable, petitioners’ APA challenge must fail. *See, e.g., Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) (“[The agency] is not required to choose the best solution, only a reasonable one.”).

B. Other Matters Addressed By Petitioners Are Not Properly Before This Court.

In their opening brief, petitioners also seek to call into question the soundness of the Postal Service's respective relocation decisions. In *Mittleman*, petitioner suggests that the decision to close the Pimmit Branch was short-sighted and a poor business decision, *see* Pet. Br. 12, 13, 14; argues that the replacement services offered at the Falls Church post office are not convenient notwithstanding its close proximity to Pimmit Hills, *see* Pet. Br. 41; and asserts that "[t]he Postal Service simply ignored the needs of [] postal customers" in deciding to close the Pimmit Branch, Pet. Br. 43. In *Venice*, petitioners assert that the Postal Service action was not intended to "improve retail facilities in the Venice community" but rather only to "generate revenue from th[e] sale" of the former post office building. Pet. Br. 47. Petitioners also argue that the Commission's order was arbitrary and capricious because it "failed to consider the historic preservation issues concerning the Venice Post Office and its mural." Pet. Br. 47; *see generally id.* at 18-22, 47-50.

The merits of the Postal Service's closure determinations are not at issue before this Court. Even if the Court were to conclude that APA review of the Commission's decisions rendered under 39 U.S.C. § 404(d)(5) was available, the only question before the Court in the *Mittleman* and *Venice* cases is whether the Commission reasonably determined that it lacked jurisdiction over the appeals because they concerned relocations rather than closures. Because judicial review of final agency action must

be based upon the agency action actually undertaken, *see* 5 U.S.C. § 704, petitioners are mistaken in their attempt to interject issues into these proceedings that are not fairly encompassed within the Commission's decisions.

Moreover, with respect to the historic preservation issues, section 404(d)(5) does not provide the Commission with authority to review the Postal Service's compliance with statutes or regulations governing matters of historic preservation. *See, e.g.*, PRC Order No. 1588, at 5 n.9, Docket No. A2013-1 (Santa Monica Post Office, Santa Monica, CA) (Dec. 19, 2012) (“[T]he Commission's role in appeals does not include responsibility for enforcing the [National Historic Preservation Act].”); PRC Order No. 1037, at 12, Docket No. A2011-49 (Village Station, Pinehurst, NC) (Dec. 12, 2011) (same). Petitioners' arguments concerning such matters are directed to the wrong forum.

CONCLUSION

Because Congress has precluded judicial review over decisions made by the Commission under 39 U.S.C. § 404(d)(5), the petitions for review should be dismissed. Alternatively, this Court should deny the petitions on their merits because the Commission acted reasonably in the exercise of its authority in each case.

Respectfully submitted,

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MARCH 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,082 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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5 U.S.C. § 706—Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

39 U.S.C. § 404—Specific powers.

(a) Subject to the provisions of section 404a, but otherwise without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

...

(3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed;

...

(d)

(1) The Postal Service, prior to making a determination under subsection (a)(3) of this section as to the necessity for the closing or consolidation of any post office, shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to ensure that such persons will have an opportunity to present their views.

(2) The Postal Service, in making a determination whether or not to close or consolidate a post office—

(A) shall consider—

(i) the effect of such closing or consolidation on the community served by such post office;

(ii) the effect of such closing or consolidation on employees of the Postal Service employed at such office;

(iii) whether such closing or consolidation is consistent with the policy of the Government, as stated in section 101(b) of this title, that the Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining;

(iv) the economic savings to the Postal Service resulting from such closing or consolidation; and

(v) such other factors as the Postal Service determines are necessary; and

(B) may not consider compliance with any provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(3) Any determination of the Postal Service to close or consolidate a post office shall be in writing and shall include the findings of the Postal Service with respect to the considerations required to be made under paragraph (2) of this subsection. Such determination and findings shall be made available to persons served by such post office.

(4) The Postal Service shall take no action to close or consolidate a post office until 60 days after its written determination is made available to persons served by such post office.

(5) A 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 shall not apply to any review carried out by the Commission under this paragraph.

(6) For purposes of paragraph (5), any appeal received by the Commission shall—

(A) if sent to the Commission through the mails, be considered to have been received on the date of the Postal Service postmark on the envelope or other cover in which such appeal is mailed; or

(B) if otherwise lawfully delivered to the Commission, be considered to have been received on the date determined based on any appropriate documentation or other indicia (as determined under regulations of the Commission).

39 U.S.C. § 410—Application of other laws.

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

...

39 U.S.C. § 503—Rules; regulations; procedures.

The Postal Regulatory Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this title. Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.

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 and section 2112 of title 28, on the basis of the record before the Commission.

Nos. 12-1095, 12-1110 & 12-1157

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELAINE J. MITTLEMAN,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

VENICE STAKEHOLDERS ASSOCIATION, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

PAUL McCLUNG, et al.,
Petitioners,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

ON PETITIONS FOR REVIEW FROM THE
POSTAL REGULATORY COMMISSION

**ADDENDUM OF POSTAL RATE COMMISSION
AND POSTAL REGULATORY COMMISSION DECISIONS**

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UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

RECEIVED

Before Commissioners: Clyde S. DuPont, Chairman;
Simeon M. Bright, Vice Chairman;
Kieran O'Doherty; Carlos C. Villarreal

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Gresham, S.C., Route #1)
(Olin Jones, Petitioner))

Docket No. A78-1

OPINION AND ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION
UNDER 39 U.S.C. § 404(b)

(August 16, 1978)

This is the first appellate proceeding conducted by the Postal Rate Commission under 39 U.S.C. § 404(b),^{1/} providing specialized procedures for the closing or consolidation of post offices. The case presents an important question of jurisdiction, since the United States Postal Service (Postal Service or Service) action complained of is the consolidation of rural delivery routes. Our conclusion, after analysis of the parties' arguments and of the history and meaning of § 404(b), is that the factual situation presented to us is not one which § 404(b) was intended to govern.

^{1/} Added to Title 39 by Pub. L. 94-421 (September 24, 1976), 90 Stat. 1310-1311. The text of this provision is set forth in Appendix A hereto, for ready reference. Our rules of practice governing these cases appear at 39 CFR § 3001.110 et seq.

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THE POSTAL SERVICE'S ACTION AND THE
PROCEEDINGS BEFORE THE COMMISSION

History of the proceedings. On May 2, 1978, petitioner Olin Jones filed with us an "Appeal from Decision to Consolidate" (hereinafter, "Appeal") and an "Application for Suspension Pending Review," pursuant to 39 U.S.C. § 404(b)(5). The facts alleged in the Appeal may be summarized briefly. Petitioner, and others whom he represents, are patrons of Route #2, Gresham, S.C. On or about April 1, 1978, the Postal Service announced, by letter placed in these patrons' rural boxes, that Route #1, Gresham, would be consolidated in part with Route #2, Gresham, and in part with Route #3, Marion. No hearing was held by the Service and no written determination issued.

Petitioner contended in his Appeal that failure to follow § 404(b) procedures rendered the Service's action violative of that section, and resulted in its being unsupported by substantial evidence--no evidentiary record having been made. He also charged that it violated § 101(b) and § 404(b) in that it unlawfully favored an urban over a rural community. Petitioner requested, alternatively, that we require the Service (1) to re-establish Gresham Routes #1 and #2 as they were before April 22, 1978, or (2) to provide notice and a hearing before implementing the consolidation. Several affidavits, a petition signed by numerous local residents,

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and two maps illustrating the route changes were tendered in support of the Appeal.

On May 19, 1978, we published in the Federal Register^{1/} a "Notice of Filing of Appeal" in which we called attention to the apparent jurisdictional question on which the case has, in fact, hinged. We also set forth a procedural schedule.

On May 15, 1978, the Service filed a motion to dismiss the appeal. An accompanying affidavit executed by James R. Braughton, Assistant Postmaster General for Delivery Services, stated that there was no plan to close or consolidate the Gresham Post Office. The Service argued that the "adjustment" of rural routes does not amount to a closing or consolidation of post offices under § 404(b), and that we therefore lacked subject matter jurisdiction. On May 30, 1978, petitioner filed a response contending, inter alia, that the Service's action was a partial consolidation of the Gresham and Marion Post Offices and thus should have been treated as subject to § 404(b).

Petitioner did not file an initial brief. The Postal Service filed a brief^{2/} responding, in particular, to the

^{1/} See 43 Fed. Reg. 21749 (May 19, 1978).

^{2/} Hereinafter referred to as its "Answering Brief."

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argument just described respecting partial consolidation. On July 7, 1978, petitioner filed a Reply.^{1/}

The question of § 3662. One feature of petitioner's last pleading requires comment. He cites, and appears to rely upon, § 3662 of the Act--to an extent not altogether clear. We wish to make it clear that claims under § 404(b) and § 3662 cannot normally be commingled in one proceeding. The papers in this appeal, moreover, do not set forth adequately the matters our rules of practice require to be expounded in a complaint case. See particularly 39 CFR §§ 3001.82, 3001.83. The suggestion that § 3662 may apply to this situation was made at a late stage in the proceedings, after the issues had been shaped in a § 404(b) context. We do not mean to impose rigid rules of common-law pleading upon parties, but fairness to the respondent in this case does require that we continue to treat it as a § 404(b) matter. We express no views here as to the ultimate availability of § 3662 to the petitioner,^{2/} but we will not consider it further in this case.

^{1/} In this Reply, petitioner requested an opportunity to present oral argument. In our Notice, we stated that we would schedule or dispense with argument "as the interests of prompt and just decision may require." The issues, legal in nature, are by now clear enough to permit decision without argument, and we will dispense with it.

^{2/} As an illustration, however, of the inappropriateness of dealing with § 404(b) and § 3662 issues together, we note that § 3001.82 of our rules deprecates the use of the complaint mechanism to address an "individual, localized, or temporary service issue." 39 CFR § 3001.82. Section 404(b), on the other hand, is designed specifically to cope with local problems.

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The case thus standing submitted, we turn to the overriding issue of jurisdiction.

THE QUESTION OF JURISDICTION

Introduction. The pleadings described above made it plain that the question whether the Gresham route consolidation was covered by § 404(b) would be central to this case. We are therefore devoting the main portion of our opinion to it. We have determined, after examining the pleadings, the legislative history, and the few cases so far decided, that the facts alleged in this appeal do not give us jurisdiction to review the Postal Service's action.

We consider the jurisdictional question raised in this case to be an important one for the administration of § 404(b). Route adjustments and consolidations are undertaken by the Service with some frequency. It is clear (Answering Brief, pp. 10-12) that postal management regards the prospect of potential review proceedings in each such instance as a hindrance to managerial improvements in operational assignments, and as unauthorized by the Act. Petitioner, equally clearly, asserts an interest in the quality of service received by him and other patrons. The situation is analogous to one perceived by the Fifth Circuit in Buchanan v. U.S. Postal Service, 508 F.2d 259, 262 (5th Cir., 1975):

Two of the basic policies underlying the Postal Reorganization Act pull in different directions. The Postal Service emphasizes the goal of vesting in management the freedom to

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make decisions without external constraints. The plaintiffs counter with the goal of providing to the American people a public service which is sensitive and responsive to their needs.

Our task, of course, is not to resolve this conflict in conformity with our own ideas but to determine how Congress resolved it in enacting § 404(b).

The "plain meaning" of § 404(b). At first glance, the question might appear easily resolved on the basis of § 404(b)'s language alone. A hearing, and the opportunity to seek review, are provided when the Service contemplates "the closing or consolidation of any post office." Petitioner's factual allegations disclose that rural routes are being consolidated. The Service denies^{1/} that the Gresham post office (or any other post office) is to be either closed or consolidated. Petitioner does not directly controvert this assertion.^{2/} The question thus arises whether § 404(b) uses the term "post office" in its ordinary sense --i.e., a fixed retail facility serving the public and acting as the point of origin for delivery routes--or whether

^{1/} Motion to Dismiss, pp. 1-2; Braughton Affidavit, p. 2.

^{2/} He does assert (Response to Motion to Dismiss, p.1) that there is, at least, a "consolidation" of some post office functions as between Gresham and Marion, but appears to concede that the Gresham post office will remain open. We will consider this argument at pp. 12 et seq., below.

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a more extended meaning can be given it. Specifically, we must inquire whether there is any characteristic of rural routes which requires us to deem them "post offices" for § 404(b) purposes.

Though petitioner's appeal papers are less clear on the point than might be desired, we think they may be fairly read as raising this question. The Postal Service appears^{1/} also to have read the appeal in this sense.

The only possible basis for such an argument which we can perceive--either in the appeal or through independent examination of the question--is that a rural carrier commonly provides certain services for patrons which, in city-carrier areas, would be available only at the clerk's window. Petitioner cites^{2/} the sale of money orders as an example. Subpart 156.4 of the Postal Service Manual provides for acceptance of mail by rural carriers, who will also return change on a subsequent trip when the appropriate postage cannot be determined at the time of acceptance. (PSM § 156.42.)^{3/} We believe it possible to argue--although, as will appear subsequently,

^{1/} Answering Brief, p. 4, where the Service attributes to petitioner "the argument that a rural route consolidation is the 'consolidation of [a] post office' under 39 U.S.C. § 404(b)." (Footnote omitted.)

^{2/} Appeal, pp. 3-4.

^{3/} Services of this kind offered through rural carriers are described in some detail in Postal Service Handbook M-37, Part 3 (1965).

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we are unable to accept the argument as valid--that these special functions performed by rural carriers make them analogous to window clerks, and their routes, correspondingly, to "post offices" as the term is commonly used. Indeed, it might be contended that the rendering of these "window services" by rural (but not city) carriers represents an official recognition that rural residents may not have easy access to the services offered at a fixed retail postal facility and so should be offered similar services at or near their homes.

The significance of Martin v. Sloan. The decision most clearly relevant to our present inquiry is Martin v. Sloan, 432 F. Supp. 616 (W.D.N.C., 1977). The Postal Service believes Martin is dispositive here; petitioner argues that the case is distinguishable.

The underlying facts were similar to those alleged in this case:

. . . Martin, a resident of Morven, North Carolina, brings suit to enjoin the defendant Postal Service official from consolidating Rural Route 1, emanating from Morven, with Rural Route 5 out of Wadesboro, North Carolina, on the grounds that consolidation might precipitate the closing of the Morven Post Office and that no notice was given nor hearing conducted before the decision to consolidate was disclosed. . . . [1/]

1/ 432 F. Supp. at 616.

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In granting the Service's motion to dismiss, Judge McMillan appears to have searched Title 39 for provisions which might support the action brought by Martin. He found, however, that

. . . nothing in Title 39 appears to require notice or hearing for those affected by rural consolidation nor to empower this court to review a decision to consolidate. [1/]

The court found "three mechanisms for postal patron input"^{2/} in Title 39: the complaint procedures of § 3662; the nationwide service change procedures of § 3661; and § 404(b). He determined that, if any of these mechanisms was available to plaintiff Martin, it was § 3662:

The rural route consolidation challenged in this suit will not affect postal service generally on a nationwide basis, and until the Postal Service proposes to close the Morven Post Office, if the Service ever so proposes, plaintiff and the other Morven postal patrons are not entitled to a hearing. [3/]

It is therefore clear that the court considered § 404(b) and found it inapplicable to the consolidation of rural routes, as distinguished from post offices.

In his "Reply to Postal Service's Answering Brief," pp. 1-2, petitioner advances two counterarguments:

^{1/} 432 F. Supp. at 617.

^{2/} Id.

^{3/} 432 F. Supp. at 616 (emphasis added).

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1. Martin was concerned with limitations on the District Court's review powers, and cannot be read as limiting the Commission's authority; and
2. Martin did not involve an allegation that the Service had violated § 101(b) by discriminating against a rural community, whereas this appeal specifically so charges.

We have considered both counterarguments, but cannot accept either of them.

As we read Martin, the plaintiff was requesting an injunction against the consolidating of the routes without a hearing. The court's discussion of the various "patron input" mechanisms, cited above, makes it clear that the requirement vel non of a Postal Service hearing was a central issue. Judge McMillan concluded that he was powerless to order a hearing (i.e., to enjoin the consolidation until a hearing was provided) not because of a limitation placed on his jurisdiction qua District Court, but because he found that the statutes governing the Service's behavior did not require a hearing in the factual setting presented.^{1/}

^{1/} If the District Judge had found that his inability to require a § 404(b) hearing resulted from a peculiarity of his own jurisdictional reach, he would presumably have considered whether this Commission could afford the relief. Instead, the court simply declared § 404(b) inapplicable.

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This being so, it seems to us to make no difference whether the question is raised before us or before a United States District Court under § 409(a).^{1/} We think that when the District Judge said that he could not compel the Postal Service to provide a hearing for the Morven postal patrons he was reflecting a limitation inherent in § 404(b). That limitation would apply to us as well as to the court.

Petitioner's second argument--that Martin did not involve an issue of discrimination against rural residents--may well be correct in fact, but does not appear to us to overcome the central finding of that case. It is true that § 404(b)(2)(C) does make the policy of § 101(b) in favor of maximum service to rural patrons an explicit criterion for § 404(b) cases. As such, it necessarily governs the exercise of our review jurisdiction, but does not add to it. Like the other standards of § 404(b)(2), it controls the Service "in making a determination whether or not to close or consolidate a post office." Where a postal functional unit other than a "post office" is being consolidated, the fact that the Postal Service's action may also violate § 101(b) does not create jurisdiction--or the requirement of a hearing--under § 404(b).

^{1/} We do think it likely, as well as appropriate, that a District Court faced with an actual post office closing case would remit the plaintiff to the administrative mechanism provided for review of such actions. See Buchanan v. U.S. Postal Service, 375 F. Supp. 1014 (N.D. Ala., 1974), affirmed in part and vacated in part, 508 F.2d 259 (5th Cir., 1975).

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We are, accordingly, of the view that Martin v. Sloan supports the Postal Service's contention that this case is not within the purview of § 404(b).

The "partial consolidation" question. If petitioner were arguing only that a rural route is (for § 404(b) purposes) to be treated as a post office, we think Martin v. Sloan would be dispositive. However, petitioner asks us, alternatively, to examine the matter in another light: as a consolidation, though not a complete consolidation, of the Gresham and Marion Post Offices. In his Response to the motion to dismiss, petitioner argues (p. 1):

. . . functions normally carried out at the post office in Gresham, South Carolina under the consolidation may, and in all probability, will be carried out by the post office in Marion, South Carolina and, in effect, the action is a consolidation of post office functions rather than a merging of mail routes.

2. That a consolidation, even though it be a partial consolidation, comes under the provisions of the statute requiring a hearing and an opportunity of [sic] patrons to present their views, 39 USC 404(b).

This theory of the case avoids the definitional problem discussed above, in that it speaks in terms of establishments which no one denies are "post offices" within the meaning of § 404(b). The Postal Service argues in response that the

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transfer of part of a route from one office to another is not a "consolidation" of those offices.^{1/} This contention is supported by the affidavit^{2/} of Assistant Postmaster General Braughton, who states that:

There is no contemplated action at this time on post office closing or consolidation in the Gresham community.

We accept this representation by Mr. Braughton as conveying the intentions of the Service; but as petitioner raises the issue whether the route consolidation itself amounts to a jurisdictional consolidation (though only partial) of post offices, our inquiry is not thereby ended. We must, in other words, determine whether--granting, as we do, Mr. Braughton's bona fides--he and the Service may be defining "consolidation" too narrowly.

Petitioner's argument therefore raises two issues:

1. Does the shifting of a route, as undertaken here, amount to a partial "consolidation" of post offices, as Congress used the term "consolidation" in § 404(b)?
2. If it does, is a partial consolidation subject to § 404(b)--or must one office be completely merged into another before that provision comes into play?

^{1/} Answering Brief, pp. 5-6, 8 et seq.

^{2/} Attached to the Service's Motion to Dismiss, dated May 12, 1978.

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For reasons discussed below, we answer the first question in the negative, and accordingly do not reach the second.

What activities constitute "consolidations?" We start from the premise that § 404(b) is intended to protect residents of a community from the discontinuance, without a hearing, of retail postal facilities and services they have enjoyed in the past. While we must not construe this protection in a narrowly restrictive way, we do observe that courts dealing with § 404(b) have commented on the policy of the Act favoring management discretion to improve postal efficiency. Martin v. Sloan, 432 F. Supp. at 617; Wilson v. United States Postal Service, 441 F. Supp. 803, 805, 806 (C.D. Calif., 1977); cf. Buchanan v. United States Postal Service, 508 F.2d 259, 262 (5th Cir., 1975). Accordingly, we cannot regard it as part of our duty under § 404(b) to freeze patterns of postal operation whenever changes therein involve more than one post office. Our inquiry must be directed at determining whether an interest protected by § 404(b) is at stake.

In this case, it appears that the Gresham retail facility will remain open and will continue to render the same types of service it has provided in the past. Petitioner does not appear to allege the contrary, though he asserts

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that some former Gresham patrons will receive delivery later in the day, and be otherwise inconvenienced.^{1/} To the extent that § 404(b) is intended to safeguard the recognized value to the community of a local post office--which often acts as a de facto representative of the United States for other than purely postal services, as well as serving as a focus of community life^{2/}--its policies are not contravened by this route transfer. Gresham will continue to enjoy these advantages of a local post office after the change of routes.

^{1/} The Service responds that such changes in delivery times are inseparable from the correction of a substandard route (which it states existed in Gresham before the change). Answering Brief, pp. 11-12; see also Braughton Affidavit, p. 1.

^{2/} These interests were frequently invoked during the passage of Pub. L. 94-421, which added § 404(b) to the Act. See, e.g., at 122 Cong. Rec. S 14268 (August 23, 1976), the statement of Senator Randolph [sponsor of the amendment which became § 404(b)]:

. . . I look on those offices . . . as representative of the Federal Government from the standpoint of actual day-by-day service, not just for the patrons of the offices, but also for the people of those communities who are helped by the postmaster.

These postmasters--men and women--are, in a sense, counselors to so many people. They help in many ways with the filling out of forms and reports, and they represent what I believe is the human side of the Government

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This policy consideration is of assistance in determining whether a construction of the term "consolidation" that excludes the action proposed here is still broad enough to accomplish the purposes of § 404(b). So far as the preservation of nonpostal community values is concerned, we find that it is. We must continue the inquiry, however, since § 404(b) is at least equally aimed at preserving good postal service in the affected community. Therefore we must ask whether the purely postal policies served by § 404(b) require that a consolidation of routes be considered a jurisdictional event. We find that they do not.

In this inquiry we are assisted by Wilson v. U.S. Postal Service, supra--though that case is not entirely dispositive. In Wilson, the mail processing operations of 26 local post offices were centralized in the Marina Sectional Facility. The plaintiffs in an action to block the transfer argued, inter alia, that it amounted to a consolidation under § 404(b). The court disagreed. In Judge Gray's view, § 404(b)'s applicability depended on two things: the effect of the Service's action on mail service offered directly to the public, and its effect on the community interests served by maintaining a local post office in being. In Wilson, he found that neither effect would exist to any significant degree.

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The question of community interests has been discussed above, and on this score we regard Wilson as virtually on all fours with this case. The question of service to the public is less clear. Admittedly, a rearrangement of delivery routes has more of the appearance of an action affecting the public directly than did the relocation of mail processing in Wilson. The distinction does not, however, mean that the present transfer must be deemed a consolidation.

In determining this question we must bear in mind the now well-settled principle that the Postal Reorganization Act was intended to give postal management broad freedom to make internal administrative choices. See, e.g., Buchanan v. U.S. Postal Service, 508 F.2d 259, 262 (5th Cir., 1975). Section 404(b) carves out an exception to this administrative discretion but does not invalidate the general rule. Accordingly, we do not decide the present issue against a neutral background. If we extend the jurisdictional limits of § 404(b) too far we do not merely create an inconvenience for postal management but rather violate a basic policy of the Act.^{1/}

^{1/} See S. Rep. No. 91-912, pp. 2-3:

The committee's inquiries and every responsible study show that the Postmaster General is blocked or undercut at every turn by a labyrinth of postal statutes echoing every postal concern, interest, or whim expressed by Congress over a 200-year period.
[Footnote cont'd.]

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That Congress intended the administrative discretion of postal management to extend to the consolidation of rural routes seems clear. The District Court in Martin pointed out that former 39 U.S.C. § 3339,^{1/} sharply restricting the old

[Footnote cont'd.] Laws have changed laws and have added to the body of them so that, by accretion, they have multiplied, decade by decade, leaving the Postmaster General bound in his own house. Twist and turn as he may, he cannot function in the public interest as a responsible manager.

* * * * *

Former Postmaster General Lawrence F. O'Brien. . . called for postal reform that would release the [Post Office] Department's chief and let him work in the public interest. His problems, as a responsible Postmaster General, are summed up in his notable 1967 colloquy with the chairman of the House Post Office Appropriations Subcommittee:

Mr. STEED. General. . . would this be a fair summary: that at the present time, as the manager of the Post Office Department, you have no control over your workload, you have no control over the pay rates of the employees that you employ, you have very little control of the conditions of the service of these employees, you have virtually no control, by the nature of it, of your physical facilities, and you have only a limited control, at best, over the transportation facilities that you are compelled to use--all of which adds up to a staggering amount of "no control" in terms of the duties you have to perform.

Mr. O'BRIEN. Mr. Chairman, I would have to generally agree with your premise. . . that is a staggering list of "no control". . . .

1/ Section 3339 read:

The Postmaster General may not consolidate rural routes except on account of a carrier's - (1) resignation, (2) death, (3) retirement, or (4) dismissal on charges.

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Post Office Department's ability to consolidate such routes, had been reduced by the Postal Reorganization Act to the status of a Postal Service rule that the Service could rescind by agency action. Pub. L. 91-375, § 5(f) (84 Stat. 775). The Service has done so. This, of course, amounts in practice to a repeal of § 3339. The lifting of this sweeping prohibition makes it quite plain that--in 1970, at least--Congress intended managerial discretion to encompass the consolidation of rural routes. Nor can we say that Congress reconsidered six years later, when it enacted § 404(b). The legislative history is devoid of any indication that Congress wished to return, even in part, to the policy of former § 3339.^{1/} We are led to conclude that the policy of management discretion applies in full force to rural route changes of the kind before us.

The Postal Service (Answering Brief, pp. 9-10) points out the anomalous consequence of holding that a consolidation of routes is reviewable under § 404(b): where two routes emanating from the same office were being consolidated,

1/ Indeed, the Conference Report on H.R. 8603 (H.R. Rep. 94-1444, August 31, 1976, p. 18) stated: ". . . the managers intend that this provision apply to post offices only and not to other postal facilities." While it might be argued that a route is not a "facility," the conferees' language does show that Congress considered the scope of § 404(b) with some care, and the absence of any indication that rural routes were to be included thereby becomes highly persuasive.

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§ 404(b) would not apply, even under petitioner's construction. Only where the consolidated routes originated in different offices would jurisdiction exist. We think the point is well taken, in that it indicates a Congressional intent that changes in the time of delivery and similar effects of route adjustment^{1/} were not among the matters for which a remedy was being provided by § 404(b). To make the remedy depend on whether the affected routes had or had not a common origin strikes us as an irrational and arbitrary distinction. In conjunction with the other factors discussed above, it indicates that in fact no remedy by way of hearing and Commission review was intended.

To summarize: we find that the consolidation of two rural routes, in the circumstances here presented, is not a partial consolidation of post offices within the meaning of § 404(b). This finding makes it unnecessary for us to dispose of the further question whether a partial consolidation is a jurisdictional event under that section.

^{1/} Since we are dealing with a motion to dismiss, we take petitioner's allegation that such effects will occur as established.

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The effect of our determination, therefore, is to require the dismissal of the appeal. Because--as noted above, pp. 4 -5--we do not regard the papers in this case as adequately presenting a § 3662 complaint, we express no views as to the availability of that procedure on the present facts.

The lack of a Postal Service "determination." Before leaving the jurisdictional question, we must deal with an argument made on brief by the Service and not yet addressed. At pp. 6-8 of its Answering Brief, the Service argues that because it made no written determination, pursuant to § 404(b)(2), (3), "the petitioner has not brought anything to this Commission for it to review" (Answering Brief, p. 8), and that the case should be dismissed on that ground.^{1/}

We reject this argument. It amounts to a contention that should the Postal Service refuse, even wrongly and arbitrarily, to conduct a hearing and prepare a written determination, the Commission would be without authority to provide relief. The protections Congress afforded to postal patrons by § 404(b) should not, in our opinion, be subject

^{1/} The Service also argues that we cannot conduct a de novo proceeding, nor issue mandatory orders (other than a remand for further consideration) under § 404(b). True as this may be, it does not affect our authority to remand the matter for hearing, in a proper case. Such remand was requested by the petitioner, as alternative relief. See Appeal, pp. 4-5.

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to such a possibility of evasion. Section 3603 of the Act authorizes and directs the Commission to "take any other action they deem necessary and proper to carry out their functions." We think this provision is ample authority--if authority outside § 404(b) itself be considered necessary--for us to consider the present issues. See, e.g., Jupiter Corp. v. FPC, 424 F.2d 783, 791-792 (D.C. Cir., 1969), certiorari denied, 397 U.S. 937 (1970); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158-159 (D.C. Cir., 1967).

This Commission stands in the position of a reviewing court when a § 404(b) case arises. Indeed, the Commission was substituted for the United States Court of Appeals as the reviewing agency at a late stage in the legislative process. We do not think it can be seriously contended that a reviewing court would abjure the authority to determine whether the agency should have conducted a proceeding and issued an order in a case like the present one. Indeed, § 404(b)(5)(B) specifically instructs us to remand should the Service's action be "without observance of procedure required by law." The Service does not suggest (nor could it, in our

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opinion) that this provision becomes inoperative if the procedures required by § 404(b) are totally ignored.^{1/}

The Commission orders;


(A) The appeal is dismissed for want of jurisdiction over the subject matter under 39 U.S.C. § 404(b).

(B) The application for suspension pending review is denied.

(C) The request of petitioner for oral argument is denied.

By the Commission.

(S E A L)



David F. Harris
Secretary

^{1/} We also question whether the Service's jurisdictional argument is in its own interest as a matter of administrative practicality. If the Commission could not entertain actions like the present one, the District Court assuredly could. Martin makes this clear. It would appear that a statutory review proceeding under § 404(b), with a 120-day time limit, would generally offer a simpler and more expeditious resolution than a suit in the District Court for injunctive relief.

§ 404. Specific powers

(a) * * * *

(b)(1) The Postal Service, prior to making a determination under subsection (a)(3) of this section as to the necessity for the closing or consolidation of any post office, shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to insure that such persons will have an opportunity to present their views.

(2) The Postal Service, in making a determination whether or not to close or consolidate a post office, shall consider--

(A) the effect of such closing or consolidation on the community served by such post office;

(B) the effect of such closing or consolidation on employees of the Postal Service employed at such office;

(C) whether such closing or consolidation is consistent with the policy of the Government, as stated in section 101(b) of this title, that the Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining;

(D) the economic savings to the Postal Service resulting from such closing or consolidation; and

(E) such other factors as the Postal Service determines are necessary.

(3) Any determination of the Postal Service to close or consolidate a post office shall be in writing and shall include the findings of the Postal Service with respect to the considerations required to be made under paragraph (2) of this subsection. Such determination and finding shall be made available to persons served by such post office.

(4) The Postal Service shall take no action to close or consolidate a post office until 60 days after its written determination is made available to persons served by such post office.

(5) A 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 Rate 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 shall not apply to any review carried out by the Commission under this paragraph.

ORDER NO. 436

RECEIVED

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

JUN 25 1 25 PM '82

Before Commissioners: Janet D. Steiger, Chairman;
Henry R. Folsom, Vice-Chairman;
Simeon M. Bright; John W. Crutcher;
James H. Duffy

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Oceana Station, Virginia Beach, Virginia 23453) Docket No. A82-10
(T.J. Hutchings, Jr., et al.,)
Petitioners))

ORDER DISMISSING DOCKET NO. A82-10

(Issued June 25, 1982)

Introduction and Summary. The petitioners in this case filed an appeal opposing the Postal Service's decision to close the Oceana station in Virginia Beach, Virginia. The Postal Service explains that the closing of the Oceana station is part of its plan to improve its network of facilities serving the community in Virginia Beach. As we explain more fully below, the Postal Service is not required to follow the formal section 404(b) procedure when it is merely rearranging its retail facilities in a community, as it is doing in Virginia Beach. We are dismissing this case, owing to the inapplicability of section 404(b).

Petitioners' Arguments. On April 25, 1982, the Commission received a letter from T.J. Hutchings, Jr. opposing the Postal Service's plans to close the Oceana station in Virginia Beach, Virginia. Mr. Hutchings enclosed a copy of the Postal Service's notice stating its decision to close the Oceana station. The Commission established Docket No. A82-10 in response to Mr. Hutchings' appeal letter. Order No. 432. The Commission had

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also received appeal letters from James A. Mulligan and Ann T. Joyce, President of the Oceana Community League. Ms. Joyce enclosed a petition with almost six hundred signatures and a study of the community done by Old Dominion University.¹ The Commission consolidated the appeal letters from Mr. Mulligan and Ms. Joyce in this docket.

In his April 10, 1982, appeal letter, Mr. Hutchings states the Postal Service has decided to close the Oceana station and move the lockboxes to the London Bridge station. Mr. Hutchings says the London Bridge station is in a large and busy shopping center, with parking very far from the door. Also, according to Mr. Hutchings, a number of Oceana residents are elderly and walking to the London Bridge, rather than the Oceana station, would be a hardship. Appeal letter from T.J. Hutchings, Jr., p. 1 (Apr. 10, 1982). Mr. Hutchings asserts that Oceana is one of the oldest post offices in the city and serves many people in the southern section of Virginia Beach. Id. Mr. Hutchings states that the London Bridge station was moved into Oceana as a temporary measure. Mr. Hutchings proposes that the London Bridge station be moved to that section of the city, and he wants the name Oceana retained for a postal station. Id.

In his March 31, 1982, appeal letter, Mr. Mulligan proposes that the Postal Service close the London Bridge station and open a new station to serve the Great Neck area of Virginia Beach

¹ "An Evaluation of Housing Conditions and Population Characteristics of Atlantic Park, Lake Smith and Mill Dam Areas of the City of Virginia Beach," Center for Urban Research and Service, Old Dominion University (Aug. 15, 1980).

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(located north of the Oceana section). Mr. Mulligan says that the Oceana station should be kept open, as it serves many of the patrons who would otherwise have to use the London Bridge station. Appeal letter from James A. Mulligan, p. 1 (Mar. 31, 1982). According to Mr. Mulligan, the London Bridge station is overcrowded and inconvenient. Mr. Mulligan says that heavy traffic makes travelling to the London Bridge station difficult and parking is a problem due to the congestion caused by the shopping center. Id.

In her April 7, 1982, appeal letter, Ms. Joyce, president of the Oceana Community League describes how the Oceana station serves the needs of the community. Appeal letter of Ann T. Joyce (Apr. 7, 1982). According to Ms. Joyce, the Oceana station is convenient for the three largest segments of the community--retired persons, young upwardly mobile families and persons working at the Oceana Naval Air Station. Ms. Joyce asserts that although the London Bridge station is only a quarter of a mile from the Oceana station, the trip would be inconvenient, especially for persons walking, because of heavy traffic. Id. at 1.

Ms. Joyce says the Oceana station is important to the community, which predates most of Virginia Beach. According to Ms. Joyce, the Oceana station is a long-established element of the community. Id. Ms. Joyce states that the community does recognize the need of the Postal Service to be efficient, but believes that the station may very well bring in sufficient revenues to offset its costs. Id. Ms. Joyce's appeal letter

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also included a petition, with almost 600 signatures, asking that the Oceana station be kept open and a report done by Old Dominion University for the Office of Housing and Community Development of the City of Virginia Beach.

Applicability of 39 U.S.C. § 404(b). In the order establishing this docket, the Commission noted that this case contained a threshold question of whether 39 U.S.C. § 404(b), the statutory provision setting out the required procedures for closing or consolidating post offices, was applicable to the Postal Service's plan to close the Oceana station. The Commission requested that the Postal Service file a memorandum of law on this question. Order No. 432, p. 3.

The Postal Service filed its memorandum of law on May 24, 1982.² In that memorandum, the Postal Service asserted that "stations" such as Oceana are not "post offices" for the purpose of section 404(b). Postal Service Memorandum, pp. 18-30. In its Memorandum the Postal Service also described its decisions concerning postal facilities in Virginia Beach. The Postal Service says that the decision to close the Oceana station must be considered in light of its planned network of postal facilities in Virginia Beach. According to the Postal Service, it is enhancing its network by opening a new Virginia Beach main post office 4 miles west of the Oceana station. That new post office will permit the Postal Service to move the carriers out of

² USPS Memorandum of Law and Motion for Immediate Dismissal of Appeal and Termination of Proceeding, (May 24, 1982) (hereinafter cited as Postal Service Memorandum).

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the London Bridge station, making more room for post office boxes and additional retail counter space. Also, the Postal Service is improving the service offered in the Seapines and Atlantic stations. The Postal Service has added a Detached Lockbox Unit and self-service facility in the Lynnhaven area, to the west of Oceana, but plans to close the present Lynnhaven station. The Postal Service is also attempting to establish an additional contract station in the Great Neck area. Id. at 34-36.

The Postal Service also described the factors underlying its decision to close the Oceana station. According to the Postal Service, the Oceana station is an old cinderblock building of 1,115 square feet with no room for expansion; there is a limited amount of unpaved off-street parking. The Postal Service found that the London Bridge station had 4,000 square feet, much of which can be devoted to retail service after the carriers are moved to the new main post office; there is ample paved parking. Having analyzed the operation at the Oceana station, the Postal Service concluded that the London Bridge station could provide the service at little or no additional cost.³ The Postal Service concluded that maintaining these two stations was duplication of services. Id. at 36.

The Postal Service notes that Oceana is one of the many residential areas of Virginia. Various small communities in the county have also been blended into the city of Virginia Beach.

³ The Postal Service notes that Oceana residents will have to change their ZIP code, but says that change can be accomplished in the course of ordinary correspondence. Postal Service Memorandum, p. 37.

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The Postal Service points out that the Oceana name will be continued in a number of landmarks in the area, including the Oceana Naval Air Station. Id. at 37-38.

Commission Analysis. The relevant statute provides that the Postal Service must follow a specific procedure "prior to making a determination to close or consolidate any post office." 39 U.S.C. § 404(b)(1). The threshold question, whether the Postal Service's action with regard to the Oceana station constitutes a closing or a consolidation of a post office, must be answered before the Commission could proceed to the merits of this case. We find that the Postal Service's actions complained of do not constitute a closing or a consolidation of a post office, but rather, when viewed in light of the Postal Service's decisions regarding the area, are a relocation of facilities within the community.

The requirements of section 404(b) do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community. We do not believe that section 404(b) was intended to govern the Postal Service's decisionmaking on improving or relocating facilities within the community. One of the reasons for the reorganization of the Post Office Department in 1970 was to promote the efficient progress of needed capital improvements. Additionally, in 1976 when Congress was considering changes to the Postal Reorganization Act, the goal of upgrading facilities was emphasized. 112 Cong. Rec. S14294-95 (Aug. 23, 1976).

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The Postal Service, as Ms. Joyce points out, has the often conflicting goals of providing service that is both effective and economical. See Wilson v. USPS, 441 F. Supp. 803, 805 (C.D. Cal. 1977). Section 404(b) was enacted to insure that the Postal Service gives appropriate--and formal--consideration to the effects of removing a post office from a community or making what Congress considered a serious change in the management structure of a community's post office. We believe that Congress intended to permit the Postal Service to rely on less formal decision-making, and correspondingly gave the Commission no jurisdiction to hear appeals of such decisions, when considering where retail facilities are to be located within the community. Cf. Missouri P. Rr. v. State Corporation Commission, 205 Kan. 610, 470 P.2d 767 (1970). Because of the implicit tension between the goals of economical operation and comprehensive community service, we must avoid undue literalism in construing section 404(b). A rule of reason, rather than an approach which either ignores the relevant facts of the case or adheres to an extreme or mechanical interpretation of the word "close", is needed.

The Postal Service's decision to close the Oceana station must be considered within the context of the Postal Service's other actions in the area. The Postal Service's decision constitutes a moving of facilities within the community rather than an elimination of facilities or a change in management

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within the scope of the statutory provisions. If the Postal Service had decided to close the Oceana station and build a new facility across the street, the action would not be a closing within the meaning of the statute. That principle may be equally apposite--as we think it is here--when the Postal Service is considering the set of offices serving a community. Considering the description of the Postal Service's decision presented in its memorandum, we conclude that the Postal Service is merely rearranging the retail facilities in the community. Therefore, the Postal Service is not required to follow the formal section 404(b) procedure. We note (though the fact is not dispositive on the point of legal interpretation) that the Postal Service says its decision was made "after extensive consideration of the service needs of the community, the potential for economy in operations, and the convenience of Oceana customers." Postal Service Memorandum, p. 38.

We believe that the section 404(b) requirements for consolidations are not applicable to the decision regarding the Oceana station. The consolidation that the statute speaks of is consolidation of management, not facilities. "Consolidation" would be redundant in the statute if it referred to the facility, as another facility must always take over the work of a post office that is closed. In including consolidations in section 404(b), Congress was expressing its concern that replacing postmasters with officers-in-charge who are subordinate to

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postmasters in larger communities would vitiate the community orientation of postal facilities.⁴

Motion to suspend. On June 15, 1982, Mr. Hutchings filed a motion to suspend the Postal Service's decision to close the Oceana station. On June 24, 1982, the Postal Service filed a response opposing Mr. Hutchings' motion. We are dismissing this appeal; therefore we will deny Mr. Hutchings' motion.


The Commission Orders:

A. Docket No. A82-10 is dismissed because the subject matter is not cognizable under 39 U.S.C. § 404(b).

B. Mr. Hutchings' motion to suspend is denied.

By the Commission.

(S E A L)


David F. Harris
Secretary

⁴ Now the Postal Service has embarked on a new project. It has far reaching implications for rural America. Congress does not want indiscriminate closing of our rural and small town post offices. The decision has also been made to create branches out of many post offices close to large cities. This would transfer a community oriented post office into one administered through the institutions and directives of large city postmasters with little or no community involvement. This plan will erode the identity so important to people who wish to maintain a heritage of mutual interest.

Hearings on S. 2844 before the Senate Comm. on Post Office and Civil Service, Part 4, 94th Cong., 2d Sess. 142 (1976). Cited in, *Wilson v. United States Postal Service*, 441 F. Supp. 803, 806 (C.D. Cal. 1977).

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

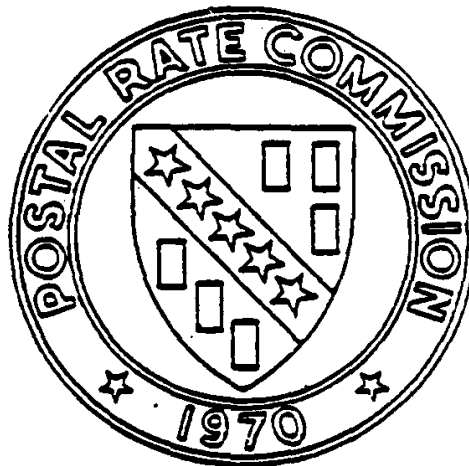
Before

Chairman Steiger,
Vice-Chairman Crutcher,
Commissioners Bright, Duffy and Folsom

In the Matter of:

Knob Fork, West Virginia 26579
(Donald R. Rankin, Petitioner)

:
: Docket No. A83-30



COMMISSION OPINION REMANDING DETERMINATION
FOR FURTHER CONSIDERATION
39 U.S.C. § 404(b)(5)

Washington, D.C. 20268-0001
(January 18, 1984)

Introduction and Summary. This case involves the question of whether the 39 U.S.C. § 404(b) procedure must be followed before the Postal Service decides to close a Community Post Office (CPO) which is the only retail postal facility serving the community. We hold that section 404(b) does apply. We set aside the Postal Service's decision because it was made "without observance of procedure required by law."

Facts and position of parties. On September 30, 1983, the Commission received an appeal letter from Donald R. Rankin of Knob Fork, West Virginia, stating that the Postal Service had decided to discontinue the Knob Fork Community Post Office. Mr. Rankin argues that the decision is invalid because the Postal Service did not follow the procedure established in 39 U.S.C. § 404(b). Mr. Rankin says he has requested the documentation on which the Postal Service based its decision. According to Mr. Rankin, the Knob Fork CPO has grown in the past five years and would expand more if a money order machine is installed. A small store is operated in conjunction with the office, and Mr. Rankin says the employees and patrons would be affected by the closing.

In Order No. 527, establishing this docket, the Commission pointed out the issue of whether 39 U.S.C. § 404(b) is applicable to the Postal Service's actions regarding the Knob Fork CPO. On October 14, 1983, the Postal Service filed a notice and motion to terminate this proceeding.¹ The Postal Service said Mr. Rankin's appeal letter concerns the closing of a community post office and it has made no decision to close or consolidate a "post office" (as it understands that term), in Knob Fork. Postal Service Motion, p. 2. The Postal Service noted that the Conference Report concerning section 404(b) stated that the procedure would apply only to post offices and not to other postal facilities.

¹ USPS Notice Regarding Administrative Record and Motion to Terminate Docket (Postal Service Motion).

Docket No. A83-30

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Id., citing H.R. Rep. No. 94-1444, 94th Cong., 2d. Sess. 17 (1976).

The Postal Service Motion pointed out that in its 1977 rulemaking to establish procedures for applying the section 404(b) amendment, it said that "by long tradition" decisions concerning stations and branches have been made on a less centralized basis and these facilities "tend to be changed more frequently than post offices." Additionally, the Postal Service pointed out that contract facilities can be terminated by notice of the operator. Postal Service Motion, p. 3. The Postal Service contends that no statutory justification exists for this docket and there is no subject matter to be reviewed. Id. at 3-4.

Section 404(b)(1) states:

The Postal Service, prior to making a determination under subsection (a)(3) of this section as to the necessity for the closing or consolidation of any post office, shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such closing or consolidation to persons served by such post office to insure that such persons will have an opportunity to present their views.

Section 404(b) continues by providing the factors the Postal Service must consider, the procedure to be followed, and the patrons' appeal rights.

Applicability of section 404(b). The threshold issue² in this case is whether the Knob Fork community post office is a "post office" as that term is used in section 404(b). If it is, then the Postal Service has not followed the prescribed section 404(b) procedure in the Knob Fork closing; if not, then there is no particular statutorily prescribed procedure.

² In previous cases, the Commission rejected a Postal Service threshold argument that the Commission has no review authority in the absence of a formal "Final Determination" by the Postal Service. PRC Order No. 409, pp. 7-11. In this case, the Postal Service has advanced no new argument requiring reconsideration of that decision.

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The Postal Service gives a technical definition of "post office", as "The basic organizational unit of the USPS. Generally, each Post Office has a specific geographic area for which it has primary responsibility for collection, delivery, and retail operations." Postal Service Glossary of Postal Terms (1981). The Postal Service defines Community Post Offices (CPOs) as "contract units which provide service in small communities. A CPO bears its community's name as part of a recognized mailing address." Postal Operations Manual § 211.126.

The statutory language, in section 404(b), however, can be said to include a latent ambiguity: Is "post office" used in its technical or in its common sense? The common meaning of post office is a fixed, staffed retail facility where postal services may be obtained. The American Heritage Dictionary (1976 edition) defines "post office" as: "Any local office where mail is received, sorted, and delivered, and stamps and other postal matter are sold."³

In ordinary usage, "post office" is a retail facility where patrons may purchase postal services, and dispatch and possibly receive mail. The technical or specialized usage of "post office" adds to the ordinary definition the requirement of a specific degree of managerial independence. That is, the technical meaning of post office is a retail postal facility with a managerial structure including a postmaster position. Postmasters have authority concerning operational decisions in the area served by their post offices.⁴

As an aid in determining whether Congress intended the common or the specialized meaning, the Commission will look

³ This is the second definition. The first refers to the entire establishment responsible for mail services -- clearly not a relevant meaning here.

⁴ See e.g., Postal Operations Manual §§ 144.2, 631.2 and 636.2; Domestic Mail Manual §§ 113.611 and 113.71; Buchanan v. USPS, 508 F.2d 259, 265 (5th Cir. 1975).

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to the purpose of the section 404(b) amendment. The court in Buchanan v. USPS gave a succinct explanation of the accommodation possible between the two policies underlying Postal Reorganization: those calling for promotion of both the freedom to manage and responsiveness to the public.

Although these policies conflict to some extent, we think a balance may be struck whereby management is given the freedom to manage without unnecessary limitations and the public is given an opportunity to present their views on decisions of the Postal Service which affect them.

Buchanan v. USPS, 508 F.2d 259, 262 (5th Cir. 1975).

In the Postal Reorganization Act of 1970, Congress emphasized its concern regarding postal facilities in less-populated areas. "The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit." 39 U.S.C. § 101(b).

Congress, not satisfied with the Postal Service's implementation of this directive, in 1976 added section 404(b) to limit the previous grant of authority and provide a procedure for its exercise. In explaining this amendment, Senator Randolph described the intent as establishing a "very simple mechanism"⁵ to insure the opportunity for patrons to participate in the decisionmaking to close or consolidate the community's post office. 122 Cong. Rec. 14268. The importance of the role post offices can play in the life of a community was emphasized during the debates on the 1976 amendments. 122 Cong. Rec. 14268, 14283-84, 14292, 14304, 14417, 14428, 14446 and 14456.

The Postal Service accurately points out that the Conference Report states that the provision is to "apply to post offices only and not to other postal facilities." Postal Service Motion, p. 1. This statement, however, provides no insight to whether

⁵ 122 Cong. Rec. 14277 (Aug. 23, 1976).

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"post office" is to mean community post offices as well as independent post offices. It is reasonable to assume that the words "other facilities" refer to units other than retail facilities, such as mail processing centers or vehicle maintenance facilities. The reasonableness of this assumption is underscored by the attempts of interested parties to require the Postal Service to follow section 404(b) procedures before mail processing functions⁶ or rural routes⁷ could be consolidated.

The legislative history does not provide a definitive answer on the meaning of the term "post office." However, the legislative history does describe the situation section 404(b) seeks to change: the Postal Service's closing or consolidation of small communities' only retail postal facility without first requesting the views of the affected patrons. See 122 Cong. Rec. 14284 and 14424. Not only were the post offices which were discussed the sole retail postal facility in the community; often they were also the only federal presence there. Id. at 14456. Senator Randolph explained that the problem concerned the smaller offices in the rural areas. Id. at 14286. It is not reasonable, given these concerns, to believe that the availability of the comment procedure should turn on whether the only postal facility in the community is operated by a postal employee or a private contractor.

Another indication that Congress assumed the conventional meaning of "post office" (that is, a staffed retail facility) is Senator Fong's statement on the ramifications of section 404(b). He argued, in opposing the amendment, "If the Postmaster [General] should decide that he will close a station, he can be taken to court." 122 Cong. Rec. 14278 (August 23, 1976). No one

⁶Knapp v. USPS, 449 F. Supp. 158 (E.D. Mich. 1978); Wilson v. USPS, 441 F. Supp. 803 (C.D. Cal. 1977).

⁷ Martin v. Sloan, 432 F. Supp. 616 (W.D. N.C. 1977); PRC Order No. 208.

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disputed this interpretation.

In proceedings concerning conversions of independent post offices into CPOs, the Postal Service has emphasized that, in the public's perception, the two types of facilities function in exactly the same manner. The difference is in the employment status of the person operating the facility. "A CPO [community post office] offers the same services as a small post office, but is operated by a bonded contractor . . . not by a career postal employee . . . The CPO contractor is trained by Postal Service personnel to insure that postal procedures, policies, and service standards are followed." Postal Service Motion for Expedited Affirmance of the Final Determination to Consolidate the Ruby Valley, Nevada, Post Office, pp. 12-13, Docket No. A83-2 (Dec. 8, 1982).

The Postal Service has emphasized, in explaining to patrons about the effects of converting their independent post office into a CPO, that the same service will be provided. "The principal difference in service as a result of the change will be the employment status of the operator of the office. . . . Service will be equal to the service now provided by the Sessums Post Office."⁸ "The same high standards of customer service and courtesy would be expected of a successful bidder for the contract station. . . . The Postal Service would demand the same standards of service from this contractor as is expected of postal employees." Postal Service Final Determination, p. 3, Tomnolen, Mississippi, Docket No. A82-16.

What section 404(b) addresses is the closing, or a particular change in the management structure, of a post office serving a community. The court in Knapp v. USPS⁹ emphasized the importance of retail facilities to the community. "Given the

⁸ Postal Service Final Determination, p. 1, Sessums, Mississippi, Docket No. A82-9.

⁹ 449 F. Supp. 158 (E.D. Mich. 1978).

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prospect of adverse impact on the populace of the postal community of such a closing or consolidation, it makes perfect sense to accord affected postal customers the right to notice and a hearing prior to consolidation as § 404(b) requires." 449 F. Supp. at 162.

If we accept the Postal Service's consistent position that a community post office serves the public in much the same way as an independent post office, the more reasonable reading of section 404(b) is that it is to apply whenever the Postal Service proposes to close or consolidate a community's retail postal facility. The public generally describes these facilities as "post offices." Congress was concerned about the effects on the community resulting from the Postal Service's decisions on retail facilities.¹⁰

It may be helpful to point out that our decision in this case is entirely consistent with our holding in Docket No. A82-10, Oceana Station, that section 404(b) did not apply to the Postal Service's decision to eliminate the Oceana Station facility. That case involved a relocation of facilities within a community, rather than the closing of the only retail facility serving a community. PRC Order No. 436. Thus it did not present the situation we face here.

Interpreting "post office" in the conventional sense comports well with the two broad, and sometimes conflicting, policies of the Postal Reorganization Act, as amended -- freedom to manage and responsiveness to the public. Section 404(b) simply gives a procedure and guidelines for the Postal Service to

¹⁰ Section 404(b) explicitly applies to consolidating the management of a post office. As the effects of consolidating the management of an independent post office could be expected to be significantly less than those of eliminating a CPO, interpreting "post office" in its usual sense is more reasonable and more likely to achieve the result intended: that is, to permit meaningful public participation in decisions concerning the community's retail postal facility.

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follow in exercising its authority over the nation's system of post offices; it does not place rigid constraints on the Postal Service's management of its system of retail facilities. Section 404(b) does not follow the more intrusive route of an absolute prohibition or numerical limit for closings and consolidations.¹¹ The Postal Service's reliance on a distinction that is more closely related to the Postal Service's internal management structure than the public perception of the services provided by the community post offices does not comport with the policy of responsiveness to public concerns. It follows that interpreting "post office" in its non-technical sense promotes one main policy of the statute (responsiveness) without doing violence to the other (managerial freedom).

We have carefully considered the ramifications of refusing to accept the Postal Service's limitation on the applicability of section 404(b). We believe the intent of the amendment extends to facilities such as the CPO in Knob Fork, West Virginia. An important intent, but not the only one, of Congress was to apply § 404(b) to the closing of the sole postal retail facility serving a community. That is implicit in the definition of a CPO. See p. 3, supra. Of course, if a community no longer exists, the facility may be closed. We find no such determination in this case. We do not anticipate that requiring the section 404(b) procedures before closing CPOs will unduly hamper the operations of the Postal Service. The intent of the amendment was to establish a "very simple mechanism" for decisionmaking on the closing or consolidation of post offices. 122 Cong. Rec. 14277.

The Postal Service's argument that section 404(b) is not applicable because, traditionally, stations, branches and contract facilities tend to be changed more frequently than independent post offices is not persuasive. The Postal Service's additional observation that contractors may terminate the facilities on notice

¹¹ Compare Pub. L. 94-421 §§ 2(2), (3) and (4).

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does not make the argument convincing. See Postal Service Motion, p. 3. The Postal Reorganization Act was passed to improve the traditional operating practices of the Post Office Department. The 1976 amendments were "fine tuning" on the Act. Accepting Congressional dissatisfaction with previous functioning, we cannot accept as persuasive an argument based merely on tradition. Rather, we must look at the rationale underlying those traditions to determine whether they remain applicable to current practice.

That stations, branches and contract facilities tend to be "changed" more frequently does not address the applicability of section 404(b). The statute is concerned with only two types of changes: a closing which eliminates a community's post office or a particular consolidation of management of an office. The Postal Service may make a myriad of changes in postal facilities that do not come under section 404(b). The Commission has previously addressed some of the changes that do not come within section 404(b). Postal Rate Commission Order No. 436, p. 6:

The requirements of section 404(b) do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community. We do not believe that section 404(b) was intended to govern the Postal Service's decisionmaking on improving or relocating facilities within the community. One of the reasons for the reorganization of the Post Office Department in 1970 was to promote the efficient progress of needed capital improvements. Additionally, in 1976 when Congress was considering changes to the Postal Reorganization Act, the goal of upgrading facilities was emphasized. 112 Cong. Rec. S14294-95 (Aug. 23, 1976).

That the operators of community post offices may cancel the contracts on notice does not show that Congress intended to exclude communities with only contractor-operated facilities from the procedural protections of section 404(b). The changing of contractors would not be an event requiring the section 404(b) procedure. Additionally, since the Postal Service must continue to provide service to every community in the nation [39 U.S.C. § 101(a)] and there are provisions to deal with unanticipated

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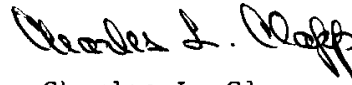
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inability of post offices to remain functioning (DMM § 113.3), it does not appear that the contractor's ability to cancel has any bearing on the proper interpretation of section 404(b).

Likewise, the Postal Service's emphasis on the decentralized decisionmaking on the provision of retail facilities other than independent post offices does not address the question at issue. Section 404(b) does not place the responsibility for carrying out the requirements at any particular management level within the Postal Service.

Accordingly, the Postal Service's determination to close the community post office at Knob Fork, West Virginia, is set aside as having been made without observance of the procedure required by law.

By the Commission.



Charles L. Clapp
Secretary

ORDER NO. 696

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Before Commissioners: Janet D. Steiger, Chairman;
Henry R. Folsom, Vice-Chairman;
John W. Crutcher; Bonnie Guiton;
Patti Birge Tyson

In the Matter of:

Wellfleet, Massachusetts 02667 : Docket No. A86-13
(Gerald Houk et al., Petitioners) :

ORDER DISMISSING DOCKET NO. A86-13

(Issued June 10, 1986)

On February 18, 1986, the Commission received an appeal letter from Gerald Houk, Chairman of the Town of Wellfleet Board of Selectmen. Mr. Houk asserted that the Postal Service had acted in violation of its regulations under 39 U.S.C. § 404(b). Mr. Houk said that the Postal Service had made a decision to move the Wellfleet post office into South Wellfleet. Wellfleet and South Wellfleet are villages within the Town of Wellfleet, Massachusetts. Mr. Houk argued that the Postal Service was required to follow the section 404(b) procedures, including public notice and comment.

The Commission issued Order No. 670 which established Docket No. A86-13 to consider the matter and drew the Postal Service's attention to the issue of whether section 404(b) applies. On March 17, 1986, the Commission received a Participant Statement. A number of newspaper articles were also sent to the Commission. The Postal Service filed motions on March 4 and April 7. In response to a Commission request, on May 8, the Postal Service filed a Memorandum of Law addressing the question of whether its plan is consistent with the statute (Postal Service Memorandum).

The questions the Commission asked the Postal Service to address are: (1) is the village of Wellfleet (located within the Town of Wellfleet) a community for the purposes of section 404(b), (2) is the planned site for the Wellfleet post office located outside the boundaries of Wellfleet, and (3) is the Postal Service's proposed

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action consistent with its regulations (particularly DMM § 113.12) and previous positions presented in these appeals? PRC Order No. 686, p. 4.

According to the Postal Service there are no defined boundaries dividing the villages of Wellfleet and South Wellfleet. Postal Service Memorandum, p. 3. To support its position, the Postal Service filed a map drawn by a land surveying company located in Wellfleet (Library Reference USPS-LR-1). Examination of the map reveals no defined border between Wellfleet and South Wellfleet. By contrast, the map shows the borders for the National Seashore Park and the neighboring communities of Eastham and Truro.

If our record shows that the Postal Service is only relocating a post office within a community, section 404(b) does not apply and we must dismiss the appeal, since we have no jurisdiction. Section 404(b) sets up a formal public decisionmaking process for only two types of actions concerning post offices -- closing or consolidation.¹ The meaning of "closing a post office" as used in the statute is the elimination of a post office from a community. The Postal Service has the authority to relocate a post office within a community without following the formal section 404(b) proceedings. PRC Order No. 436, p. 7.

Having considered the arguments in this case and examined the maps submitted, we cannot find that the Postal Service is planning to eliminate a post office from the community. The Petitioner asserts that the new post office location is across the line (Cove Road) which divides Wellfleet from South Wellfleet. Petition, p. 2. The Postal Service argues that no defined border exists between these villages. Postal Service Memorandum, p. 3. From the information supplied, we cannot find that the Postal Service is moving the post office outside the Wellfleet community, although the Postal Service and Petitioners agree the post office is to be moved from the center of the village. The record indicates that there are two villages, roughly 2-3 miles apart, with no exact border between the two. Cove Road, which the

¹ Consolidation is a change in the management structure of a post office which includes the elimination of the postmaster position. There has been no assertion in this case that the Postal Service's plan constitutes a consolidation.

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Petition says is a border could not make a complete dividing line between the two villages. It extends neither to the nearby, defined boundary for the National Seashore Park nor to the bay.

In this set of circumstances, it does not appear that the Postal Service is removing the post office from the community, particularly since the new location is just across what might be thought of as, perhaps, an informal border. When dealing with the changes that take place within communities, particularly villages which have existed as long as Wellfleet and South Wellfleet, it is difficult to determine exactly where one ends and another begins in the absence of formal, established boundary lines. As we dispose of the case on these grounds, we do not have to address the distinct legal issue of whether the Town of Wellfleet or the village of Wellfleet, is the community for purposes of section 404(b). Hence we should not be understood as ruling that a Town -- in states using that form of local government -- is the community even when there are distinct villages within it.

The Petitioner expresses concern that the move may be the first step in a plan to close or consolidate the South Wellfleet post office. The Postal Service notes the importance of the South Wellfleet office and states that it intends to operate it, as well as the Wellfleet office, as an independent post office. Postal Service Memorandum, pp. 7 and 9. If the Postal Service should desire to close (rather than relocate) or consolidate either the Wellfleet or the South Wellfleet post office, it would first have to follow a formal section 404(b) procedure of information gathering, public notice, opportunity for comment and consideration of the statutory factors. The residents would be given a formal opportunity to present their views and they would possess the right to have any final Postal Service decision reviewed.

The Commission Orders:

Docket No. A86-13 is dismissed because the subject matter does not fall within the requirements of 39 U.S.C. § 404(b).

By the Commission.


Cyril J. Pittack
Acting Secretary

ORDER NO. 891

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Before Commissioners: George W. Haley, Chairman;
Henry R. Folsom, Vice-Chairman;
John W. Crutcher; W. H. "Trey"
LeBlanc, III; Patti Birge Tyson

In the Matter of:

San Francisco Main Post Office, California 94101 : A91-4
(Paul A. Lovinger, et al., Petitioners) :

ORDER DISMISSING DOCKET NO. A91-4 FOR LACK OF JURISDICTION
AND DISPOSING OF MOTION

(Issued July 8, 1991)

Petitioners in this case object to the Postal Service's decision to eliminate retail operations at two facilities: the Main Post Office and the Embarcadero Postal Center Box Unit, which are located in San Francisco, California. The Postal Service had moved operations out of the San Francisco Main Post Office following the earthquake in 1989, and used the Embarcadero facility as a substitute. Petitioners contend that the Postal Service's decisions with regard to these two facilities are subject to the requirements in 39 U.S.C. § 404(b), which establishes procedures the Postal Service must follow before it decides to close or consolidate a post office.

In Order No. 884, issued May 30, 1991, the Commission pointed out the jurisdictional issue of whether the Postal Service's actions are subject to the requirements of 39 U.S.C. § 404(b). On June 5, 1991, the Postal Service filed a motion asking that the docket be dismissed for lack of

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jurisdiction.¹ Petitioners filed a Response² on June 24, 1991. Petitioners have filed three other documents³ in which they had the opportunity to address the applicability of section 404(b). On June 27, 1991, Petitioners filed a motion requesting that the planned July 6, 1991, closing of the Embarcadero facility be suspended. The Postal Service filed its reply to that motion on July 3, 1991.

Summary of decision. Having considered the Petitioners' arguments on the applicability of section 404(b) to the Postal Service's actions with regard to these facilities, we find that the situation does not fall within the scope of that statutory provision. As the Postal Service is not required to follow the procedure established in section 404(b), the Commission has no jurisdiction to review the decision on appeal. Because we are deciding this case on the threshold issue of jurisdiction, our decision does not address the merits of Petitioners' arguments. As we are dismissing this docket, we are denying Petitioners' motion to suspend the Postal Service's decision with regard to the Embarcadero facility.

Statutory provisions. Section 404(b) reads as follows:

The Postal Service, prior to making a determination under subsection (a)(3) of this section as to the necessity for the closing or consolidation of any post office, shall provide adequate notice of its intention to close or consolidate such post office at least 60 days prior to the proposed date of such

¹ United States Postal Service Notice Regarding Administrative Record and Motion to Dismiss.

² Response to Respondent's Notice and Motion and Petitioners' Request for Further Information.

³ Petitioners' Motion to Require the United States Postal Service to Submit Additional Factual Material in Response to Commission Order No. 884 (June 10, 1991), Response to Respondent's Notice and Motion and Petitioners' Request for Further Information (June 24, 1991), and Petitioners' Statement and Brief (July 2, 1991).

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closing or consolidation to persons served by such post office to insure that such persons will have an opportunity to present their views.

Section 404(a)(3), which is referenced in section 404(b) reads as follows:

Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others . . . to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed.

Postal Service arguments. The Postal Service maintains that section 404(a)(3), which contains no procedural requirements, applies to the situation rather than section 404(b). The Postal Service explains that box service was moved to the Embarcadero facility after the earthquake, adding that the new box unit is closer to the original main post office building. The Postal Service describes its actions as relocating the operations of facilities, and points out the Commission has previously held that such actions are not subject to section 404(b). The Postal Service says that a "closing" as that word is used in the statute can occur only when no replacement facility is provided to the community. Postal Service Motion to Dismiss.

In its response to the Petitioners' motion to suspend the closing of the Embarcadero facility, the Postal Service argues that accepting the Petitioners' view that section 404(b) procedures must be followed every time the Postal Service wants to move out of a particular building would seriously damage its ability to operate. Postal Service Response at 3. The Postal Service lists some of the many possible reasons for moving out of a particular building. Id. at 4.

Explanation of lack of jurisdiction. The Commission faced a similar question in Docket No. A82-10. Petitioners were objecting to the Postal Service's plans to close the Oceana postal station and make other changes in the retail

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facilities serving the city of Virginia Beach, Virginia. In determining that section 404(b) did not apply in the relocation of facilities within the community, the Commission stated:

The requirements of section 404(b) do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community. We do not believe that section 404(b) was intended to govern the Postal Service's decisionmaking on improving or relocating facilities within the community. One of the reasons for the reorganization of the Post Office Department in 1970 was to promote the efficient progress of needed capital improvements.

PRC Op. A82-10 at 6.

The Commission explained that the purpose of section 404(b) was to ensure that the Postal Service give formal consideration the possible effects of removing a post office from the community. The Postal Service may use less formal decisionmaking processes when making changes which are not expected to have as great an effect on the community. The Commission emphasized that the goal of efficiency is often in conflict with that of comprehensive service to the community. PRC Op. A82-10 at 7. The Commission decided that the Postal Service is not required to follow the section 404(b) procedures when it is "merely rearranging the retail facilities in the community." Id. at 8.

Arguments submitted by Petitioners. In the June 10, 1991, Motion, Petitioners cite 36 C.F.R. § 1.4, which calls for the Postal Service to provide the public with as much information as possible concerning its decisionmaking. Petitioners' Motion at 1. The Petitioners state that the Commission decision concerning the Oceana Station in Virginia Beach, Virginia, is not on point, because that case dealt with an old building in need of repair, rather than a landmark like the San Francisco Main Post Office. Id. at 2.

The holding in the Oceana case with regard to jurisdiction did not turn on the age, or state of repair of

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the building in question. That decision speaks to what kind of decisions must be preceded by formal section 404(b) procedures. The plans regarding the San Francisco offices, as described by the Petitioners, are rearrangements of facilities. Therefore, the statute permits a decisionmaking process less formal than that established by section 404(b). There is no connection between the regulation cited by the Petitioners and the formal procedure specifically required in those instances where section 404(b) applies.

Petitioners complain that all of the services previously provided at the main post office are no longer convenient. Petitioners' Response at 3 and 5-6. Petitioners describe the Postal Service's interpretation of section 404(b) as applying to a large city only in the extreme circumstance of a decision to close all of its retail facilities. Citing the Constitutional guaranty of equal protection, Petitioners argue that if section 404(b) applies to small, rural communities, it must also apply when a large facility is closed, since the impact is much greater. Id. at 4.

Interpreting section 404(b) to apply only when the Postal Service is proposing to remove all retail facilities (or the postmaster position in the case of a consolidation) does not deny the residents of cities equal protection of the law. It is true that the statute is concerned with a specific situation which is likely to occur only in smaller communities. The statute is concerned with the serious situations of loss of all retail facilities or the postmaster position. For changes that are expected to have less impact on the community, the Postal Service is permitted to use less formal decisionmaking procedures.

The Petitioners also argue that San Francisco is made up of many communities. Petitioners' Response at 5. The Postal Service notes that the replacement facilities are nearby and describes them as being in the same vicinity. Postal Service Response at 3-4. Therefore, accepting that argument

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presented by the Petitioners does not show that the Postal Service's planned replacement facilities are outside accepted boundaries of the community served. See Order No. 696, Order Dismissing Docket No. A86-13 (June 10, 1986).

Petitioners say that the ordinary meaning of the words used in the statute should govern its interpretation, arguing that everyone knows what "post office" and "closed" mean. Petitioners Response at 7. The Petitioners cite the decision in the Knapp⁴ case, in which the judge noted the appropriateness of giving the community a hearing before closing or consolidating a post office.

In interpreting the terms used in section 404(b), the court in Knapp held that closing "refers to the complete elimination of the post office." 449 F. Supp. 162. That is not the situation described by Petitioners. The Postal Service will continue to offer retail services through a network of facilities located in San Francisco. Changing the building housing the post office is different from eliminating the post office. Section 404(b) is concerned only with the elimination of the post office or the postmaster position.

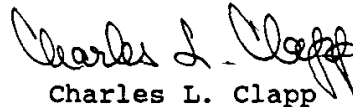
The Commission orders:

(A) Docket No. A91-4 is dismissed because the subject matter does not fall within the requirements of 39 U.S.C. § 404(b).

(B) Petitioners' June 27, 1991, Motion for Suspension of Effectiveness of Announced Facility Closings is denied.

By the Commission

(SEAL)


Charles L. Clapp
Secretary

⁴ Knapp v. United States Postal Service, 449 F. Supp. 158 (E.D. Mich. 1978).

Postal Rate Commission
Submitted 12/3/2003 2:34 pm
Filing ID: 39577
Accepted 12/3/2003
ORDER NO. 1387

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

Before Commissioners: George Omas, Chairman;
 Tony Hammond, Vice Chairman;
 Dana B. Covington, Sr., and
 Ruth Y. Goldway

In the Matter of:

Birmingham Green, AL 35237 : Docket No. A2003-1
(George Prince *et al.*, Petitioners) :

ORDER DISMISSING APPEAL
ON JURISDICTIONAL GROUNDS

(Issued December 3, 2003)

Introduction and Summary. On September 17, 2003, three individuals petitioned the Commission to review the Postal Service's actions regarding the Birmingham Green, Alabama Post Office.¹ The Commission gave notice and accepted the appeal in Order No. 1384, issued on September 23, 2003.² The Postal Service subsequently moved to dismiss this proceeding, arguing that the Commission lacks jurisdiction to consider an appeal under 39 U.S.C. § 404(b).³ After considering the circumstances of this appeal in light of applicable law and precedent in earlier dockets, the Commission has concluded that this proceeding should be dismissed for lack of jurisdiction.

Petitioners' Request for Review. Petitioners George Prince, Terry Finch, and James E. Roberts contest a Postal Service action — which they characterize as a “closing or consolidation” — affecting the Birmingham Green Post Office, located at 317 North 20th

¹ Joint Petition for Review and Application for Suspension, September 17, 2003.

² Notice and Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. § 404(b)(5), September 23, 2003.

³ United States Postal Service Motion to Dismiss Proceeding, October 3, 2003.

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Street in Birmingham, Alabama 35237. Joint Petition at 1. Petitioners document the Postal Service action in two attachments to their pleading.

The first attachment is a letter dated August 27, 2003 and signed by Paul T. Barrett, Postmaster of Birmingham. In the letter, Mr. Barrett advises postal customers that “the Birmingham Green Post Office will be officially closed September 12, 2003.” In light of this development, he states that customers will be required to change their Post Office Boxes, and that mail will be forwarded in accordance with postal regulations. He further states that “[r]etail services from the Main Post Office will ensure effective and regular services to the Downtown Birmingham community.”

The second attachment is a document entitled “Proposal to Consolidate the Birmingham Green Station and Establish a Contract Postal Unit,” dated June 20, 2003. According to the document’s cover page, the matter was assigned Docket Number 35237.

The document states at the outset that the Postal Service “is proposing to consolidate the Birmingham Green Station and provide retail services by establishing a contract postal unit (CPU) under the administrative responsibility of the Main Post Office, located 4 blocks away.” Proposal to Consolidate at 1. The remainder of the document consists of assessments of the proposal’s anticipated effects, under headings entitled “Responsiveness to Community Postal Needs,” “Effect on Community,” “Effect on Employees,” “Economic Savings,” and “Other Factors.” These areas of inquiry correspond to the criteria the Postal Service is directed to consider in making a statutory determination to close or consolidate a post office, pursuant to 39 U.S.C. § 404(b)(2).

Petitioners assert that the Postal Service’s determination to close the Birmingham Green facility, announced in a Notice of Final Determination on August 27, 2003 violates the requirement in 39 C.F.R. § 241.3(a)(2)(iii) that such determinations be available in writing at least 60 days before discontinuance takes effect. On this basis, petitioners argue that the process was “without observance of procedure required by law,” in contravention of 39 U.S.C. § 404(b)(5)(B). Joint Petition at 1.

Petitioners also challenge the merits of the Service’s decision. They allege that it will have adverse effects on the community served by the Birmingham Green facility and

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will degrade the degree of service provided; that the Service failed to take into account all the disadvantages of closing the facility; that the Service provided no statement of the facility's income or revenue in its proposal; and that it did not adequately respond to the concerns raised by community members in both questionnaire responses and in a public hearing. *Id.* at 1-2.

Postal Service Motion to Dismiss. Order No. 1384 established October 3, 2003 as the date for the Postal Service's filing of its administrative record in this appeal. On that date, rather than filing an administrative record, the Service submitted a motion to dismiss this proceeding.⁴

In its motion, the Postal Service submits that the Petition does not fall within the Commission's jurisdiction under § 404(b)(5). The Service cites two bases for this conclusion. First, it asserts that the Birmingham Green facility is a Classified Postal Station — one of at least four USPS-operated facilities in downtown Birmingham — and thus is not a Post Office. Second, the Service represents that operations at the Birmingham Green facility "are currently suspended rather than formally closed[.]"⁵ and that it has been working with Birmingham customers on providing them services, with the expectation that a contract station will be established in the vicinity of the Birmingham Green Station.

The Postal Service musters an extensive review of legislative history and case law to support its position "that the procedures mandated by 404(b) apply only to the closing or consolidation of an independent post office, which is a facility occupied and immediately supervised by a postmaster, and not the closing or consolidation of a station, branch, contract unit, or other subordinate facility under the administrative supervision of a post office."⁶ The Service argues at length that Congress, in enacting § 404(b), intended to limit the term "post office" to a definition predating the Reorganization Act that distinguishes between independent post offices and their subordinate retail facilities such

⁴ *Id.*

⁵ *Id.* at 1. (Footnote omitted.)

⁶ *Id.* at 2.

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as stations and branches.⁷ The Service also cites judicial authority in support of the restrictive interpretation of “post office” it urges.⁸ Most notably, it invokes the decision in *Shepard Community Association v. United States Postal Service*,⁹ in which a United States District Court found convincing indications of Congressional intent to distinguish post offices from branches and stations for purposes of applying § 404(b), and accordingly ruled that § 404(b) did not apply to the contested closing of the Shepard station in Columbus, Ohio.

Analysis of Jurisdictional Applicability. The available documentary evidence concerning the Birmingham Green facility, and the nature of the Postal Service’s actions affecting it, are somewhat opaque. The Service asks the Commission to infer that operations at the facility have been “suspended,” based on the absence of a formal announcement of its closure in the Postal Bulletin.¹⁰ However, Postmaster Barrett’s letter of August 27, 2003, publicly discloses an official intention to close the facility, with Post Office Boxes and other services to be provided at the Main Post Office.

At the same time, his apparently contemporaneous administrative responsibility for the Birmingham Green facility implies that its closure would not constitute a statutory “consolidation,” which has been found to have “the characteristic of subordinating the day to day overall management of one office having a postmaster to the administrative personnel of another office.”¹¹ If Postmaster Barrett already had administrative responsibility for the Birmingham Green facility, closing it would not appear to constitute a “consolidation” subject to review under § 404(b). Yet, apparently two months earlier, the Postal Service at some administrative level had prepared an analysis on the “Proposal to Consolidate the Birmingham Green Station and Establish a Contract Postal Unit,” which Petitioners have provided as an attachment to their appeal.

⁷ *Id.* at 3-9.

⁸ *Id.* at 9-14.

⁹ *Shepard Community Association v. United States Postal Service*, Civ. No. C2-82-425 (S.D. Ohio 1985).

¹⁰ Postal Service Motion to Dismiss, *supra*, at 1, n. 4.

¹¹ *Knapp v. United States Postal Service*, 449 F. Supp. 158, 162 (C.D. Cal. 1978).

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Notwithstanding these unclear circumstances, the Commission finds that the available facts support a conclusion that the Postal Service's actions regarding the Birmingham Green facility — whether considered as a “closing” or a “suspension” — affect a “station or branch” within the service area administered by the Birmingham post office, and thus do not fall within the ambit of the review process provided in 39 U.S.C. § 404(b).

The Commission's action in an earlier proceeding, Docket No. A82-10, provides useful guidance in this controversy. In that docket, petitioners contested the Postal Service's plan to close the Oceana Station in Virginia Beach, Virginia. In its dispositive order,¹² the Commission considered legal arguments on what it regarded as a threshold issue: whether § 404(b) procedures for closing or consolidating post offices were applicable to the Service's plan to close the Oceana Station.

In deliberating on this issue, the Commission held that the Postal Service decision to close the facility “must be considered within the context of the Postal Service's other actions in the area.”¹³ After examining the facts presented, the Commission found the proposed closing of the Oceana Station to be one component of a plan to reconfigure the network of postal facilities providing services to various communities in the Virginia Beach area. Employing a “rule of reason,” the Commission held that “the requirements of section 404(b) do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community.”¹⁴ In light of the Service's description of its actions in the Virginia Beach area, the Commission concluded “that the Postal Service is merely rearranging the retail facilities in the community[.]”¹⁵ and that the formal requirements of § 404(b) were not intended to apply to such changes. More broadly, the Commission stated that “the Postal Service is not required to follow the formal § 404(b) procedure when it is merely rearranging its retail facilities in a community, as it is doing in Virginia Beach.”¹⁶

¹² Order No. 436, Order Dismissing Docket No. A82-10, June 25, 1982.

¹³ *Id.* at 7.

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 1.

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Here, as in Docket No. A82-10, the Postal Service's action affects one Classified Station of several in a metropolitan area: in this instance, Birmingham, Alabama.¹⁷ The Postal Service represents that equal or superior service is available at the Birmingham Main Post Office, less than one-half mile away, but that it is also working to establish a contract station in the vicinity of the Birmingham Green station.¹⁸ These activities indicate that the Service's action with regard to the Birmingham Green station is part of a rearrangement of the retail network serving the Birmingham community, as with the Virginia Beach area in Docket No. A82-10. For this reason, the Commission concludes that the procedural requirements of § 404(b) do not apply, and that the appeal of the Postal Service's action regarding the Birmingham Green station does not fall within the Commission's jurisdiction under that section.¹⁹ Therefore, the Postal Service's motion to dismiss this proceeding shall be granted.

The Joint Petition for Review was accompanied by an application for suspension of the Postal Service's action regarding the Birmingham Green station. Inasmuch as the Commission has found § 404(b) inapplicable to the Service's action, the motion for suspension must also be denied.

¹⁷ *Id.*, Attachment #1, p. 3-7.

¹⁸ Postal Service Motion to Dismiss, *supra*, at 1-2.

¹⁹ The Commission views this outcome as compatible with, if not in every respect identical to, the court's analysis in the *Shepard* decision, *supra*.

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The Commission orders:

- (a) The United States Postal Service Motion to Dismiss Proceeding, filed October 3, 2003, is granted.
- (b) Petitioners' Application for Suspension, filed September 17, 2003, is denied.
- (c) The Secretary of the Postal Rate Commission shall publish this Order in the **Federal Register**.

By the Commission.

(S E A L)

Steven W. Williams,
Secretary

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

Before Commissioners:

George Omas, Chairman;
Dawn A. Tisdale, Vice Chairman;
Mark Acton; Ruth Y. Goldway; and
Tony Hammond

Observatory Finance Station
Pittsburgh, PA 15214-0651
(Observatory Hill Inc., Petitioner)

Docket No. A2006-1

ORDER DENYING POSTAL SERVICE
MOTION TO DISMISS AND REMANDING
FOR FURTHER CONSIDERATION

(September 29, 2006)

I. INTRODUCTION AND SUMMARY

The Petitioner filed an appeal claiming that the Postal Service did not follow all of the statutory requirements of 39 U.S.C. § 404(b) before closing the Observatory Finance Station located in Pittsburgh, Pennsylvania.¹ The Postal Service claims that it did not have to follow those requirements in this case, concedes that it did not follow those requirements with respect to the closing, and moves to dismiss the appeal.²

¹ Petition for Review received from Malcolm Hardie, President, Observatory Hill Inc., regarding the closing of the Observatory Finance Station, Pittsburgh, PA, June 21, 2006 (Petition). The Petitioner, Observatory Hill Inc., is a § 501(c)(3) corporation claiming to represent 6,000 residents within the surrounding area of Observatory Finance Station, of which 2,000 are seniors. The Petitioner has collected 606 signatures in support of keeping Observatory Finance Station open.

² United States Postal Service Motion to Dismiss Proceeding, July 26, 2006 (Motion to Dismiss). Contemporaneously with the Motion to Dismiss, the Postal Service filed a Motion of the United States Postal Service for Late Acceptance of Its Motion to Dismiss Proceeding on July 26, 2006 (Motion for Late Acceptance). Since there does not appear to be any prejudice from the delay, the Commission grants the Postal Service's Motion for Late Acceptance.

This case involves the question of whether the Postal Service followed the appropriate procedures before closing Observatory Finance Station. The Commission finds that the Postal Service apparently has not fulfilled its obligations under the circumstances.

II. PROCEDURAL HISTORY

On June 21, 2006, the Petitioner filed an appeal petition with the Postal Rate Commission claiming the Postal Service did not follow the § 404(b) statutory requirements when it closed the Observatory Finance Station on June 16, 2006.³ The Commission issued a notice and order accepting the Petitioner's appeal and establishing a procedural schedule on July 28, 2006.⁴ The procedural schedule and Commission regulations required the Postal Service to file the administrative record in this case no later than July 6, 2006.⁵ On July 6, 2006, the Postal Service filed a notice stating that it did not compile an administrative record in this case and that on July 21, 2006 it would be filing a motion to dismiss the proceeding arguing that the Commission lacked jurisdiction to hear the appeal.⁶ The Postal Service filed its Motion to Dismiss on July 26, 2006. The Petitioner filed a pleading opposing the Postal Service's Motion to Dismiss on August 1, 2006⁷ and a Supplement to its Appeal on August 2, 2006.⁸ The Commission also received letters with packets of information from Congressman Mike Doyle and Senator Rick Santorum.⁹

³ Observatory Finance Station was established as a post office station in 1912. See *Postal Bulletin* 9985 (November 13, 1912).

⁴ Notice and Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. Section 404(b)(5), June 28, 2006.

⁵ *Id.* at 3; 39 C.F.R. § 3001.113.

⁶ Notice of United States Postal Service Regarding Filing of Administrative Record, July 6, 2006 (Notice).

⁷ Observatory Hill Inc. Motion in Response to the United States Postal Service Motion, August 1, 2006 (Opposition).

⁸ Supplement to the Petition for Review, August 2, 2006 (Supplement to Petition).

⁹ Letter from The Honorable Mike Doyle to Steven Williams regarding Docket No. A2006-1, August 11, 2006; Letter from The Honorable Rick Santorum to Steven Williams regarding Docket No. A2006-1, August 14, 2006. These letters did not urge the Commission to act in a certain way with respect to the appeal. Instead, they asked the Commission to consider the merits of the appeal.

III. ACTIONS TAKEN BY THE POSTAL SERVICE WITH RESPECT TO CLOSING

Prior to closing the doors of Observatory Finance Station permanently on June 16, 2006, the Postal Service took the following procedural steps:

Sent out questionnaires in the Spring/Summer of 2005 to post office box customers;¹⁰

Held a community meeting at the Kilbuck Finance Station, approximately three miles away on May 5, 2005;¹¹

Posted a proposal for closing at Observatory, Allegheny, and Kilbuck Stations from July 11 to September 9, 2005;¹²

Denied a request of Petitioner for a community meeting on October 3, 2005, as being past the “proposal and invitation for customer comment” stage of the case;¹³

Informed customers that a right to appeal the Postal Rate Commission existed;¹⁴ and

Did not make any written findings that comply with § 404(b) requirements.¹⁵

IV. POSTAL SERVICE’S MOTION

The Postal Service Motion to Dismiss argues that the Commission does not have jurisdiction to consider the Petitioner’s request. The Postal Service notes that the Commission only has jurisdiction to hear appeals of decisions to close “post offices.” The Motion to Dismiss urges the Commission to interpret the statutory term “post office” in its technical sense applying the procedural closing requirements only to “independent

¹⁰ Petition at 3; Motion to Dismiss at 3.

¹¹ The Petitioner disputes that this meeting was held at a place and location convenient to the community.

¹² Petition, Attachment, Letter from Richard L. Sekinger, Postmaster, Pittsburgh, PA to Susan Rooney, dated October 3, 2005 (Rooney Letter).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Notice, *supra*.

post offices,” which are “facilit[ies] occupied and immediately supervised by a postmaster.”¹⁶ The Postal Service argues that § 404(b) does not apply to “the closing or consolidation of a station, branch, contract unit, or other subordinate facility under the administrative supervision of a post office.”¹⁷ Thus, according to the Postal Service, because Observatory Finance Station is classified administratively as a “station” and not as an “independent post office,” the Postal Service did not have to follow the statutory § 404(b) procedures prior to closing the facility.¹⁸ Indeed, the Postal Service concedes that it did not follow the § 404(b) procedures before closing Observatory Finance Station.¹⁹

In support of its position, the Postal Service cites many statutory provisions from former Title 39, excerpts from Congressional floor debates, and four federal court cases.²⁰ It fails to discuss any of the numerous Commission decisions that have evaluated these arguments.²¹

V. PETITIONER'S RESPONSE

The Petitioner contends that Observatory Finance Station is a post office within the meaning of § 404(b) and that the Postal Service should have followed the statutory closing procedures prior to closing the facility. The Petitioner argues that the term post

¹⁶ Motion to Dismiss at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Notice, *supra*. (“[T]he Postal Service has not created an administrative record compliant with the regulations for closing post offices” in this case); see also, Motion to Dismiss at 1-2 & n.3 (“This is confirmed by the statements in the Petition indicating that no final determination was posted”).

²⁰ *Id.* at 4-5.

²¹ The Postal Service does cite Docket No. A94-8, *In the Matter of Benedict, MN*, although only to inform the Commission and Petitioner that this is a means to obtain a copy of the unpublished slip opinion *Shepard Community Ass'n v. United States Postal Service*, Civ. No. C2-82-425 (S.D. Ohio 1985) (October 7, 1985), which is discussed and analyzed in the Postal Service's Motion to Dismiss. This method of citation puts the Pennsylvania-based petitioner at a distinct disadvantage in having to locate legible copies of briefs filed by the Postal Service nearly 12 years ago in another case where the files are located in the basement of the Commission's District of Columbia office. The Commission urges the Postal Service to follow standard litigation practice and furnish copies of cited unpublished opinions as attachments to briefs and motions. See, e.g., D.C. Circuit Rule 28(c)(3).

office was used in the statute in its ordinary, colloquial meaning — a fixed retail facility serving the public. The Petitioner cites several statements from the Congressional floor debates which it believes advance that argument. The Petitioner also provides information on the immediate surrounding area and businesses as well as the composition of Observatory Hill and its relationship to greater Pittsburgh.

VI. COMMISSION ANALYSIS

The Postal Service does not controvert allegations that it began the process of closing Observatory Finance Station by following the statutorily prescribed procedure under § 404(b). The Postal Service apparently halted that process without publishing its analysis and closed the retail facility. The Postal Service admits that it “has not created an administrative record compliant with the regulations for closing post offices,”²² and contends the statute does not afford citizens served by the Observatory Finance Station any rights or recourse.

The Postal Service argues that § 404(b) does not apply to its decision to close Observatory Finance Station. The Postal Service has repeatedly made identical legal arguments in other cases. Indeed, since at least Docket No. A94-8, *In re Benedict, MN*, the Postal Service has submitted almost identically worded briefs to the Commission to contest jurisdiction in post office closing appeal cases.²³ In none of these briefs has the Postal Service addressed, cited, or attempted to distinguish Commission analysis of these contentions.

The Commission has repeatedly rejected these arguments. The Commission first addressed the definition of post office in Docket No. A78-1, *In re Gresham, SC*, Order No. 208 (August 16, 1978). The Commission analyzed whether there were any characteristics of rural routes that would require it to deem them post offices for § 404(b) purposes. In making its determination that rural delivery routes were not post offices within the meaning of § 404(b), the Commission resolved the question as to

²² Notice, *supra*.

²³ See also, e.g., Docket No. A2003-1, *In re Birmingham Green, AL*.

whether “§ 404(b) uses the term ‘post office’ in its ordinary sense — i.e., a fixed retail facility serving the public and acting as the point of origin for delivery routes — or whether a more extended meaning can be given to it.” *Id.* at 6-7.

In another early post office closing case, intervenors raised the concern that once the independent post office was consolidated and turned into a station, the station “could be closed without prior notice or without chance of appeal” since it would be a station, not an independent post office.²⁴ In response to this concern, the Commission stated:

We believe that our Opinion and Order in *Gresham, South Carolina*, is dispositive of the question of the proper definition of what constitutes a “post office” for purposes of the Act In *Gresham*, the Commission held that, based upon our construction of the Act, the term “post office,” as used in § 404(b), is to be defined in its ordinary sense: “[A] fixed retail facility serving the public and acting as the point of origin for delivery routes...,” rather than to be given the more technical meaning implied by a distinction between “post office” in the narrow sense and “branch” or “station.” Applying our interpretation of the term “post office,” as enunciated in *Gresham*, it is clear that even after the proposed consolidation is effected, thereby making Mt. Eden a station of Hayward, the patrons of Mt. Eden would clearly have standing, under § 404(b) of the Act, to appeal any proposed closing or consolidation of that post office. This is the case because, even as a mere station of Hayward, Mt. Eden would be a retail facility, and a part of Hayward from which delivery routes would originate.

Id. at 21-22 (internal footnotes omitted).

In *Oceana Station, Virginia Beach, VA*, the Commission distinguished a situation in which it does not have jurisdiction to hear appeals of post office closings under § 404(b).²⁵ In that case, the Postal Service was closing the Oceana station, but argued that “the decision to close the Oceana station must be considered in light of its planned

²⁴ Docket No. A80-4, *In re Mt. Eden, CA*, Comm’n Op. Affirming Determination – 39 U.S.C. § 404(b)(5) (May 28, 1980) at 2.

²⁵ Docket No. A82-10, *In re Oceana Station, Virginia Beach, VA*, Order No. 436 (June 25, 1982).

network of postal facilities in Virginia Beach.” *Id.* at 4. According to the Postal Service, it was not just closing the Oceana station, it was “enhancing its network by opening a new Virginia Beach main post office 4 miles west of the Oceana station...[which] will permit the Postal Service to move the carriers out of the London Bridge station, making more room for post office boxes and additional retail counter space.” *Id.* at 4-5.²⁶ The Commission found that the proposed closing “must be considered within the context of the Postal Service’s other actions in the area.” *Id.* at 7. Specifically, “[t]he requirements of section 404(b) do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community.” *Id.* at 6. Accordingly, the Commission held that “the Postal Service is not required to follow the formal section 404(b) procedure when it is merely rearranging its retail facilities in a community, as it is doing in Virginia Beach.” *Id.* at 1.²⁷

The Commission also has developed the definition of post office for purposes of § 404(b) in the context of community post offices (CPOs).²⁸ In *Knob Fork, WV*,²⁹ the first in a line of Commission cases on CPOs, the Commission stated that the “threshold

²⁶ The Postal Service was also adding a Detached Lockbox Unit and self-service facility in the Lynnhaven area and establishing a contract station in the Great Neck area. *Id.* at 5.

²⁷ See also, Docket No. A2003-1, *In re Birmingham Green, AL*, Order No. 1387 (December 3, 2003) at 6 (“These activities indicate that the Service’s action with regard to the Birmingham Green station is part of a rearrangement of the retail network serving the Birmingham community”); Docket No. A91-4, *In re San Francisco Main Post Office, CA*, Order No. 891 (July 8, 1991) at 5-6 (“The plans regarding the San Francisco offices, as described by the Petitioners, are rearrangements of facilities. Therefore, the statute permits a decisionmaking process less formal than that established by section 404(b).”) In the instant case, the Postal Service is not opening any new facilities in the area and does not make a claim that by closing Observatory Finance Station, it is merely rearranging its retail facilities. Accordingly, this line of cases is not applicable here.

²⁸ Community post offices are operated by private contractors. As private contracts, they may be terminated by either party, although the Postal Service termination requires authorization from headquarters.

²⁹ Docket No. A83-30, *In re Knob Fork, WV*, Comm’n Op. Remanding Determination for Further Consideration — 39 U.S.C. § 404(b)(5) (January 18, 1984). *Knob Fork*’s progeny contains similar legal holdings and reasoning. See Docket No. A94-1, *In re Waka, TX*, Comm’n Op. Affirming Decision Under 39 U.S.C. § 404(b) (February 4, 1994) at 5-6; Docket No. A94-3, *In re Inavale, NE*, Comm’n Op. Affirming Decision Under 36 U.S.C. § 404(b) (March 15, 1994) at 5 (“The statute intends that, when the Postal Service is planning to close the only retail facility serving a community, the people living in that community have” the protections of § 404(b).); Docket No. A94-8, *In re Benedict, MN*, Comm’n Op. Remanding Decision Under 39 U.S.C. § 404(b) (August 3, 1994) at 7-8.

issue in this case is whether the Knob Fork community post office is a ‘post office’ as the term is used in section 404(b).” *Id.* at 2 (footnote omitted). The Postal Service argued that the statute should be interpreted using the “technical” definition in the Postal Service Glossary of Postal Terms. *Id.* at 3. This argument did not convince the Commission which recognized that “[t]he statutory language, in section 404(b), however, can be said to include a latent ambiguity: Is ‘post office’ used in its technical or in its common sense?” *Id.* The Commission noted that:

In ordinary usage, “post office” is a retail facility where patrons may purchase postal services, and dispatch and possibly receive mail. The technical or specialized usage of “post office” adds to the ordinary definition the requirement of a specific degree of managerial independence...including a postmaster position.³⁰

Id. In analyzing the legislative history, including statements by Senator Randolph, the Commission found that “the legislative history does not provide a definitive answer on the meaning of the term ‘post office.’” *Id.* at 5.

Indeed, the Commission pointed to a comment by Senator Fong that makes it seem as though Congress meant to use the ordinary definition of post office, including branches and stations. Senator Fong stated “[i]f the Postmaster [General] should decide that he will close a *station*, he can be taken to court.”³¹ Ultimately, the

³⁰ The Commission noted that “[t]he American Heritage Dictionary (1976 edition) defines ‘post office’ as: ‘Any local office where mail is received, sorted, and delivered, and stamps and other postal matters are sold.’” *Id.*

³¹ *Id.* (citing 122 Cong. Rec. 14278 (August 23, 1976)) (emphasis added). Further legislative history support for a definition of “post office” that includes branches and stations is found in the statements of Congressman Buchanan:

I commend the gentlemen for including language about closing branches, because in my district ... they were about to close some 27 branches in an urban area and make other radical changes, with no advance warning, with no consultation, with no chance for people to have a hearing on the matter.

I had to go to Federal court to stop it. That certainly ought not to happen over and over again, so I am glad that the gentleman included that language.

See Staff of Comm. On Post Office and Civil Service 94th Cong., 2d Sess., Report on H.R. 8603 Postal Reorganization Act Amendments of 1976 at 547 (Comm. Print No. 94-20 1976).

Commission found that the more reasonable reading of section 404(b) is that it applies whenever the Postal Service seeks to close or consolidate a community's retail facility. In so holding, the Commission rejected the very same arguments the Postal Service makes in this case and based its decision on the following rationale:

Congress, not satisfied with the Postal Service's implementation of this directive [39 U.S.C. § 101(b)], in 1976 added section 404(b) to limit the previous grant of authority and provide a procedure for its exercise. In explaining this amendment, Senator Randolph described the intent as establishing a "very simple mechanism" to insure the opportunity for patrons to participate in the decisionmaking to close or consolidate the community's post office....

The Postal Service accurately points out that the Conference Report states that the provision is to "apply to post offices only and not to other postal facilities." This statement, however, provides no insight to whether "post office" is to mean community post offices as well as independent post offices. It is reasonable to assume that the words "other facilities" refer to units other than retail facilities, such as mail processing centers or vehicle maintenance facilities. The reasonableness of this assumption is underscored by the attempts of interested parties to require the Postal Service to follow section 404(b) procedures before mail processing functions^[32] or rural routes^[33] could be consolidated.

Id. at 4-5 (footnote omitted).

³² *Knapp v. USPS*, 449 F. Supp. 158, 162 (E.D. Mich. 1978) (in finding that § 404(b) does not apply, the court found it important that "[p]ostal customers will not be affected by these transfers" of mail processing functions and that "[g]iven the prospect of adverse impact on the populace of the postal community of such a closing or consolidation, it makes perfect sense to accord affected postal customers the right to notice and a hearing prior to the consolidation as § 404(b) requires."); *Wilson v. USPS*, 441 F. Supp. 803, 805 (C.D. Cal. 1977) (in holding that rearrangements of mail processing operations are not subject to § 404(b), the court highlighted the fact that "[i]n this instance, public services will at the very least remain substantially the same. All of the local post offices in question will remain in existence...; the public can still purchase stamps and money orders, and register, certify or insure their mail."); see also *Hopkins v. USPS*, 830 F. Supp. 296, 299 (D.S.C. 1993) (noting that "[t]he Hopkins Post Office continues to remain in existence. ...The public can still obtain all of the services at the Hopkins Post Office that they could prior to the transfer of the mail-casing operation. These are factors which are important in determining whether or not there has been a consolidation.").

³³ *Martin v. Sloan*, 432 F. Supp. 616 (W.D.N.C. 1977); Docket No. A78-1, *In re Gresham, SC*, Order No. 208 (August 16, 1978).

The *Knob Fork* opinion also found it persuasive that from the point of view of the public, a retail facility performs the same functions as an independent post office and that such an interpretation best conforms to the policies of the Postal Reorganization Act. The Commission found:

If we accept the Postal Service's consistent position that a community post office serves the public in much the same way as an independent post office, the more reasonable reading of section 404(b) is that it is to apply whenever the Postal Service proposes to close or consolidate a community's retail postal facility. The public generally describes these facilities as "post office." Congress was concerned about the effects on the community resulting from the Postal Service's decisions on retail facilities.

....

Interpreting "post office" in the conventional sense comports well with the two broad, and sometimes conflicting, policies of the Postal Reorganization Act, as amended — freedom to manage and responsiveness to the public.^[34] Section 404(b) simply gives a procedure and guidelines for the Postal Service to follow in exercising its authority over the nation's system of post offices; it does not place rigid constraints on the Postal Service's management of its system of retail facilities. Section 404(b) does not follow the more intrusive route of an absolute prohibition or numerical limit for closings and consolidations. The Postal Service's reliance on a distinction that is more closely related to the Postal Service's internal management structure [rather] than the public perception of the services provided by the community post offices does not comport with the policy of responsiveness to public concerns. It follows that interpreting "post office" in its non-technical sense promotes one main policy of the statute (responsiveness) without doing violence to the other (managerial freedom).

Id. at 7-8 (footnote omitted). The Commission concluded that Congress' decision to require the Postal Service to follow the section 404(b) procedures did not place an

³⁴ *Buchanan v. USPS*, 508 F.2d 259, 262 (5th Cir. 1975).

undue burden on the Postal Service's managerial discretion. The Commission reasoned that:

We do not anticipate that requiring the section 404(b) procedures before closing CPOs will unduly hamper the operations of the Postal Service. The intent of the amendment was to establish a "very simple mechanism" for decisionmaking on the closing or consolidation of post offices. 122 Cong. Rec. 14277.

The Postal Service's argument that section 404(b) is not applicable because, traditionally, stations, branches and contract facilities tend to be changed more frequently than independent post offices is not persuasive...The Postal Reorganization Act was passed to improve the traditional operating practices of the Post Office Department. The 1976 amendments were "fine tuning" on the Act. Accepting Congressional dissatisfaction with previous functioning, we cannot accept as persuasive an argument based merely on tradition. Rather we must look at the rationale underlying those traditions to determine whether they remain applicable to current practice.

....

Likewise, the Postal Service's emphasis on the decentralized decisionmaking on the provision of retail facilities other than independent post offices does not address the question at issue. Section 404(b) does not place the responsibility for carrying out the requirements at any particular management level within the Postal Service.

Knob Fork, WV at 4-8 (some internal citations omitted).

In so holding, the Commission noted that its decision in *Knob Fork, WV* is consistent with *Oceana Station, Virginia Beach, VA*. It recognized that *Oceana* "involved a relocation of facilities within a community, rather than the closing of the only retail facility serving a community." *Id.* at 7.

In this case, the Postal Service has not raised any new topics or arguments that require the Commission to reevaluate its longstanding prior decisions on the definition of post office. Nothing in the Postal Service's instant Motion to Dismiss addresses the

legal arguments that the Commission found persuasive in its previous cases, and the facts of this case do not change the stature of those well-reasoned opinions.

VII. APPLICATION TO CURRENT PROCEEDING

Congress intended that the Postal Rate Commission and the Postal Service would work together in providing the public with a meaningful opportunity to participate in certain postal matters.³⁵ With respect to the closing of Observatory Finance Station, the Commission is more concerned with furthering Congressional goals than attempting to explore the limits of its appellate authority. While the Commission has rejected the arguments presented in the Motion to Dismiss, it has never specifically considered whether a finance station meets the test of *Mt. Eden* or *Knob Fork*, and the pleadings do not address these decisions.

The basic goals and policies of §§ 101 and 404 specify protections for both urban and rural interests.³⁶ Section 101 requires the Postal Service to provide prompt, reliable and efficient services to the public “in *all* areas” and render postal services “in *all* communities.”³⁷ These postal policies do not allow the Postal Service to arbitrarily or capriciously close offices. The Postal Service is charged with taking these policies into account regardless of whether citizens have a right to appeal to the Postal Rate Commission.³⁸

The pleadings indicate that the Postal Service began the closing process by obtaining customer input to ensure that it would maintain a satisfactory level of service to the public in the Observatory Hill area. It appears, however, that although the Postal Service started that process, it never completed it. To comply with the Congressional mandate of §§ 101 and 404, the Postal Service needs to complete that process with

³⁵ See, e.g., 39 U.S.C. §§ 3622-3625, 3661.

³⁶ 39 U.S.C. §§ 101(b), 404(b)(2)(C).

³⁷ 39 U.S.C. § 101(a) (emphasis added).

³⁸ It is neither the Commission’s responsibility nor inclination to second guess proper Postal Service decisions to alter individual retail locations.

respect to Observatory Finance Station by evaluating, among other things, input from affected citizens, and reaching a conclusion on whether a satisfactory level of service will be maintained. This obligation is heightened when the public is confused about the status of the Postal Service's actions and about the status of their right to be heard, particularly when that confusion is caused by the contradictory statements of the Postal Service.³⁹ Indeed, when the Postal Service's actions are contradictory and confusing to a public not well-versed in postal matters, the Postal Service has an inherent obligation to make sure that its customers are adequately informed about why its actions are consistent with applicable public policy.

In the circumstance of this case, the Postal Service had the obligation to consider the input it solicited from customers, and reach a decision on whether closing this facility was consistent with the policies of §§ 101 and 404 that was neither arbitrary nor capricious. It had the further obligation to show that this had been done.

The current procedural posture of Observatory Finance Station is unique. Ordinarily, the Postal Service makes its decision to "close" a retail facility while that facility remains open. Here, however, the retail facility has been closed since June 16, 2006, and, therefore, the Postal Service's further consideration of whether to "close" Observatory Finance Station will not be taking place within the context of an ongoing post office. To satisfy the statutory requirements, the Postal Service must consider whether to "close" a post office that is in effect already closed. This changes the analysis slightly, but the Postal Service's obligations with respect to the procedure it must follow and the findings it must make remain the same. Specifically, it must consider the sufficiency of the services that it currently offers in the area as well as the other relevant factors.⁴⁰ It should adequately justify its findings and transparently communicate those findings in a rational way to affected postal patrons.

³⁹ Compare Rooney Letter with Motion to Dismiss at 2-3.

⁴⁰ Cf. Docket No. A95-11, *In re South Westerio, NY*, Comm'n Op. Affirming Decision Under 39 § 404(b) (September 8, 1995) at 15.

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If after thorough review and proper completion of the evaluation the Postal Service finds that its actions in closing Observatory Finance Station are not consistent with §§ 101 and 404, it should alter its prior decision and take appropriate action to provide sufficient services to the public in the Observatory Hill area.

It is ordered:

1. The Motion of the United States Postal Service for Late Acceptance of Its Motion to Dismiss Proceeding filed on July 26, 2006, is granted.
2. The United States Postal Service Motion to Dismiss Proceeding, filed on July 26, 2006, is denied.
3. The Postal Service's determination to close Observatory Finance Station is remanded for further consideration as outlined herein.

By the Commission.

(S E A L)

Steven W. Williams
Secretary

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

Before Commissioners:

Dan G. Blair, Chairman;
Dawn A. Tisdale, Vice Chairman;
Mark Acton; Ruth Y. Goldway; and
Tony L. Hammond

Ecorse Classified Branch
Ecorse, MI 48229
(LaTonya Wilson, Petitioner)

Docket No. A2007-1

ORDER DISMISSING APPEAL
ON JURISDICTIONAL GROUNDS

(October 9, 2007)

I. INTRODUCTION AND SUMMARY

On July 27, 2007, the Petitioner filed an appeal claiming that the Postal Service did not follow all of the statutory requirements of 39 U.S.C. § 404(d)¹ before closing the Ecorse Classified Branch located near Detroit, Michigan.² The Postal Service claims that it did not have to follow those statutory requirements in this case, and instead followed other, less formal procedures with respect to the closing.³ After considering

¹ The Postal Accountability and Enhancement Act (PAEA) redesignated 39 U.S.C. § 404(b) as 39 U.S.C. § 404(d).

² Letter from LaTonya Wilson to Postal [Regulatory] Commission dated July 27, 2007 regarding the closing of the Ecorse Classified Branch, August 3, 2007 (Petition). The PAEA § 1006 amends 39 U.S.C. § 404(d) to make the date of receipt by the Commission of a post office closing appeal the date on which it receives a Postal Service postmark.

³ Notice of the United States Postal Service Regarding the Filing of Administrative Record, August 16, 2007 (Notice of Filing the Administrative Record). Contemporaneously with the Notice of Filing the Administrative Record, the Postal Service filed a Motion of the United States Postal Service for Late Acceptance of Administrative Record on August 16, 2007 (Motion for Late Acceptance). Since there does not appear to be any prejudice from the delay, the Commission grants the Postal Service's Motion for Late Acceptance.

the Petitioner's contentions, the administrative record, the Postal Service's comments, and the circumstances of this appeal in light of applicable law and precedent in earlier dockets, the Commission has concluded that this proceeding should be dismissed for lack of jurisdiction.

II. PROCEDURAL HISTORY

On July 27, 2007, the Petitioner filed an appeal petition with the Postal Regulatory Commission claiming the Postal Service did not follow the § 404(d) statutory requirements in closing the Ecorse Classified Branch. A supplement to the Petitioner's appeal petition was deemed filed on July 30, 2007.⁴ The Supplemental Appeal Petition contained a request that the Commission suspend the closing of the Ecorse Classified Branch pursuant to 39 C.F.R. § 3001.114, pending the Commission's review.⁵ The Commission issued a notice and order accepting the Petitioner's appeal and establishing a procedural schedule on August 9, 2007.⁶ The procedural schedule and Commission regulations required the Postal Service to file the administrative record in this case no later than August 13, 2007.⁷ On August 16, 2007, the Postal Service filed an administrative record in this proceeding (Administrative Record).⁸ With the Administrative Record, the Postal Service filed a notice stating the Administrative Record was prepared following the procedures of the Postal Operations Manual section 123.8 and chapter 7 of Handbook PO-101 since it does not believe that the statutory requirements of § 404(d) apply to this

⁴ Letter from LaTonya Wilson to Postal [Regulatory] Commission dated July 30, 2007 regarding the closing of the Ecorse Classified Branch, August 6, 2007 (Supplemental Appeal Petition). The Supplemental Appeal Petition was received by the Commission on August 6, 2007, yet due to the operation of 39 U.S.C. § 404(d)(6), it was deemed received on July 30, 2007.

⁵ The Petitioner's application that the Commission suspend the determination of the Postal Service to close did not contain specific information related to the suspension request "show[ing] the reasons for the relief requested and the facts relied upon" as required by 39 C.F.R. § 3001.114(a). Accordingly, the Commission can not find sufficient cause to grant the temporary relief of the suspension application.

⁶ Notice and Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. Section 404(d)(5), August 9, 2007.

⁷ *Id.* at 5; 39 C.F.R. § 3001.113.

⁸ Administrative Record A2007-1, Ecorse, Michigan 48229, August 17, 2007.

facility.⁹ The Postal Service also filed comments regarding the appeal.¹⁰ David B. Popkin and the American Postal Workers Union, AFL-CIO filed Notices of Intervention but did not file any other pleadings.¹¹

III. PETITIONER'S REQUEST FOR REVIEW

The Petitioner contends that the Postal Service was required to follow the statutory requirements of 39 U.S.C. § 404(d) prior to closing the Ecorse Classified Branch. The Petitioner argues that the Postal Service failed to follow applicable procedures since it: (1) did not make a written determination which considers the five factors of § 404(d)(2)(A); (2) failed to make such written determination available to persons served by the post office 60 days prior to closing as required by § 404(d)(4); and (3) failed to solicit or consider comments from the public prior to making a determination to close the facility as required by the Postal Service's Operations Manual.¹²

IV. THE ADMINISTRATIVE RECORD

Prior to closing the doors of the Ecorse Classified Branch, the Administrative Record shows that the Postal Service took the following steps:

- Sent out questionnaires on September 29, 2006 to all 145 post office box customers;¹³
- Analyzed the responses to those questionnaires and other public comments received;¹⁴
- Responded to those comments that expressed concerns;¹⁵

⁹ Notice of Filing the Administrative Record at 2.

¹⁰ United States Postal Service Comments Regarding Appeal, September 20, 2007.

¹¹ Notice of Intervention of David B. Popkin, August 10, 2007; Notice of Intervention of the American Postal Workers Union, AFL-CIO, August 24, 2007.

¹² Supplemental Appeal Petition at 1-2.

¹³ Administrative Record, Item No. 6.

¹⁴ *Id.* at Item 15.

- Reviewed the mail processing, financial, and human resources data of the Ecorse Classified Branch facility;¹⁶
- Reviewed the real property information of the facility, including its condition and location information;¹⁷ and
- Reviewed local businesses and community organizations and services.¹⁸
- The Administrative Record also contains information regarding the replacement service that is expected to take over the workload and retail facility operations of the Ecorse Classified Branch. Prior to beginning the process of considering closing the Ecorse Classified Branch, a new, larger postal retail facility was being constructed 1.7 miles away from the Ecorse Branch.¹⁹ This new River Rouge facility opened on December 16, 2006, and now has the same retail services available to the public as the Ecorse Branch.²⁰ This facility is also open longer hours than the Ecorse facility.²¹ The Administrative Record also indicates that the opening of this new facility was a primary justification for the Postal Service concluding that the Ecorse Classified Branch should be closed.²²

V. POSTAL SERVICE COMMENTS

The Postal Service's comments discuss the Commission's most recent post office appeal opinion in Docket No. A2006-1, *Observatory Finance Station, Pittsburgh, PA 15214*, and past litigation regarding the definition of the term "post office" as used in 39 U.S.C. § 404(d). It argues that the situation in Ecorse is similar to the case *Oceana*

¹⁵ *Id.* at Item 12.

¹⁶ *Id.* at Items 3, 4, 5, 9, 10, 16.

¹⁷ *Id.* at Items 7, 11, 13, 14, 21, 23, 24.

¹⁸ *Id.* at Items 17, 19.

¹⁹ *Id.* at Items 6, 16.

²⁰ *Id.* at Item 26.

²¹ *Id.*

²² *Id.* at Items 16, 26.

Station, Virginia Beach, VA,²³ where the Commission dismissed the appeal because “the Postal Service is merely rearranging the retail facilities in the community.” PRC Order No. 436 at (June 25, 1982) 7-9. In support of its argument that the Commission should follow its precedent in *Oceana*, the Postal Service draws attention to two items in the Administrative Record. First, it points out that a new postal facility was built near the Ecorse Branch. Second, it highlights the fact that Postal Service staff asked for customer feedback on their recommendation to close the Ecorse Branch long before a final decision to close the facility was made by the Postal Service. Thus, according to the Postal Service, these portions of the Administrative Record demonstrate that this situation was a rearrangement of retail facilities which is not subject to the requirements of § 404(d) under *Oceana*.

VI. COMMISSION ANALYSIS OF JURISDICTIONAL AUTHORITY

The Commission has jurisdiction to hear appeals of post office closings that are required to follow the statutory requirements of § 404(d). A review of the Administrative Record raises issues as to whether the current appeal is properly before the Commission. Whether the Commission has jurisdiction to hear an appeal is a finding which is necessary before the Commission may reach any decision on the merits. A review of applicable Commission precedent on its jurisdiction in post office closing appeals is instructive.

In *Oceana Station, Virginia Beach, VA*, the Commission recognized a jurisdictional exception to hearing appeals of post office closings under § 404(d). *Id.* In that case, the Postal Service was closing the Oceana station, but argued that “the decision to close the Oceana station must be considered in light of its planned network of postal facilities in Virginia Beach.” *Id.* at 4. According to the Postal Service, it was not just closing the Oceana station, it was “enhancing its network by opening a new Virginia Beach main post office 4 miles west of the Oceana station...[which] will permit the Postal Service to move the carriers out of the London Bridge station, making more

²³ Docket No. A82-10, *In re Oceana Station, Virginia beach, VA*, Order No. 436, June 25, 1982.

room for post office boxes and additional retail counter space.” *Id.* at 4-5.²⁴ The Commission found that the proposed closing “must be considered within the context of the Postal Service’s other actions in the area.” *Id.* at 7. Specifically, “[t]he requirements of section 404[(d)] do not pertain to the specific building housing the post office; but rather are concerned with the provision of a facility within the community.” *Id.* at 6. Accordingly, the Commission held that “the Postal Service is not required to follow the formal section 404[(d)] procedure when it is merely rearranging its retail facilities in a community, as it is doing in Virginia Beach.” *Id.* at 1.²⁵

In the later *Knob Fork, WV* case dealing with the closing of a community post office, the Commission noted that its decision was consistent with the *Oceana Station, Virginia Beach, VA* case.²⁶ In *Knob Fork, WV*, the Commission recognized that *Oceana* “involved a relocation of facilities within a community, rather than the closing of the only retail facility serving a community.” *Id.* at 7.

The *Oceana* case instructs the Commission to consider the closing of the Ecorse Branch within the context of the Postal Service’s other actions in the area. Here, as the Postal Service correctly points out, the Administrative Record includes information showing that the Postal Service opened a new, larger facility 1.7 miles away from the Ecorse Branch. This new River Rouge facility has the same retail services as the Ecorse Branch and was designed, among other things, to take over and replace the workload and retail services offered at the Ecorse Branch. The opening of this new facility was one of the chief justifications for the Postal Service’s decision to close the Ecorse Classified Branch.

²⁴ The Postal Service was also adding a Detached Lockbox Unit and self-service facility in the Lynnhaven area and establishing a contract station in the Great Neck area. *Id.* at 5.

²⁵ See also, Docket No. A2003-1, *In re Birmingham Green, AL*, Order No. 1387, December 3, 2003, at 6 (“These activities indicate that the Service’s action with regard to the Birmingham Green station is part of a rearrangement of the retail network serving the Birmingham community”); Docket No. A91-4, *In re San Francisco Main Post Office, CA*, Order No. 891, July 8, 1991, at 5-6 (“The plans regarding the San Francisco offices, as described by the Petitioners, are rearrangements of facilities. Therefore, the statute permits a decisionmaking process less formal than that established by section 404[(d)].”)

²⁶ Docket No. A83-30, *In re Knob Fork, WV*, Comm’n Op. Remanding Determination for Further Consideration — 39 U.S.C. § 404(b)(5), January 18, 1984.

These facts show that the Postal Service's action with regard to the Ecorse Classified Branch is part of a larger retail facility realignment plan serving the community, as with the *Oceana* case. For these reasons, the Commission concludes that the procedural requirements of § 404(d) do not apply, and that the appeal of the Postal Service's action regarding the Ecorse Branch does not fall within the Commission's jurisdiction under that section. Therefore, the Commission dismisses the appeal for lack of jurisdiction.

It is ordered:

1. The Motion of the United States Postal Service for Late Acceptance of Administrative Record filed on August 16, 2007, is granted.
2. The Petitioner's appeal of the closing of the Ecorse Classified Branch filed on July 27, 2007, is dismissed.
3. The Petitioner's Application for Suspension filed on July 30, 2007, is denied.

By the Commission.

Steven W. Williams
Secretary

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

Before Commissioners:

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

Sundance Post Office
Steamboat Springs, CO

Docket No. A2010-2

ORDER DISMISSING APPEAL

(Issued April 27, 2010)

I. INTRODUCTION AND SUMMARY

On December 29, 2009, Don Ciavarra (Petitioner) petitioned the Commission seeking review of the Postal Service's actions regarding the Sundance post office.¹ The Commission gave notice of the appeal in Order No. 395, issued January 21, 2010.² The Postal Service subsequently filed a responsive pleading, indicating that no

¹ The petition for review was filed in the form of a letter and was docketed January 8, 2010. A second petition, dated January 9, 2010 and filed January 21, 2010, was submitted by Renee Mestan. This Order addresses both petitions (Petitions). Both Petitions make reference to the Sundance post office. Petitioner also refers to the facility as the Sundance Plaza Station. See Participant Statement from Don Ciavarra, January 29, 2010 (Participant Statement). For purposes of this Order the facility will be referred to as the Sundance post office.

² Notice and Order Accepting Appeal and Establishing Procedural Schedule, January 21, 2010 (Order No. 395).

administrative record would be forthcoming because no final decision to close the Sundance post office has been made.³ The Postal Service maintains that while the retail services provided at Sundance post office are suspended, customers may access the same services 1.3 miles away at the Steamboat Springs post office. The Postal Service provides written materials indicating that plans exist to construct a new consolidated post office by 2011. *Id.*, Attachment. The Commission finds that these actions do not constitute a closing under 39 U.S.C. 404(d), but rather a rearranging of retail facilities within the community.

II. PROCEDURAL HISTORY

On August 25, 2009, a “Dear Postal Customer” letter was placed in customers’ post office boxes informing them that the Postal Service was considering relocating the services offered at the Sundance post office to the Steamboat Springs post office. Attached to the letter was a questionnaire to be completed and returned by August 31, 2009.

On December 10, 2009, the Postal Service posted a customer notice in the Sundance post office lobby stating that retail services would cease after January 15, 2010, and that post office box service would remain until further notice. On December 29, 2009, the Commission received a petition for review regarding the notice posted in the Sundance post office lobby. The filing included a copy of the posted customer notice and a newspaper article regarding the matter. The Commission noticed and established a procedural schedule for the appeal on January 21, 2010. On January 11, 2010, the Petitioner filed a motion to suspend the Postal Service’s decision to close the Sundance post office. The Postal Service did not file a response.

On February 1, 2010, the Postal Service filed its responsive pleading arguing that the Commission lacks subject matter jurisdiction to review its decisions regarding stations and branches. *Id.* at 1. The Postal Service adds that the Sundance post office

³ Notice of United States Postal Service, February 1, 2010 (Notice).

has not been discontinued but suspended. *Id.* at 2. The Postal Service urges the Commission to dismiss this matter *sua sponte*. *Id.*

Attached to the Notice is a letter from the Postal Service to U.S. Senator Mark Udall of Colorado. *Id.*, Attachment. The letter provided additional details concerning the facilities at issue.

The Postal Service contends that a consolidated facility is capable of continuing to provide a high level of customer service and acknowledges its continued support of plans by a local developer to construct a new post office by 2011. The letter expresses concern for the issues raised by city officials and customers and indicates that the Postal Service is attempting to negotiate a new lease agreement at the Sundance post office so that the 2,500 post office boxes may remain.

III. PARTICIPANT PLEADINGS

Petitioner argues that the Postal Service has failed to follow the proper procedures for closing a post office. He contends that the Postal Service never posted its final determination to close the Sundance post office. Petitioner adds that there were no public hearings and that the effect on the community was never considered by the Postal Service in making its decision. Participant Statement at 2.

On February 4, 2010, the Public Representative filed a statement raising several issues regarding the Postal Service's actions concerning the Sundance post office.⁴

The City of Steamboat Springs (City) filed a brief in support of the petition objecting to the decision.⁵ The City points out that the Steamboat Springs post office is located at a congested intersection. City Brief at 3. The City contends that adding 2,500 post office boxes will present safety concerns for customers who will have to park across the street due to limited parking in the parking lot. *Id.* The City adds that the impact on the public and costs to mitigate customer concerns outweigh the costs of

⁴ Statement by the Public Representative Regarding Participant Presentations, February 4, 2010.

⁵ Brief In Support of Petition by the City of Steamboat Springs, February 11, 2010 (City Brief).

keeping the Sundance post office open until a long-term plan for a consolidated post office facility can be completed. *Id.* at 6.

IV. CONTROLLING STATUTORY PROVISIONS

The Postal Service is required to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.” 39 U.S.C. 101(b). Congress specified that no post office may be closed solely for operating at a deficit, *id.*, and established a statutory procedure that the Postal Service must follow prior to closing or consolidating a post office.

Under the terms of 39 U.S.C. 404(d)(1), prior to any decision as to the necessity for closing or consolidating any post office, the Postal Service must provide adequate notice so that persons served by the post office will have an opportunity to present their views. The law further requires the Postal Service to consider five enumerated factors in making a decision on whether to close a post office, the first of which is “the effect of such closing or consolidation on the community served by such post office.”

These statutory provisions establish as national policy that citizens should have the opportunity to convey their concerns to the Postal Service before their local post office is closed, and most important, that the Postal Service will fairly consider those concerns prior to making a decision to close that facility.

V. COMMISSION ANALYSIS

The Postal Service argues that the Commission lacks subject matter jurisdiction under 39 U.S.C. 404(d) to review its decision regarding the discontinuance of stations and branches. Notice at 1. The Postal Service suggests that since this docket pertains to a station and not an independent post office the Commission may simply dismiss this case. The Commission is not persuaded by this argument.

The Commission is dismissing the petition because the actions taken by the Postal Service represent a rearrangement of retail facilities in the community, and thus section 404(d) is inapplicable.

The Commission's order in Docket No. A82-10 is germane. See Docket No. A82-10, Order No. 436, June 25, 1982 (*Oceana*). In *Oceana*, several petitioners opposed the proposal to close the Oceana station contending it would force customers to use the nearest station which was overcrowded and inconvenient for persons walking because of heavy traffic. *Id.* at 3. In response, the Postal Service maintained that its decision to close the Oceana station must be considered in light of its planned network of postal facilities in the community. *Id.* at 4. The planned network included plans for a new post office four miles west of the Oceana station. Construction of the new post office would permit the Postal Service to move carriers from the nearby London Bridge station, thus creating room for additional retail counter space for patrons. *Id.* at 4-5.

The Commission found that the Postal Service's actions did not constitute a closing or consolidation of a post office, but rather, when viewed in light of the Postal Service's decisions regarding the area, a relocation of facilities within the community. The Commission reasoned that the Postal Service's actions constituted moving facilities and not the elimination of facilities. *Id.* at 7. The Virginia Beach community still had access to the services provided at the Oceana station, first at a nearby station and soon at a new post office. The Commission found that the Postal Service was not required to follow the requirements of section 404(d) when merely rearranging its retail facilities within a community. *Id.* at 1.

In the present case, the Postal Service provided notice to the public of its proposal to relocate services provided at the Sundance post office to the Steamboat Springs post office. Questionnaires were disseminated to customers and returned to the Postal Service. Based on customer concerns, the Postal Service modified its proposal to continue providing post office box service at the Sundance post office by extending the lease an additional 3 years. Notice, Attachment. Based on representations made by the Postal Service, the Steamboat Springs post office has sufficient space to accommodate a consolidated operation immediately.

Based on the record, it appears that the Postal Service has a planned network of retail facilities in the Steamboat Springs community. This planned network includes the

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Sundance post office which houses 2,500 post office boxes, the Steamboat Springs post office located 1.3 miles from the Sundance post office which provides retail services and post office box service, and plans for a new consolidated post office located south of the Sundance post office. It appears that at the present time the community is not losing any of its postal facilities and stands to gain a new post office in the future. As in *Oceana*, it appears that the Postal Service is rearranging retail facilities within the Steamboat Springs community.

The Commission finds that the Postal Service's actions in Steamboat Springs are a rearrangement of retail facilities in the community, and therefore are not subject to appeal under section 404(d). Therefore, this appeal is dismissed.

It is ordered:

The Petitions filed in this docket are dismissed as discussed in the body of this Order.

By the Commission.

Shoshana M. Grove
Secretary

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

Before Commissioners:

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

East Elko Station
Elko, Nevada

Docket No. A2010-3

ORDER DISMISSING APPEAL

(Issued June 22, 2010)

I. INTRODUCTION AND SUMMARY

On February 22, 2010, Simon Sanchez, Jr. (Petitioner) petitioned the Commission seeking review of the Postal Service's actions regarding the East Elko Station, Elko, Nevada.¹ The Commission established Docket No. A2010-3 and a procedural schedule for consideration of the Petitions.² The Postal Service subsequently filed a responsive pleading indicating that no final administrative record would be forthcoming and that the matter should be dismissed.³ The Postal Service

¹ Request for Appeal to Post Office Closure of the East Elko Station, Elko Nevada filed February 22, 2010 (Sanchez Petition). A second petition, dated February 22, 2010, was submitted by the Elko County Board of Commissioners. This Order which addresses both petitions is collectively referred to as the appeal.

² Notice and Order Accepting Appeal and Establishing Procedural Schedule, March 3, 2010, (Order No. 417).

³ Notice of United States Postal Service, March 9, 2010 (Notice).

maintains that the Commission lacks subject matter jurisdiction under 39 U.S.C. § 404(d) to review the discontinuance of stations and branches. Notice at 2. For the reasons discussed below, the appeal is dismissed.

II. BACKGROUND

On July 2, 2009, the Postal Service filed its Station and Branch Optimization and Consolidation Initiative (Initiative) in Docket No. N2009-1.⁴ During the proceeding, the issue regarding whether or not the same discontinuance procedures for closing a post office are required for closing a branch or a station surfaced. The Commission determined that Docket No. N2009-1 was not the appropriate venue to consider the matter but referenced the instant docket as a possible alternative.⁵

In Order No. 417, the Commission invited interested persons to comment on its interpretation of 39 U.S.C. § 404(d)(1). The Commission's interpretation accords customers of stations and branches the same treatment of post offices for purposes of appeal. In response, Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and the Association of Priority Mail Users, Inc. each filed a Notice of Intervention as full participants⁶ and jointly filed comments.⁷ The Postal Service also filed comments regarding the applicability of 404(d).⁸ Neither Petitioner filed a participant statement or brief in support of their petition.

⁴ Docket No. N2009-1, Request of the United State Postal Service for an Advisory Opinion on Changes in Postal Services, July 2, 2009.

⁵ Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, March 10, 2010 (Advisory Opinion).

⁶ Valpak Direct Marketing Systems, Inc. Notice of Intervention and Valpak Dealers' Association, Inc. Notice of Intervention, both filed March 29, 2010. On April 19, 2010, Association of Priority Mail Users, Inc. filed a Notice of Intervention accompanied by Association of Priority Mail Users, Inc. Motion for Late Acceptance of Notice of Intervention, April 16, 2010. The motion is granted.

⁷ Answering Brief of Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and Association of Priority Mail Users, Inc., April 19, 2010 (Valpak Brief).

⁸ Comments of United States Postal Service Regarding Jurisdiction Under (Current) Section 404(d), April 19, 2010 (Postal Service Comments).

III. PARTICIPANT PLEADINGS

Most customers of the East Elko Station are P.O. Box holders and live in the rural areas of Elko, Nevada. Sanchez Petition at 2. Walk-in customers tend to be employees of surrounding businesses, including stores in the mall, hotels and the casino. *Id.* The Petitioner similarly contends that the Postal Service never effectively sought customer opinions regarding closing the East Elko Station, and never considered the effect on the community. *Id.* at 1. He acknowledges that surveys were available to the public, however customers had to stand in line and request them. *Id.* at 2.

An answering brief was jointly filed by Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and the Association of Priority Mail Users, Inc. (Valpak). The brief addresses the disagreement between the Commission and the Postal Service regarding the applicability of section 404(d) to stations and branches. Valpak maintains that section 404(d) should be interpreted narrowly and only applies to closing post offices, not to closing stations and branches. Valpak Brief at 5. Valpak argues that the Commission in interpreting section 404(d) does not examine the text of 404(d), its legislative history, or the use by Congress of the same terminology in other contexts. *Id.* at 7. Valpak states that the first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. *Id.* at 8. Valpak contends that the language of section 404(d) is unambiguous and that the statutory scheme to limit appeals to post offices is a coherent and consistent policy. *Id.* at 9. Arguing for protection of managerial discretion, Valpak adds that the Postal Accountability and Enhancement Act vests broad managerial discretion in the Postal Service. Valpak maintains that the Postal Service must be allowed to exercise such discretion if it is to operate in a businesslike manner. *Id.* at 10.

In its comments, the Postal Service maintains that section 404(d) was enacted for the purpose of protecting small rural post offices from formal discontinuance. Postal Service Comments at 1-2. The Postal Service reiterates its position that the term "post office" should be interpreted in its technical sense as a facility supervised by a

postmaster. *Id.* at 9. The Postal Service argues that Congress was well aware of the longstanding distinction between post offices and other types of postal facilities when it enacted section 404(d). The Postal Service cites statements made by Senator Randolph expressing his opposition to the “‘indiscriminate closing of our rural and small town post offices’ as well as the decision ‘to create branches out of many post offices close to large cities.’” *Id.* The Postal Service reviews various Commission decisions under section 404(d) and the evolving definition of the term “post office.” In addition, citing case law, the Postal Service argues that the decisions suggest that the Postal Service’s technical or specialized interpretation of “post office” is eminently reasonable. *Id.* at 16. The Postal Service contends that appeal rights exist only for the consolidation or closing of an independent Post Office. *Id.* at 22.

The Public Representative argues that the appeal should be dismissed on the grounds that the discontinuance does not constitute a “closing” or “consolidation”, but rather a rearrangement of retail facilities within a community.⁹ The Public Representative maintains that the facts in the instant proceeding are similar to those in Docket No. A2010-2 (*Sundance*). In each instance, the post office slated for closure is near another postal retail facility. *Id.* at 3. The Public Representative states that customers who would otherwise be served by the East Elko Station would be served by the Elko Main Post Office. *Id.* at 3-4. The Public Representative adds that the facilities affected in the present case are approximately 1.5 miles apart, while in *Sundance*, the distance between the facilities was 1.3 miles. *Id.* at 4. The Public Representative acknowledges the distinction between the present case and *Sundance*. He states that the Commission’s decision in *Sundance* was partly based on the Postal Service’s representations that a new postal facility was being constructed for customers in contrast to this case where there is no reference to the construction of a new post office. *Id.* at 4. The Public Representative also maintains that this proceeding may not be the

⁹ Reply Brief of the Public Representative, May 4, 2010 (Public Representative Reply).

appropriate venue for resolving the question of whether stations and branches are post offices within section 404(d). *Id.* at 5.

IV. CONTROLLING STATUTORY PROVISIONS

The Postal Service is required to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.” 39 U.S.C. 101(b). Congress specified that no post office may be closed solely for operating at a deficit, *id.*, and established a statutory procedure that the Postal Service must follow prior to closing or consolidating a post office.

Under the terms of 39 U.S.C. 404(d)(1), prior to any decision as to the necessity for closing or consolidating any post office, the Postal Service must provide adequate notice so that persons served by the post office will have an opportunity to present their views. The law further requires the Postal Service to consider five enumerated factors in making a decision on whether to close a post office, the first of which is “the effect of such closing or consolidation on the community served by such post office”. 39 U.S.C. 404(d)(2)(A)(i).

These statutory provisions establish a national policy that citizens should have the opportunity to convey their concerns to the Postal Service before their local post office is closed, and most important, that the Postal Service will consider fairly those concerns prior to making a decision to close that facility.

V. COMMISSION ANALYSIS

According to the Postal Service, the Commission lacks subject matter jurisdiction under 39 U.S.C. § 404(d) to review its decision regarding the discontinuance of the East Elko Station. Notice at 1. The Postal Service suggests that since this docket pertains to a station and not an independent post office the Commission may simply dismiss this case. *Id.* at 2. The Commission is not persuaded by this argument. Nonetheless, it concludes that the appeal should be dismissed.

The Commission maintains its position that section 404(d) is applicable to the discontinuance of post offices, branches and stations. The Commission believes that section 404(d) was enacted to give persons served by postal retail facilities being considered for closure an opportunity to comment on the closing and to appeal the decision. The general public is largely unaware of the technical differences between a station, branch, community post office or main post office.¹⁰ The discontinuance of a Postal Service operated retail facility has similar effects on patrons regardless of how the Postal Service might classify the facility. *Id.* at 66.

The Postal Service and Valpak argue that the Commission's interpretation of section 404(d) has ventured far from what Congress envisioned, thus broadening the Commission's jurisdiction. The Postal Service maintains that the first time in which the Commission signaled its claimed jurisdiction to consider all station and branch discontinuance decisions was in the 2009 testimony provided in an oversight hearing by a member of the Commission's staff. The Postal Service's statement is incorrect. In 1982, the Commission accepted an appeal regarding the closing of the Oceana Station, Virginia Beach Virginia.¹¹ The Postal Service's argument that the appeal be dismissed because the facility in question was a classified station was rejected. However, the Postal Service explained that closing the Oceana Station, building a new facility, and shifting services and employees around the Virginia Beach area were all a part of its plan to enhance the postal network in Virginia Beach. *Id.* at 4. The Commission held that the Postal Service's decision to close the Oceana Station be considered within the context of the Postal Service's other actions in the area and therefore was a rearranging of postal facilities in the community and not a closing.

Similarly, in *Ecorse* the Commission considered whether the Postal Service's decision to close one facility, Ecorse Classified Branch, located in close proximity to

¹⁰ Advisory Opinion, *supra*, at 61.

¹¹ Docket No. A82-10, Order Dismissing Docket No. A82-10, June 25, 1982 (Oceana).

another facility, was covered by section 404(d).¹² In *Ecorse*, the Postal Service built a new facility located 1.7 miles away from the Ecorse Branch. *Id.* at 4. The Postal Service decided to close the Ecorse Branch since customers could obtain the same services 1.7 miles away at the new facility. The Petitioner argued that the Postal Service had failed to follow the appropriate closing procedures. *Id.* at 2. In light of opening the new facility in close proximity to the Ecorse Station, the Commission reasoned that the community was not losing service, and therefore the Postal Service's actions did not amount to the type of closing envisioned by section 404(d). The Commission held that the actions regarding the Ecorse Branch were a part of a larger retail facility realignment plan servicing the community and the Postal Service was not obligated to follow the formal post office closing requirements. *Id.* at 6.

In Elko, Nevada, there were two postal facilities, the East Elko Station and the Elko Main Post Office. The two facilities were just off the same street, approximately 1.5 miles apart. The Postal Service decided to discontinue services at the East Elko Station requiring customers to utilize the Elko Main Post Office. Petitioner Sanchez contends that the Postal Service did not consider the effect that closing the East Elko Station would have on the community and therefore failed to meet the requirements of section 404(d). The Public Representative contends that section 404(d) is not applicable to the circumstances before the Commission because a closing as envisioned by section 404(d) has not occurred. Public Representative Reply at 2-4.

Here, the Postal Service has decided to close a station located 1.5 miles away from the main post office which offers the same services. In *Ecorse*, the Postal Service decided to close the Ecorse Branch which was located 1.7 miles away from a newly constructed post office offering customers the same services. In this case, while there is no new facility, the East Elko Station is in close proximity to a post office where P.O. Boxes are available and other services may be obtained. Therefore, the East Elko Station customers are not losing access to the postal services offered in their

¹² Docket No. A2007-1, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007 (*Ecorse*).

Docket No. A2010-3

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community. The Commission considers the close proximity of the Elko Main Post Office, and the fact that the same services are available there to be a chief justification for closing the East Elko Station. For these reasons, the Commission concludes that the procedural requirements of section 404(d) do not apply.

Notwithstanding differences in interpreting section 404(d), the Commission strongly encourages the Postal Service to provide similar notice to patrons of stations and branches as is required, under the Postal Service's view, to patrons of post offices. Patrons should be given an opportunity to present their views prior to a formal determination to discontinue service. Providing such notice does not prevent the Postal Service from promptly taking whatever action it deems appropriate, including the closing of such facilities.

It is Ordered:

The Petitions filed in this docket are dismissed as discussed in the body of this Order.

By the Commission.

Shoshana M. Grove
Secretary

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

Before Commissioners:

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

Ukiah Main Post Office
Ukiah, California

Docket No. A2011-21

ORDER GRANTING MOTION TO DISMISS

(Issued August 15, 2011)

I. INTRODUCTION AND SUMMARY

On July 14, 2011, Michael E. Sweeney and the Save Ukiah Post Office Committee (Petitioners) petitioned the Commission for review of the Postal Service's decision to close the Ukiah Main post office.¹ In Order No. 761, the Commission gave notice of the appeal and directed the Postal Service to file the administrative record or a responsive pleading.²

¹ Petition for Review of Closure and Consolidation of Ukiah Main Post Office and Application for Suspension of Determination, July 14, 2011 (Petition).

² Notice and Order Accepting Appeal and Establishing Procedural Schedule, July 18, 2011 (Order No. 761).

On July 29, 2011, the Postal Service filed a motion to dismiss this proceeding.³ On August 10, 2011, the Petitioner filed a brief opposing the discontinuance of service at the Ukiah Main post office.⁴ On August 11, 2011, the Public Representative filed a reply brief concluding that the Postal Service's actions are outside the Commission's review jurisdiction.⁵

The Postal Service's Motion to Dismiss is granted.

II. PARTICIPANT PLEADINGS

Petitioner. Petitioner contends that the Commission should set aside the Postal Service's decision regarding the Ukiah Main post office. Petition at 2. Petitioner argues that the Postal Service has failed to observe procedures required by 39 CFR 241.3 by not disclosing its written findings regarding the closing. *Id.* at 3. He adds that closing the Ukiah Main post office will cause substantial harm to customers and fails to provide any financial benefit to the Postal Service. Petitioner further explains that while the Postal Service refers to its actions as a "relocation," this is a *de facto* closure. *Id.* at 2.

Postal Service Motion to Dismiss. The Postal Service contends that this appeal should be dismissed because it is not within the Commission's jurisdiction. Motion to Dismiss at 1. The Postal Service asserts that the appeal concerns the relocation of a post office which is an event that falls outside the scope of 39 U.S.C. 404(d)(5). The Postal Service argues that the process for relocating retail operations within the community is governed by 39 CFR 241.4. *Id.* at 3.

The Postal Service explains that it plans to relocate retail operations from the Ukiah Main post office to the Ukiah Carrier Annex, a nearby site where currently there are no retail operations. *Id.* at 2. The Postal Service further indicates that there are

³ Motion of United States Postal Service to Dismiss Proceedings, July 29, 2011 (Motion to Dismiss).

⁴ Petitioners' Brief Opposing Closure and Consolidation of Ukiah Main post office, August 10, 2011 (Petitioner Brief).

⁵ Reply Brief of the Public Representative, August 11, 2011 (PR Reply Brief).

other alternate access options, including five stamp consignment sites located within 1 mile of the Ukiah Main post office. *Id.* The Postal Service argues that, in similar circumstances, other appeal proceedings have been dismissed by the Commission. *Id.* at 3-5.

Public Representative. The Public Representative agrees that the appeal should be dismissed. PR Reply Brief at 6. The Public Representative contends that the Postal Service is not required to follow the section 404(d) closing procedures when merely rearranging its retail facilities in a community. *Id.* at 5. She adds that the community will not experience a drop in the level of retail services currently offered. *Id.*

III. COMMISSION ANALYSIS

Petitioner contends that the Postal Service is closing the Ukiah Main post office and in doing so has failed to follow the procedures set forth in 39 CFR 241.3. Petition at 3. The Postal Service, on the other hand, argues that its decision to relocate postal operations from one retail facility to a nearby facility is not covered by section 404(d). Motion to Dismiss at 3. Both the Postal Service and Public Representative maintain that the Commission lacks jurisdiction over this matter and that this appeal should be dismissed. *Id.* at 3; PR Reply Brief at 6. The Commission is dismissing this appeal because the actions taken by the Postal Service represent a relocation of retail facilities in the community, and thus section 404(d) is inapplicable.

Order No. 37 is relevant to the issue presented here.⁶ In Order No. 37, the Commission considered whether the Postal Service's decision to close one facility, the Ecorse, MI Classified Branch, when it opened a new facility in close proximity, was a closing under section 404(d). *Id.* at 4. The Postal Service planned to close the Ecorse Branch since customers could obtain the same services 1.7 miles away at the new facility. In light of offering retail services at the new facility and its close proximity to the

⁶ Docket No. A2007-1, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007 (Order No. 37).

Ecorse Branch, the Commission concluded that the community was not losing access to postal services and that the Postal Service's actions did not amount to a closing subject to section 404(d) review. The Commission held that the actions regarding the Ecorse Branch were a retail facility relocation within the community and the Postal Service was not obligated to follow the formal post office closing requirements. *Id.* at 6.

Here, the Postal Service has decided to close the Ukiah Main post office and transfer the retail operations and services to the Ukiah Carrier Annex. The Ukiah Carrier Annex is located 1 mile from the Ukiah Main post office and currently does not provide any retail services. After retail services are transferred to the Ukiah Carrier Annex, customers will continue to have the same level of access to retail services in the community. The Commission finds that the Postal Service's actions in Ukiah were a relocation of retail services within the community, and therefore are not subject to appeal under section 404(d).

It is ordered:

The Motion of the United States Postal Service to Dismiss Proceedings, filed July 29, 2011, is granted.

By the Commission.

Shoshana M. Grove
Secretary

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

Before Commissioners:

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

Village Station
Pinehurst, North Carolina

Docket No. A2011-49

ORDER AFFIRMING DETERMINATION

(Issued December 12, 2011)

I. INTRODUCTION

On August 18, 2011, John M. Marcum and Bettye M. Marcum (Petitioners) filed a petition with the Commission seeking to appeal the Postal Service's determination to close the Village station in Pinehurst, North Carolina (Village station).¹ The Petition included a request for suspension of the Postal Service's decision pending review. *Id.* The Commission also docketed an appeal and request for suspension from Ralph

¹ Petition of John M. Marcum and Bettye M. Marcum, postmarked August 12, 2011 (Petition or Marcum Petition). A later filing by Petitioners includes an attachment referred to in, but omitted from, the Petition. See Appeal and Petition for Review, August 22, 2011 (Revised Petition). The attachment is a copy of a Public Notice posted by the Postal Service at the Village station.

Redmond Jr.² After reviewing the record in this proceeding, the Commission affirms the Final Determination to close the Village station.

II. PROCEDURAL HISTORY

On August 22, 2011, the Commission established Docket No. A2011-49 to consider the appeal, designated a Public Representative, and directed the Postal Service to file the Administrative Record and any responsive pleadings.³ On September 2, 2011, the Postal Service filed a notice, a copy of an Administrative Record, and an application for non-public treatment of certain portions of the record.⁴ The Notice supports the Postal Service's decision to close the Village station. It also challenges Commission jurisdiction over the appeal and related matters, including any obligation to file an Administrative Record complying with the standards for cases involving post offices and applicability of other procedural requirements. These challenges stem from the Postal Service's position that a station is a retail unit subordinate to a post office and that section 404(d) and implementing regulations therefore do not apply to this situation. Notice at 1-2.⁵

² See Appeal and Petition for Review from Ralph Redmond Jr., August 26, 2011 (Redmond Petition). The Redmond Petition is identical to the Marcum Petition, except for the name and contact information. In a separate filing, Robert and Ruth Stolting annotate the Marcum Petition with an expression of support for Petitioners' position. See Letter from Robert and Ruth Stolting Regarding the Pinehurst Village Station, Pinehurst, NC 28370, September 1, 2011. The Commission did not receive any additional filings from Mr. Redmond or the Stoltings.

³ Notice and Order Accepting Appeal and Establishing Procedural Schedule, August 22, 2011 (Order No. 819).

⁴ United States Postal Service Notice and Application for Non-Public Treatment, September 2, 2011 (Notice). The Administrative Record was submitted with the Notice and included, as Item No. 47, the Final Determination to Close the Village Station, NC Station and Continue to Provide Service by Independent Post Office (Final Determination). The Application of the United States Postal Service for Non-public Treatment of Materials appears as Exhibit 1 to the Notice.

⁵ The Commission has repeatedly rejected the Postal Service's jurisdictional arguments based on the Postal Service's internal categorization of retail facilities. See Docket No. A2010-3, Order No. 477, Order Dismissing Appeal (East Elko), June 22, 2010, at 5-6.

On September 23, 2011, Petitioners filed a brief in support of their appeal, including a statement opposing the application for non-public treatment.⁶ On October 7, 2011, Petitioners filed a motion renewing their earlier request for suspension of the Postal Service's decision to close the Village station on grounds that re-opening it would not entail undue effort.⁷

On October 14, 2011, the Postal Service filed an opposition to the Motion.⁸ The opposition reiterates the Postal Service's position that the Commission lacks jurisdiction over station consolidations or closings. *Id.* It further asserts the Commission has not granted suspensions in previous cases involving stations and branches and claims a delay will frustrate plans to close the Village Station. *Id.* On October 27, 2011, Petitioners filed a response to the Postal Service's opposition.⁹

III. BACKGROUND

The Village station is located in Pinehurst, North Carolina. The Postal Service has determined to close the Village station and provide delivery and retail services at Pinehurst post office, located approximately 2 miles away.¹⁰ Final Determination at 2. The Village station provides service 22.5 hours a week, Monday through Friday from 10

⁶ Petitioner(s) Marcum Brief in Support of their Petition for Appeal and Suspension, September 23, 2011 at 2 (Marcum Brief). A Commission rule allows access to non-public material under certain conditions.

⁷ Motion of Petitioners John and Bettye Marcum for an Order Suspending the Decision to Close the Pinehurst Station, October 7, 2011 (Marcum Motion). Petitioners renewed this request in their brief. The last day of business at Village station was August 19, 2011. See Revised Petition, Attachment.

⁸ Response of United States Postal Service to Motion of Petitioners John and Bettye Marcum for an Order Suspending the Decision to Close Pinehurst Station, October 14, 2011 (Postal Service Response to Marcum Motion).

⁹ [Marcum] Motion for Late Acceptance and Response to USPS Comments, October 27, 2011 (Marcum Response). The Commission grants the Motion for Late Acceptance.

¹⁰ Mileage estimates in the Administrative Record vary slightly. No estimate is more than 2 miles or less than 1.6 miles. See, *for example*, Final Determination at 2 (section I) referring to 1.9 miles and Final Determination at 4 (section VI) referring to 1.9 miles. MapQuest estimates the driving distance between the Village station and the Pinehurst post office to be approximately 1.9 miles (4 minutes driving time).

a.m. to 2:30 p.m. It is closed on Saturday. *Id.* The lobby is open 24 hours a day, Monday through Saturday. *Id.* The Village station has 1291 post office box or general delivery customers and no delivery customers.¹¹ *Id.* Retail services include the sale of stamps, stamped paper, and money orders; special services; and acceptance and dispatch of all classes of mail. *Id.* Retail window activity averaged 176 transactions and accounted for 147 minutes of daily retail workload. *Id.* Office receipts for the last 3 years have been \$316,950 in FY 2008; \$320,509 in FY 2009; and \$361,599 in FY 2010. *Id.*

On March 25, 2011, the Postal Service distributed 1291 questionnaires to delivery customers. It also made questionnaires available over the counter to retail customers. *Id.* Four hundred forty-four questionnaires were returned. *Id.* The Postal Service characterizes questionnaire responses addressing the alternative service as 4 favorable; 89 unfavorable; and 351 expressing no opinion. *Id.* The Postal Service also states that on April 10, 2011, it received a petition with 55 signatures supporting retention of the Village station. *Id.*¹²

Upon implementation of the Final Determination, the Postal Service intends to provide delivery and retail services to former Village station patrons at Pinehurst post office. *Id.* Window service hours at Pinehurst post office are 8:30 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 12 noon on Saturday. *Id.* Customers who currently have a post office box at the Village station may opt to retain their box, but boxes will be physically relocated to the Pinehurst post office. The cost of boxes at the replacement facility will be the same. *Id.* at 3 (Response to Concern No. 8). Former Village station patrons also may opt for street delivery via a carrier route emanating from the Pinehurst post office. *Id.*

¹¹ Petitioners indicate that the number of boxes, until recently, was close to 2000, but the closing notice prompted customers to make delivery decisions in advance of the closing. See Marcum Brief at 4.

¹² See also Administrative Record, Item No. 27.

IV. PARTICIPANT PLEADINGS

Petitioners' positions. In their brief, Petitioners incorporate and expand on concerns set forth in their original filing.¹³ They reiterate their claim that the Postal Service did not follow notification, posting, and other requirements, or respond to the motion for suspension. Marcum Brief at 1.¹⁴ They also assert that the Postal Service's redaction of data and information in the Administrative Record has severely handicapped their efforts, and provide several reasons why the application for non-public treatment should be denied. *Id.* at 2.

Station/office distinction. Petitioners take issue with the Postal Service's distinction between post offices and stations. They note that the Village station location has been in continuous operation for 116 years, most of that as the only Pinehurst post office. *Id.* at 3. They assert that the replacement office was built in the early 1990s, that both facilities have been well utilized ever since, and that the population has quadrupled.¹⁵ *Id.* Thus, they consider the Postal Service's distinction between station and post office "quite arbitrary," and contend that one or both facilities could be treated as a main post office by any reasonable definition. *Id.*

Impact on business. Petitioners assert that many of the Postal Service's responses to redacted letters frequently state that there "is no impact on the business community." *Id.* They contend this is completely contrary to the record, which they view as replete with numerous complaints from business owners. *Id.* Moreover, they note that have recently received 15 letters from business owners in the village center seeking to join their appeal. *Id.*

¹³ Petitioner(s) Marcum Brief in Support of their Petition for Appeal and Suspension, September 23, 2011 (Marcum Brief). The Marcum Brief includes a list (Annex) of Pinehurst businesses Petitioners indicate support their appeal. See also Errata Notice, September 28, 2011 (Errata).

¹⁴ Petitioners ask that the Motion for Suspension be granted immediately and renew their request for the duration of this proceeding. Marcum Brief at 1.

¹⁵ Petitioners also say it is not clear whether the newer facility on Blake Road was coordinated under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470, *et seq.* (NHPA). Petition at 2 (Concern No. 8).

Alternative economic analysis. Petitioners present an alternative analysis challenging the Postal Service's estimate that it will save \$66,000 by closing the Village station. *Id.* at 4. Their approach results in costs of over \$325,000 associated with the closing, which they say swamps the estimated savings. *Id.* and Errata. Petitioners' estimate, in the absence of accessing redacted data, is based on conversations with District (Charlotte, NC) postal officials about assumptions underlying the Postal Service's estimate, a Government Accounting Office (GAO) figure for curbside delivery, and personal observations. They assert the Postal Service's estimate assumed all current box holders would transfer their box service to the replacement facility; there would be no curbside delivery cost; and all window counter business would go to the replacement facility. *Id.* at 4.

Petitioners assert that in the months leading up to the closure, many box holders had already withdrawn, erecting their own mailboxes. *Id.* They acknowledge that they do not have precise data, but say it appears that nearly half the box renters have withdrawn and have erected mailboxes or are using the service at the gated community. *Id.* Petitioners also estimate that at approximately \$100 average yearly rental per box, and a presumed loss of one thousand customers (half the original boxes), there is a loss of \$100,000. Using \$225 per customer for curbside delivery (based on GAO data) and some loss in window service revenue (based on patrons switching parcel mailings to a private service), they estimate a likely drop in revenue of more than \$325,000, far exceeding the Postal Service's savings estimate of \$66,000. *Id.* They observe: "Looked at another way, the USPS-owned station is fully depreciated, had one staff member, and before the closing was initiated was taking in perhaps a quarter of a million dollars—a nice profit under any criteria." *Id.*

Impact on historic district. Petitioners claim the closing has had a negative impact on the historic district of Pinehurst. They say that the village station has been the cultural and business center of the village for over a century and is the main magnet that draws residents to the village center. *Id.* at 5. Petitioners assert that the Village station is within a national historic district. Therefore, they believe the Postal Service

should have considered the requirements of the National Historic Preservation Act (NHPA).

Petitioners acknowledge that the Postal Service faces difficult circumstances in trying to plan for achieving profitability; however, they assert that the goal of closing small, underutilized and unprofitable stations is not applicable in the case of the Village of Pinehurst. Instead, they contend there is a brisk business in the Village station, with over a thousand daily users, and over 120 more through the window, and it returns a profit based on Postal Service information provided prior to closure. *Id.*

Postal Service. The Postal Service maintains its position that this appeal concerns a station, not a Post Office, for purposes of 39 U.S.C. § 404(d).¹⁶ Postal Service Comments at 1. Its view is that Congress knowingly used “Post Office” in its technical sense, thereby excluding stations and branches, as demonstrated in the legislative history, and that Congress had used “Post Office” in its technical sense for well over a century. Accordingly, it claims the Commission lacks jurisdiction to hear Petitioners’ appeal. *Id.* at 2.

The Postal Service also claims the procedural requirements of 39 U.S.C. § 404(d) do not apply because the discontinuance of the Village station does not qualify as a closure envisioned by 39 U.S.C. § 404(d). It asserts, and indicates the Commission has recognized, that section 404(d) procedural requirements do not apply where postal customers do not lose access to postal services due to the location of alternate retail facilities in “close proximity” to the discontinued station. *Id.* (internal citations omitted). In this instance, the Postal Service asserts that affected customers will not lose access to postal services because they will continue to have access to the Pinehurst post office, located approximately 1.6 miles from the Village station, to nearby alternate access, including at Wells Fargo Bank, or Stamps by Mail. *Id.* at 2-3 (*citing* Exhibit 3).

¹⁶ The Postal Service states that these arguments are also found in its comments in PRC Docket Nos. A2010-3 and RM2011-13. Postal Service Comments at 1 (internal citations omitted).

Moreover, the Postal Service claims that even assuming the section 404(d) requirements apply in the context of the discontinuance of the Village station, it has satisfied the salient provisions of section 404(d) because it distributed questionnaires on March 25, 2011 notifying customers of the possible discontinuance of the Village station and inviting comments on the potential change. *Id.* at 3. It says it also made the questionnaires available over the counter for all interested retail customers. *Id.* It asserts that this effort furnished customers well over 60 days' notice of the Postal Service's intention to consider discontinuance of the facility. It points to receipt of 444 customer responses to the questionnaires as confirmation of notice and the extensive input from customers. *Id.* The Postal Service also says that upon making the final decision to discontinue the Village station, it informed the community of the decision through a public notice posted on July 8, 2011. *Id.*

The Postal Service asserts that the Administrative Record demonstrates that it considered all of the pertinent criteria of section 404(d), including the effect on postal services, the community, and employees, and the economic savings arising from the discontinuance. *Id.* It states that customers notified the Postal Service of their concerns related to postal services, including the conditions of other nearby postal facilities; the community, including the effect on senior citizens and local businesses; and employees and, as reflected in the Administrative Record, it considered these concerns during the decision-making process. *Id.* It states affected postal employees will be reassigned to other postal facilities in full accordance with agreements between the Postal Service and employee organizations. *Id.* Finally, it states it provided a breakdown of the costs that serve as a basis for its estimate of economic savings. *Id.*

In response to Petitioners' assertions regarding lack of compliance with the NHPA, the Postal Service asserts that any arguments based on the NHPA are beyond the Commission's jurisdiction. *Id.* at 4 (n.7), *citing* 39 CFR § 241.4(d).¹⁷ Instead, its

¹⁷ This regulation, captioned "Discontinuance of post offices; historic preservation" provides: "(1) It is the policy of the Postal Service, by virtue of Board of Governors Resolution No. 82-7, to comply with Section 106 of the general provisions of the National Historic Preservation Act, 16 U.S.C. 470, *et seq.*,

position is that compliance is an internal Postal Service matter subject to the scrutiny of the Postal Service Board of Governors. *Id.* Moreover, it claims Petitioners' evidence regarding changes in local business traffic after the closure of the Village station (which it characterizes as anecdotal) was developed after the Postal Service made its decision to discontinue the facility and is not part of the record, and thus could not be considered in this appeal, assuming it were within the scope of the Commission's jurisdiction. *Id.* at 4-5.

The Postal Service also notes that Petitioners make representations regarding the number of former Village station box customers who chose curbside delivery after the Village station's closure in connection with their claim that the economic savings estimate is inaccurate. It contends that Petitioners' information, like the information regarding local business impact, was developed after the Postal Service made its final determination regarding the discontinuance of the Village station and is not part of the record, and thus cannot be considered in this appeal. *Id.* at 5.

V. COMMISSION ANALYSIS

The Commission's authority to review post office closings is provided by 39 U.S.C. § 404(d)(5). This section requires the Commission to review the Postal Service's determination to close or consolidate a post office on the basis of the record that was before the Postal Service. The Commission is empowered by section 404(d)(5) to set aside any determination, findings, and conclusions that it finds 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 in the record. Should the Commission set aside any such

Executive Order 12072, and Executive Order 13006. Therefore, any facility project that will have an effect on cultural resources will be undertaken in accordance with that policy. (2) Any action involving the closing or other discontinuance of a post office shall be undertaken only in accordance with 39 U.S.C. 404(b) [sic] and 39 CFR 243.1. In the event a facility action is subject to both this section, and either the NHPA or the post office discontinuance requirements, all comment periods and other public participation matters shall be governed by those statutes."

determination, findings, or conclusions, it may remand the entire matter to the Postal Service for further consideration. Section 404(d)(5) does not, however, authorize the Commission to modify the Postal Service's determination by substituting its judgment for that of the Postal Service.

The Commission and the Postal Service have reached different conclusions about the status of branches and stations under section 404(d). The Commission's position is the legislative history of this provision supports coverage of retail facilities, such as stations and branches. The Postal Service concludes otherwise, asserting that Congress used the term "post office" in a technical sense and that its administrative designations are dispositive. Both agencies, notwithstanding their institutional differences on the scope of section 404(d), have attempted to serve the interests of postal patrons affected by closing and consolidations. One example of this effort is that the Postal Service is according patrons of stations and branches some of the procedural rights extended to patrons of post offices and is providing, in an Administrative Record, some of the information and data provided in post office closings. This backdrop informs the Commission's finding in this Order.

A. Notice to Customers

Section 404(d)(1) requires that, prior to making a determination to close any post office, the Postal Service must provide notice of its intent to close. Notice must be given 60 days before the proposed closure date to ensure that patrons have an opportunity to present their views regarding the closing. The Postal Service may not take any action to close a post office until 60 days after its determination is made available to persons served by that office. 39 U.S.C. § 404(d)(4). A decision to close a post office may be appealed within 30 days after the determination is made available to persons served by that post office. 39 U.S.C. § 404(d)(5).

Petitioners contend that the notice, including notice of a right to petition, in this case did not equate to that provided to patrons of post offices. Moreover, no community meeting was held. The Commission's position supports full section 404(d) procedural

rights for patrons of stations and branches. On the record developed here, however, the Commission concludes that Petitioners and other patrons had actual notice of the Postal Service's intentions to close the Village station and of the replacement services. They also had an opportunity to comment via questionnaire. Administrative Record Item Nos. 31 and 32. Based on a review of the record, the Commission finds that the Postal Service has satisfied the notice requirements of 39 U.S.C. § 404(d).

B. Other Statutory Considerations

The Postal Service must consider the following factors in making a determination on whether to close a post office: the effect on the community; the effect on postal employees; whether a maximum degree of effective and regular postal service will be provided; and the economic savings to the Postal Service. 39 U.S.C. § 404(d)(2)(A).

Effect on the community. The Postal Service typically solicits input from the community affected by a potential post office closing by distributing questionnaires to customers and holding a community meeting. In this case, the Postal Service distributed questionnaires to post office customers and made questionnaires available over the counter. It did not hold a community meeting. Administrative Record Item No. 26.

The Postal Service asserts that it responded to concerns about the effect on the community by informing patrons that they could elect to keep their post office box address; elect a street delivery option (which would entail a change of address); or avail themselves of various alternative means of access to retail services. Postal Service Comments at 5-6.

Pinehurst Village, which includes the Village station, is a national historic district. Petitioners specifically note the station's location in the historic designation and the apparent applicability of certain requirements under the NHPA. Petition at 2. Some respondents to the questionnaire contend that closing Village station would detract from the ambiance and historic heritage of the Village of Pinehurst. See, e.g., Administrative

Record Item No. 401B. Others express concern that closing will have a negative impact on local businesses. See, e.g., *id.* at Item No 374:

The Postal Service addresses these concerns in two ways. First, it asserts that compliance with the NHPA and related regulations is a matter between it and the Board of Governors. Second, the Postal Service maintains that customer responses to questionnaires indicate that the discontinuance of the Village station would not have an adverse effect on local businesses. Postal Service Comments at 4, *citing* Administrative Record, Item No. 33 at 3. Moreover, it opposes what it characterizes as “anecdotal evidence” regarding changes in local business traffic following the closure of the Village station as outside the record, and thus ineligible for consideration in this appeal. Postal Service *Id.* at 4-5.

The Commission’s role in appeals under section 404(d)(5) does not include responsibility for enforcing the NHPA. The Commission’s review is limited to the record developed by the Postal Service in reaching its determination. 39 U.S.C. § 404(d)(5). In this case, Petitioners refer to post-record developments which the Commission is not statutorily permitted to rely upon.

Having reviewed the record, the Commission concludes that the Postal Service has adequately considered the effect of closing on the community. For example, in response to concerns that closing will have a detrimental effect on the business community, the Postal Service stated that “[b]usinesses require regular and effective postal services, . . . Questionnaire responses revealed that customers will continue to use local businesses if the post office is discontinued.” Final Determination at 3. Regarding the needs of the community, the Postal Service stated: The proposed alternate delivery service will meet the mailing needs and service needs of the community in a more cost effective manner.” *Id.* at 2.

Effect on postal employees. The Final Determination states that any employees assigned to this facility will be relocated. Final Determination at 4. The Commission agrees that this satisfies the statutory requirement in 39 U.S.C. § 404(d)(2)(A)(ii) that the Postal Service consider the effect on employees.

Effective and regular service. The Postal Service plans to provide Village station patrons with delivery and retail service out of the Pinehurst post office. Final Determination at 2. Post office box customers may retain their previous addresses, but the boxes will be physically relocated to the main post office. *Id.* at 3. The Postal Service also claims other retail outlets are available. *Id.* at 4.

Based upon its review of the record, the Commission concludes that the Postal Service has satisfied the requirement that it consider whether effective and regular service will be provided to customers as required by 39 U.S.C. § 404(d)(2)(A)(iii).

Economic savings. The Postal Service estimates that annual savings of \$66,643 will be generated from the closure. *Id.* at 4. This estimate is based solely on employee salary and benefits totaling \$66,643. It does not include any annual lease costs, since the Postal Service owns the building. *Id.* (section IV). It also does not include any one-time costs (such as relocation of boxes) or the cost of replacement service, despite the fact that these costs will be incurred.

Petitioners assert that the economic savings estimates are flawed because it assumes all customers will elect box delivery at the replacement facility, and none will elect street delivery. Marcum Brief at 4-5. Some respondents to the questionnaire also question the omission of any consideration of patrons' costs for gas, time, and new stationery. See, e.g., Administrative Record Item Nos. 384A, 402A and 392B.

The Commission traditionally has not expected the Postal Service to account for patrons' costs. However, it has repeatedly encouraged the Postal Service to improve the consistency, accuracy and transparency of its savings estimate. Here, the Postal Service notes that post office boxes will be relocated to the replacement office, but does not provide an estimate for this one-time cost or otherwise account for it in the savings estimate. In addition, there is neither offsetting estimate for the cost of replacement service, nor recognition of the continuation of the employee's salary at another location.

Postal Service savings' estimates should reflect additional costs incurred to provide the alternate service. That apparently was not done in this instance. Village station is closed. The Final Determination includes Postal Service's estimated

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economic savings. Given the Commission's conclusion that the alternate service will be adequate and reliable, under the circumstances, the Commission sees no benefit from a remand solely on this issue.

VI. CONCLUSION

Based on its review of the record before it, the Commission concludes that the Postal Service has adequately considered all requirements of 39 U.S.C. 404(d). Accordingly, its determination to close the Pinehurst Village station is affirmed.

It is ordered:

The Postal Service's determination to close the Village station (Pinehurst, North Carolina) is affirmed.

By the Commission.

Ruth Ann Abrams
Acting Secretary

Chairman Ruth Y. Goldway, dissenting.

CONCURRING OPINION BY COMMISSIONER LANGLEY

In FY 2010, the Pinehurst Village Station increased revenues by \$41,090 over FY 2009 to \$361,599, a 12.8 percent increase. Although the Postal Service determines how it will allocate its resources across its network, I believe that a profitable retail postal facility is an important asset. This is especially true at a time when the Postal Service is facing significant financial shortfalls.

While I agree that the Postal Service met the most minimum requirements to notice a proposed closure, from the Record, it appears that it pre-judged the outcome of this discontinuance. The Notice to close the Pinehurst Village Station was posted at the facility on Friday, August 19, 2011, 12 days before the formal Final Determination was signed by Postal officials in Washington, DC. By posting the Notice in the Pinehurst office prior to the official affirmation at Postal Headquarters, customers and the general public were left with the impression that the Postal Service had pre-judged the outcome. Such action underscores concerns that discontinuance reviews do not take into consideration community input and concerns under 39 U.S.C. §404(d)(2)(A)(i).

I agree with Chairman Goldway that the Commission's review is limited to the record developed by the Postal Service in reaching its determination. 39 U.S.C. § 404(d)(5). And that in this case, Petitioners referred to post-record developments which the Commission is not statutorily permitted to rely upon. However, it is important for the Postal Service to ensure that post-closure of a postal retail facility does not adversely impact the community.

Lastly, as I have stated previously in past opinions, the Postal Service did not present a fully balanced cost/benefit analysis for closing this location. The Postal Service should take into consideration that a non-career postmaster relief (PMR) has been in charge of this facility since 2008, not an EAS-11 postmaster, and reflect the PMR's salary and benefits in its cost savings analysis.

Nanci E. Langley

DISSENT OF CHAIRMAN GOLDWAY

This case should be remanded because the Postal Service failed to adequately consider the effect on the community as required by 39 U.S.C. § 404(d)(2)(A)(i), and for lack of consistency with the requirement to consider economic effects as required by 39 U.S.C. § 404(d)(2)(A)(iv).

Failure to Adequately Consider Impact on the Community

The Postal Service's responses to redacted letters frequently state that there "is no impact on the business community." This appears contrary to the record, which contains numerous complaints from business owners. Several individuals specifically identified businesses they said they would no longer be patronizing once the Village station was closed because they would no longer be in the area. Those impacts on the community should not have been ignored by the Postal Service.

Some of the responses to questionnaires unmistakably express concerns that there will be a negative impact on local businesses. *See, for example*, Administrative Record Item No 374: "Pinehurst [Village] P.O. is the gathering center for the village citizens and where they subsequently use the adjacent businesses. If the PO is closed the effect on businesses will be disastrous. ..." *See also* Administrative Record Item Nos. 382, 384 and 386.

Notwithstanding these comments, the Postal Service maintains that customer responses to questionnaires indicate that the discontinuance of the Village station would not have an adverse effect on local businesses. Postal Service Comments at 4, *citing* Administrative Record, Item No. 33 at 3. Moreover, it opposes what it characterizes as "anecdotal evidence" regarding changes in local business traffic following the closure of

the Village station as outside the record, and thus ineligible for consideration in this appeal. Postal Service *Id.* at 4-5.

The Commission's review is limited to the record developed by the Postal Service in reaching its determination. 39 U.S.C. § 404(d)(5). In this case, Petitioners refer to post-record developments which the Commission is not statutorily permitted to rely upon. There is, however, evidence in the Administrative Record regarding the alleged impact of the Village station closing on local businesses. It appears from a review of the record that these alleged impacts are directly related to, and grow out of, the Village station's existence.

The community was also concerned about the impact of the closing of the post office on the historic nature of the community. The Postal Service did not address the impact of the closing on the historic nature of the community in which the post office is located. The community's concern nevertheless is of great significance and importance to the community and for that reason should have been addressed in the Administrative Record and Final Determination.

The Postal Service's position is that compliance with the National Historic Preservation Act (NHPA) and related regulations is a matter between it and the Board of Governors. The Commission's role in appeals under section 404(d)(5) does not include responsibility for enforcing the NHPA. I believe the Commission must nevertheless consider whether the Postal Service adequately considered all material concerns patrons raised about the "effect on the community" with the facts on the record. In this instance, the Administrative Record clearly shows that numerous respondents to the questionnaire specifically noted the historic setting, without specifically mentioning the NHPA.

Given numerous expressions of concern about the impact of the closing on the historic nature of the post office and its immediate surroundings, the Postal Service's failure to address these concerns renders its consideration of the effect on the community inadequate and inconsistent with the section 404(d), fully independent of the Postal Service's position on its obligations under the NHPA and its regulations implementing that Act.

Lack of Consistency with the Requirement to Consider Economic Savings

The Postal Service estimates that annual savings of \$66,643 will be generated from the closure. Final Determination at 4. This estimate is based solely on employee salary and benefits totaling \$66,643. It does not include any annual lease costs, since the Postal Service owns the building. *Id.* (section IV). It also does not include any one-time costs (such as relocation of boxes) or the cost of replacement service, despite the fact that these costs will be incurred.

Petitioners assert that the economic savings estimates are flawed because it assumes all customers will elect box delivery at the replacement facility, and none will elect street delivery. Marcum Brief at 4-5. Some respondents to the questionnaire also question the omission of any consideration of patrons' costs for gas, time, and new stationery. See, e.g., Administrative Record Item Nos. 384A, 402A and 392B.

The Commission traditionally has not expected the Postal Service to account for patrons' costs. However, it has repeatedly encouraged the Postal Service to improve the consistency, accuracy and transparency of its savings estimate. Here, the Postal Service notes that post office boxes will be relocated to the replacement office, but does not provide an estimate for this one-time cost or otherwise account for it in the savings estimate. In addition, there is neither offsetting estimate for the cost of replacement service, nor recognition of the continuation of the employee's salary at another location.

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The Postal Service does not address why it omits offsets for relocating boxes or for salary continuation.

In my opinion, the savings estimate is not supported by the record. Even without resort to extra-record assertions, the estimate omits box relocation expense. It also omits costs for any form of replacement delivery service (box or carrier) and for potential salary continuation. Some responses to questionnaires clearly state that patrons would not opt for box service at the replacement facility. Similarly, the Administrative Record shows that the Postal Service makes an affirmative representation that any employees “will be relocated.” Final Determination at 4.

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

South Valley Station Post Office
Yerington, Nevada

Docket No. A2012-108

ORDER REMANDING DETERMINATION

(Issued April 18, 2012)

I. INTRODUCTION

On December 15, 2011, the Postal Service advised the Commission that it “will delay the closing or consolidation of any Post Office until May 15, 2012.”¹ The Postal Service further indicated that it “will proceed with the discontinuance process for any Post Office in which a Final Determination was already posted as of December 12, 2011, including all pending appeals.” *Id.* It stated that the only “Post Offices” subject to closing prior to May 16, 2012 are those that were not in operation on, and for which a Final Determination was posted as of, December 12, 2011. *Id.* It affirmed that it “will not close or consolidate any other Post Office prior to May 16, 2012.” *Id.* at 2. Lastly,

¹ United States Postal Service Notice of Status of the Moratorium on Post Office Discontinuance Actions, December 15, 2011, at 1 (Notice).

the Postal Service requested the Commission “to continue adjudicating appeals as provided in the 120-day decisional schedule for each proceeding.” *Id.*

The Postal Service’s Notice outlines the parameters of its newly announced discontinuance policy. Pursuant to the Postal Service’s request, the Commission will fulfill its appellate responsibilities under 39 U.S.C. § 404(d)(5).

On December 28, 2011, Leslie West (Petitioner West) filed a petition with the Commission seeking review of the Postal Service’s Final Determination to close the South Valley station in Yerington, Nevada (South Valley station).² On January 10, 2012, Lisa Smith (Petitioner Smith) filed a petition for review.³ The Final Determination to close the South Valley station is remanded.

II. PROCEDURAL HISTORY

On January 19, 2012, the Commission established Docket No. A2012-108 to consider the appeal, designated a Public Representative, and directed the Postal Service to file its Administrative Record and any responsive pleadings.⁴

On January 30, 2012, the Postal Service filed the Administrative Record with the Commission.⁵ The Postal Service also filed comments contesting Commission

² Petition for Review received from Leslie West regarding the South Valley Station, Yerington, Nevada post office 89447, December 28, 2011 (West Petition).

³ Petition for Review received from Lisa Smith regarding the South Valley Station, Yerington, Nevada post office 89447, January 10, 2012 (Smith Petition). The Commission also received a notice of intervention from Phyllis Longero, January 18, 2012 (Longero Intervention), and letters from Donna J. Stillfield, February 14, 2012 (Stillfield Letter), Jacklyn S. Bishop, and Vern Bishop, March 22, 2012.

⁴ Order No. 1147, Notice and Order Accepting Appeal and Establishing Procedural Schedule, January 19, 2012.

⁵ The Administrative Record is attached to the United States Postal Service Notice, January 30, 2012 (Administrative Record). The Administrative Record includes, as Item No. 47, the Final Determination to Close the South Valley Station, NV Station and Continue to Provide Service by Nearby Post Office (Final Determination). The Notice also contains assertions that the Commission lacks jurisdiction to hear this appeal.

jurisdiction and, alternatively, requesting that the Commission affirm its Final Determination.⁶ Those comments were subsequently corrected.⁷

Petitioners filed participant statements supporting their Petitions.⁸ On March 9, 2012, the Public Representative filed reply comments.⁹ On March 20, 2012, the Postal Service filed a motion to strike the reply comments of the Public Representative.¹⁰ On March 27, 2012, the Public Representative filed an answer to the Motion to Strike and a motion to file supplemental comments.¹¹ On March 28, 2012, the Public Representative filed supplemental comments.¹² On April 4, 2012, the Postal Service filed an errata to its Motion to Strike.¹³ On April 6, 2012, the Public Representative filed a response to the Postal Service's Errata.¹⁴ Finally, on April 11, 2012, the Commission denied the Postal Service's Motion to Strike and granted summary judgment, in part, in favor of the Postal Service.¹⁵

⁶ Comments of United States Postal Service, February 21, 2012.

⁷ Notice of Errata to Comments of United States Postal Service Filed February 21, 2012, March 6, 2012 (Postal Service Corrected Comments).

⁸ Participant Statement received from Leslie West, January 31, 2012 (West Participant Statement); Participant Statement received from Lisa Smith, January 31, 2012 (Smith Participant Statement).

⁹ Public Representative Reply Comments, March 9, 2012 (PR Reply Comments). On the same date, the Public Representative filed a Motion of Public Representative for Late Acceptance of Comments, March 9, 2012. The motion is granted.

¹⁰ Motion by United States Postal Service to Strike Reply Comments of Public Representative, March 20, 2012 (Motion to Strike).

¹¹ Opposition of the Public Representative to United States Postal Service Motion to Strike, March 27, 2012; Motion for Acceptance of Supplemental Comments, March 27, 2012. The Public Representative's motion is granted.

¹² Public Representative Supplemental Comments, March 28, 2012 (PR Supplemental Comments).

¹³ Notice of Errata to United States Postal Service Motion to Strike Filed March 20, 2012, April 4, 2012.

¹⁴ Public Representative Response to the United States Postal Service "Notice of Errata," April 6, 2012 (Errata).

¹⁵ Order No. 1312, Order Denying Motion to Strike and Granting Summary Judgement in Part, April 11, 2012.

III. BACKGROUND

The South Valley station provides retail postal services and service to 186 post office box customers. Final Determination at 2. The Final Determination states that no delivery customers are served by the South Valley station. *Id.*¹⁶ The South Valley station provides retail service from 8:00 a.m. to 4:30 p.m., Monday through Friday. Lobby access is 24 hours a day, Monday through Saturday. Retail transactions average 103 daily (133 minutes of retail workload). Post office receipts for the last 3 years were \$604,158 in FY 2008; \$533,683 in FY 2009; and \$517,746 in FY 2010. *Id.* By closing this station, the Postal Service anticipates savings of \$210,236 annually. *Id.* at 7.

After the closure, retail services will be provided by the Yerington main post office located approximately 1 mile away.¹⁷ *Id.* at 2. Delivery service will continue to be provided by city, rural, and highway contract carriers through the Yerington main post office.¹⁸ The Yerington main post office is an EAS-20 level post office, with retail hours of 8:30 a.m. to 5:00 p.m., Monday through Friday, and closed on Saturday. Three-hundred-seventy-six (376) post office boxes are available. *Id.*

IV. PARTICIPANT PLEADINGS

Petitioners. Petitioners oppose the closure of the South Valley station. Petitioners contend that the Postal Service has (1) failed to consider the adverse effect that closure will have on the availability of postal services in Yerington; (2) failed to consider the impact on employee working conditions that closure will have; (3) failed to consider concerns about customer safety; and (4) overestimated the cost savings that it

¹⁶ Petitioner Smith takes issues with this assertion. *See, infra.*

¹⁷ Google Maps estimates the driving distance between the South Valley station and the Yerington main post office to be approximately 0.8 miles (1 minute driving time).

¹⁸ The Postal Service states that no delivery customers are served by the South Valley station. *Id.*

anticipates from closing the South Valley station. Smith Petition at 1-2; West Petition at 1.

Postal Service. The Postal Service argues that the Commission has no authority to review the closing of a station, particularly the South Valley station. Postal Service Comments at 1-3. The Postal Service also states that the Commission should affirm its determination to close the South Valley station. The Postal Service believes the appeals raises four main issues: (1) the effect on postal services; (2) the impact on the community; (3) the effect on employees; and (4) the economic savings expected to result from discontinuing the South Valley station. *Id.* at 5-9. The Postal Service asserts that it has given these and other statutory issues serious consideration and concludes that the determination to discontinue the South Valley station should be affirmed. *Id.* at 10.

The Postal Service explains that its decision to close the South Valley station was based on several factors, including:

- a decline in mail volume, Final Determination at 2;
- a variety of other delivery and retail options (including the convenience of rural delivery and retail service), Postal Service Comments at 8;
- minimal growth in the community, *id.*; and
- expected financial savings, *id.* at 9.

The Postal Service contends that it will continue to provide regular and effective postal services to the community when the Final Determination is implemented. *Id.* at 5.

The Postal Service also asserts that it has followed all statutorily required procedures, *id.* at 3-4, and has addressed the concerns raised by Petitioners regarding the effect on postal services, the effect on the community, economic savings, and the effect on postal employees. *Id.* at 9-10.

Public Representative. The Public Representative asserts that the Commission should remand the Postal Service's determination to close the South Valley station. She alleges that the Postal Service failed to address accessibility issues at the main

Yerington post office, PR Reply Comments at 1-3, 8-9; that none of the economic savings identified by the Postal Service can actually occur, *id.* at 6, 8; that the Postal Service did not consider the effect on delivery carriers whose routes currently emanate from the South Valley station, *id.* at 6-8; that the Postal Service failed to give adequate consideration to the effect on the community, *id.* at 7; and that the Postal Service failed to follow procedures required by law. *Id.*

V. COMMISSION ANALYSIS

The Commission's authority to review post office closings is provided by 39 U.S.C. § 404(d)(5). That section requires the Commission to review the Postal Service's determination to close or consolidate a post office on the basis of the record that was before the Postal Service. The Commission is empowered by section 404(d)(5) to set aside any determination, findings, and conclusions that it finds 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 in the record. Should the Commission set aside any such determination, findings, or conclusions, it may remand the entire matter to the Postal Service for further consideration. Section 404(d)(5) does not, however, authorize the Commission to modify the Postal Service's determination by substituting its judgment for that of the Postal Service.

The Postal Service argues that Petitioners' appeals do not fall within the Commission's jurisdiction. It offers two grounds for dismissal. First, the Postal Service argues that postal stations such as the South Valley station are not "post offices" as that term is used in section 404(d). Second, it argues that patrons of the South Valley station still have access to retail services in Yerington, and the closing of the South Valley station does not constitute a "closing" under Commission precedent, citing the Commission's orders dismissing the appeals of the closing of the East Elko station in

Elko, Nevada,¹⁹ and the Pimmit Branch in Falls Church, Virginia.²⁰ Administrative Record at 1-3; Postal Service Corrected Comments at 1-3.

The Commission and the Postal Service have long disagreed about the meaning of “post office” in section 404(d).²¹ The Commission has held that a postal station or branch is a “post office.” The Commission has considered the Postal Service’s arguments in previous decisions and will not revisit the dispute here.²²

The *East Elko* and *Pimmit Branch* decisions cited by the Postal Service relied upon two other orders in which the Commission found closings of stations or branches to be rearrangements of postal facilities within a community and not closings subject to review under section 404(d). A crucial factor in those earlier “rearrangement” decisions was the construction of a new postal retail facility in the community.²³ Here the Postal Service seeks to close a relatively new facility and move all retail services and operations to the smaller (having about half the space) and older (built in 1939) main post office in the face of allegations that both employees and customers will be adversely impacted by the size and physical characteristics of the old retail facility.²⁴ Such a move does not qualify as a rearrangement.

¹⁹ Docket No. A2010-3, Order No. 477, *In re East Elko Station, Elko, Nevada*, June 22, 2010 (*East Elko*).

²⁰ Docket No. A2011-90, Order No. 1159, *In re Pimmit Branch, Falls Church, Virginia*, January 20, 2012 (*Pimmit Branch*).

²¹ See, e.g., Docket No. A82-10, Order No. 436, *In re Oceana Station, Virginia Beach, Virginia*, June 25, 1982, at 4 (*Oceana Station*); Docket No. A2011-16, *Akron-East Station, Akron, Ohio*, Order No. 748, June 17, 2011, at 2.

²² See Docket No. A2006-1, Order No. 1480, *In re Observatory Finance Station Pittsburgh, PA 15214-0651*, September 29, 2006, at 6-12.

²³ *Oceana Station* at 7-8; Docket No. A2007-1, Order No. 37, *Ecorse Classified Branch, Ecorse, Michigan*, October 9, 2007, at 6.

²⁴ The South Valley station was occupied in May 2001 and contains 6,475 square feet of space. See <http://about.usps.com/who-we-are/foia/leased-facilities/nv.csv>. The Yerington post office was occupied in June 1939 and contains 3,049 square feet of space. See <http://about.usps.com/who-we-are/foia/owned-facilities/nv.csv>.

A. Notice to Customers

Section 404(d)(1) requires that, prior to making a determination to close any post office, the Postal Service must provide notice of its intent to close. Notice must be given 60 days before the proposed closure date to ensure that patrons have an opportunity to present their views regarding the closing. The Postal Service may not take any action to close a post office until 60 days after its determination is made available to persons served by that post office. 39 U.S.C. § 404(d)(4). A decision to close a post office may be appealed within 30 days after the determination is made available to persons served by the post office. 39 U.S.C. § 404(d)(5).

The Administrative Record indicates the Postal Service took the following steps in providing notice of its intent to close. On May 27, 2011, the Postal Service distributed questionnaires to customers regarding the possible change in service at the South Valley station. Final Determination at 2. A total of 3,624 questionnaires were distributed to delivery customers. Other questionnaires were made available at the retail counter of the South Valley station. A total of 524 questionnaires were returned. On June 22, 2011, the Postal Service held a community meeting at the Lyon County Library to address customer concerns. Six customers attended. *Id.*

The Postal Service does not claim to have posted a proposal to close the South Valley station with an invitation for comments at the South Valley station (see Postal Service Corrected Comments at 3-4) although such a proposal appears in the Administrative Record as Item No. 33. That proposal, however, does not bear the round date stamps that customarily are used to verify that a proposal was posted.²⁵ Moreover, the Postal Service received no comments regarding the proposal (Administrative Record, Item No. 40) suggesting that customers of the South Valley station may have been unaware of its existence. The Final Determination was posted at the South Valley station and at the Yerington post office on December 9, 2011. Final Determination following page 7.

²⁵ See, e.g., Docket No. A2012-101, Administrative Record, Item No. 36, at 1.

The Postal Service asserts that distributing questionnaires and holding a community meeting satisfied the notice requirements of 39 U.S.C. § 404(d). Postal Service Corrected Comments at 3. In past cases, the Commission has found questionnaires and community meetings to provide sufficient notice. For example,

The record in this proceeding indicates that customers of the East Akron station were afforded adequate notice that the Postal Service was reviewing the East Akron station for possible closure. Further, customers were given an opportunity to provide input to the Postal Service by returning their questionnaires. . . . Based on review of the record, the Commission finds that the Postal Service has satisfied the notice requirements of 39 U.S.C. 404(d)(1).²⁶

However, in this case, Petitioner Smith asserts that the questionnaires and notice of a community meeting confused customers. She states that

there was a town meeting originally to close the Main Office which customers were against, then [the Acting Manager of Post Office Operations] decides to close the South Valley Station[.] [A] town meeting was held and only three customers attended[.] I think they were confused on what facility was being discussed.

Smith Petition at 2.

Confusion is apparent in some questionnaire responses. For example, one respondent stated, “If the downtown P.O. is closed, it will be a hardship on me as I don’t have a car and that would be a long walk for me.” Administrative Record, Item No. 22, at .pdf at 621.²⁷ Of course, the questionnaire sought reaction to the possible closing or consolidation of the South Valley station, not the “downtown P.O.” See *id.*, Item No. 21. Another respondent stated, “Please do not close our beautiful downtown Post Office.” *Id.*, Item No. 22, at .pdf at 999 (emphasis in original). A third respondent asked,

Why did you make it seem like only the downtown PO was to be closed?!!....First the downtown PO is threatened—everyone rallies around. Now the other & best one is going to close?

²⁶ Docket No. A2011-16, Order No. 843, Order Affirming Determination, September 8, 2011, at 9; see also Docket No. A2011-19, Order No. 912, Order Affirming Determination, October 20, 2011, at 9.

²⁷ Item No. 22 is not paginated. Page references are to the .pdf version of the Administrative Record posted on the Commission’s website.

Id. at .pdf at 105-06. Other respondents indicated that they had already submitted a response. “I remember sending this back once before, a few months ago?” *Id.* at .pdf at 860. “I have already filled this out. How many more times?” *Id.* at .pdf at 586.

“FYI ~~✱~~ I have already filled out **3** of these.” *Id.* at .pdf at 142 (emphasis in original).

Some confusion may have resulted from the earlier investigation into closing the main Yerington post office, as Petitioner Smith alleges. However, the vast majority of respondents understood that it was South Valley station that the Postal Service was looking to close. See *id.* at .pdf at 699-998, 1000-83. The Commission observes that the Postal Service has provided customers notice and an opportunity to voice opinions through the questionnaire process.

The record in this proceeding indicates that customers of the South Valley station were afforded notice that the Postal Service was reviewing the South Valley station for possible closure. Further, customers were given an opportunity to provide input to the Postal Service at the community meeting and by returning questionnaires. Based on a review of the record, the Postal Service appears to have satisfied the notice requirements of 39 U.S.C. § 404(d)(1).

B. Other Statutory Considerations

In making a determination on whether or not to close a post office, the Postal Service must consider the following factors: the effect on the community; the effect on postal employees; whether a maximum degree of effective and regular postal service will be provided; and the economic savings to the Postal Service. 39 U.S.C. § 404(d)(2)(A).

Effect on the community. Yerington, Nevada, is an incorporated community located in Lyon County, Nevada. The community is administered politically by a Mayor

and City Council.²⁸ Police protection is provided by the Yerington Police Department. Fire protection is provided by the Mason Valley Fire Department. The community is comprised of retirees, farmers, the self-employed, those who work in local businesses or commute to work in nearby communities, and unemployed individuals. *Id.* Residents may travel to nearby communities for other supplies and services. *See generally* Administrative Record, Item No. 22 (returned customer questionnaires and Postal Service response letters).

As a general matter, the Postal Service solicits input from the community by distributing questionnaires to customers and holding a community meeting. The Postal Service met with members of the Yerington community and solicited input from the community with questionnaires. Customers' concerns and the Postal Service's responses are summarized in the Final Determination. Final Determination at 2-4.

Petitioner West contends that the Postal Service failed to consider the effect that the closing will have on the Yerington community and local businesses. West Participant Statement at 6. Donna J. Stillfield and Petitioner Smith contend that the Postal Service failed to consider future growth of the community. Stillfield Letter at 2; Smith Participant Statement at 8.

The Postal Service contends that it considered the effect of closing the South Valley station on the community. The Postal Service states that "growth of a community does not depend on the location of a Post Office"; that "[c]arrier service will be able to accommodate future growth"; and "that the proposed alternate delivery service will meet the mailing and service needs of the community...." Postal Service Corrected Comments at 6. However, the Postal Service is not proposing to replace the South Valley station with carrier service. The Postal Service proposes "to provide service by nearby Post Office." Final Determination at 1. Participants were not concerned that closing the South Valley station would retard the growth of the community. Rather, they

²⁸ See <http://www.yerington.net/index.aspx?NID=295>; <http://www.leg.state.nv.us/CityCharters/CtyYCC.html>. The Final Determination states that the "South Valley Station" is unincorporated and administered politically by Lyon County. Final Determination at 2.

were concerned that future growth would overwhelm the Yerington post office, which they contend was already inadequate at the time the South Valley station was built. See Longero Intervention at 1; Smith Petition at 1.

The Final Determination reads as if the Postal Service were closing a small rural post office and extending rural carrier service. That is not happening with the closure of the South Valley station. The number of additional rural or highway contract boxes is zero. Administrative Record, Item No. 17. The Postal Service has not adequately considered the effect of the post office closing on the community as required by 39 U.S.C. § 404(d)(2)(A)(i).

Effect on employees. The Final Determination states that “Any Employees assigned to this facility will be relocated with the Postal Service.” Final Determination at 5. The Post Office Fact Sheet states that there are two non-career employees and no delivery customers at the South Valley station. Administrative Record, Item No. 18. Form 150, Postmaster Workload Information, shows that the South Valley station serves no delivery points of any kind and performs no separations to carrier route of letters or flats. *Id.*, Item No. 8. However, Petitioner Smith (the Yerington postmaster) states, “The Yerington office has four city routes, one rural route and three highway routes.”²⁹ She also states that construction of the South Valley station “was a huge milestone for the safety and ease of access for the employees....” Smith Petition at 1. These statements raise the possibility that carriers operate out of the South Valley station. They do, as confirmed by reference to the Postal Service’s FAST website.

The Postal Service has not considered the possible effects of closing the South Valley station on the carriers who work there and has thus not satisfied its obligation to consider the effect of the closing on employees as required by 39 U.S.C. § 404(d)(2)(A)(ii).

Effective and regular service. The Postal Service contends that it has considered the effect the closing will have on postal services provided to South Valley station

²⁹ The Public Representative verified with Petitioner Smith that all Yerington carriers operate from the South Valley station. PR Reply Comments at 6.

customers. Postal Service Corrected Comments at 6-7. It asserts that customers of the closed South Valley station may obtain retail services at the Yerington post office located 1 mile away. Final Determination at 2, 7. South Valley station post office box customers may obtain Post Office Box service at the Yerington post office, which has 376 boxes available. *Id.* at 2.

Petitioners, commenters, and the Public Representative raise the issue of regular and effective postal services for the customers of the South Valley station. They assert that the Postal Service failed to consider customer concerns about the additional hardships faced by customers who have difficulty negotiating the parking lot, steps, or ramp at the Yerington post office.³⁰ The Postal Service explained that customers could obtain postal services from the carrier, or use alternate access options, including www.usps.com and Stamps By Mail®. Postal Service Comments at 6-7. The Postal Service also asserts that customers “who cannot drive, who have infirmities or physical handicaps, etc....can be accommodated at the Yerington Main Office.”³¹ However, this conclusion was reached before questionnaires were distributed and responses received and analyzed.³² The Postal Service’s responses to customer concerns about access to the Yerington post office mention only service from a carrier, Money Order Application forms, 1-800-STAMP-24, www.usps.com, and Stamps By Mail®. Final Determination at 5. The responses do not explain how customers with special needs “can be accommodated at the Yerington Main Office.”

³⁰ The Public Representative and the Postal Service have debated the applicability of various statutes intended to address the challenges faced by individuals with different types of disabilities. See notes 9 through 12, *supra*. While compliance with such statutes and the responsibility for their enforcement are serious matters, the ultimate issue in this proceeding is whether handicapped or disabled individuals will, like other customers, receive effective and regular postal service if the South Valley station closes. In order to decide this issue, the Commission finds it unnecessary to address the applicability and enforcement of the laws discussed in the pleadings filed by the Public Representative and the Postal Service.

³¹ Motion to Strike at 9, citing Administrative Record, Item No. 15, at 2.

³² Administrative Record, Item No. 15 is dated May 9, 2011, and the Customer Questionnaire Analysis (Item No. 23) is dated June 24, 2011. See Administrative Record, Table of Contents (.pdf at 1).

When it reconsiders its decision on remand, the Postal Service should address concerns regarding potential hardships faced by handicapped customers who seek access to the Yerington main post office.

Economic savings. The Postal Service estimates total annual savings of \$210,236. It derives this figure by summing the following costs: postmaster salary and benefits (\$103,321)³³ and annual lease costs (\$96,915), minus the cost of replacement service (\$0). *Id.*

Petitioners and the Public Representative argue that the cost savings estimates are inaccurate. Smith Petition at 2; West Petition at 1; PR Reply Comments at 6. Petitioner Smith points out that a postmaster position will remain filled in Yerington and that there are no management positions other than the postmaster that could be eliminated by closing the South Valley station. Smith Petition at 2. She also asserts that the lease on the South Valley facility has 10 years to run. *Id.* Petitioner West asserts that it is unlikely that the Postal Service could sublet the facility, given the economy of Yerington. West Participant Statement at 2.

The Postal Service's estimate of economic savings is flawed. Based on the record, no employee position would be eliminated by closing the South Valley station. Smith Petition at 2. A postmaster position will continue to exist and be filled in Yerington. The Postal Service has neither asserted nor quantified savings from elimination of other positions.

³³ In its comments, the Postal Service cites three items in the record to support its estimate of economic savings. Postal Service Corrected Comments at 9. The Proposal to close the South Valley station lists \$84,885 as "Clerk Savings" and \$28,436 as "Fringe Benefits @ 33.5%." *Id.*; Administrative Record, Item No. 33, at 7. However, the clerks at the South Valley station are classified as non-career. Proposal Fact Sheet, Item No. 18. Non-career employees do not receive fringe benefits. Even if the clerks are career employees, their positions are not being eliminated. "Both PTF clerks will report to the Yerington Main Office on a daily basis." *Id.*; Post Office Survey Sheet, Item No. 15, at 1. The Proposal Checklist shows \$84,885 as "Postmaster salary" and \$28,436 as "Fringe benefits @ 33.5%." *Id.*, Item No. 29, at 2. The Final Determination lists \$84,885 as "Manager and/or Craft Savings" and \$28,436 as "Fringe Benefits @ 33.5%." *Id.* at 5; see also Administrative Record, Item No. 18, at 1 identifying the postmaster position level as EAS-13 with a base salary of \$84,885 and fringe benefits of \$28,436, *id.*, Item No. 47, at 5 ("carrier service can be and, in this case, is more cost-effective than maintaining a postal facility and a postmaster position.").

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The lease on the South Valley station runs through May 22, 2023 and does not include a 30-day cancellation closure. Administrative Record, Item No. 18, at 1. While the Postal Service asserts that it is permitted to sublet the South Valley station (Postal Service Corrected Comments at 9), the Final Determination does not rely on subletting as a source of savings, and Petitioner West questions the likelihood that the Postal Service could sublet a significant amount of space. The Postal Service has not recognized expenses associated with moving carrier operations from South Valley station and renovating the Yerington post office to receive them. The Postal Service has not satisfied the requirement of 39 U.S.C. § 404(d)(2)(A)(iv) that it consider economic savings.

It is ordered:

The Postal Service's determination to close the South Valley station in Yerington, Nevada is remanded.

By the Commission.

Shoshana M. Grove
Secretary

ORDER NO. 1588

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

Before Commissioners:

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

Santa Monica Post Office
Santa Monica, California

Docket No. A2013-1

ORDER GRANTING MOTION TO DISMISS

(Issued December 19, 2012)

I. INTRODUCTION AND SUMMARY

On October 9, 2012, the Commission received a petition for review of the closure of the Santa Monica, California post office from Congressman Henry A. Waxman (Petitioner).¹ Petitioner also requested that the Commission suspend the closure pending resolution of the appeal. Petition at 3. In Order No. 1491, the Commission

¹ Petition for Review Received from Henry A. Waxman Regarding the Santa Monica, CA Post Office 90401, October 9, 2012 (Petition). The Petition was dated September 20, 2012. [The envelope was franked—no postmark.]

gave notice of the appeal, designated a Public Representative, and directed the Postal Service to file the administrative record or a responsive pleading.²

II. PROCEDURAL HISTORY

On October 19, 2012, the Postal Service filed a motion to dismiss this proceeding for lack of jurisdiction.³ On October 26, 2012, the Public Representative filed an answer supporting the Motion.⁴ On November 6, 2012, the City of Santa Monica (City) filed a pleading opposing the Motion and supporting Petitioner with respect to both the appeal of the closure and the request for suspension pending appeal.⁵ The Motion is granted.⁶

III. PARTICIPANT PLEADINGS

Petitioner. Petitioner contends that the Commission should set aside the Postal Service's decision regarding the Santa Monica post office. Petition at 1. Petitioner argues that the Postal Service has failed to observe procedures required by 39 CFR 241.3. Specifically, he asserts that the Postal Service failed to provide 60 days' notice of the proposed closure; failed to inform the public of the right to appeal a closure; failed to consider the effect of the closure on the community; failed to provide an estimate of economic savings; and failed to explain how it would comply with policy provisions of the National Historic Preservation Act. *Id.* at 1-2. Petitioner further argues that while the Postal Service may refer to its action as a "relocation," it actually constitutes a discontinuance. *Id.* at 1.

² Notice and Order Accepting Appeal and Establishing Procedural Schedule, October 10, 2012 (Order No. 1491).

³ Motion of United States Postal Service to Dismiss Proceedings, October 19, 2012 (Motion).

⁴ Public Representative Response in Support of United States Postal Service Motion to Dismiss Proceedings, October 26, 2012 (PR Response).

⁵ Request of the City of Santa Monica to Intervene and Participate in Appeal of Congressman Waxman, November 6, 2012 (City Request).

⁶ Given the disposition of the Motion, the request for suspension pending appeal is moot.

Postal Service Motion. The Postal Service contends that this appeal should be dismissed because it is not within the Commission's jurisdiction. Motion at 1-2. The Postal Service asserts that the appeal concerns the relocation of a post office, which is an event that falls outside the scope of 39 U.S.C. 404(d)(5).⁷ The Postal Service argues that the process for relocating retail operations within the community is governed by 39 CFR 241.4. *Id.* at 5, 9. It states that issues regarding the National Historic Preservation Act were addressed in its final decision concerning the relocation of retail services from the Santa Monica post office to the Santa Monica carrier annex. *Id.* at 3; see also *id.*, Exhibit 3 at 1-2.

The Postal Service states that it plans to relocate retail operations from the Santa Monica post office to the Santa Monica carrier annex, a nearby facility which currently does not offer retail operations. *Id.* at 2. The Postal Service further indicates that there are other alternate access options, including 11 stamp consignment sites located within 1 mile of the Santa Monica post office. *Id.* at 4. The Postal Service argues that in similar circumstances, other appeals have been dismissed by the Commission. *Id.* at 5-8.

Public Representative. The Public Representative agrees that the appeal should be dismissed. PR Response at 5. The Public Representative concludes that the Postal Service's actions constitute a relocation of facilities within the community and thus do not give rise to Commission jurisdiction under section 404(d). *Id.* at 3-5. He adds that members of the community participated in proceedings conducted by the Postal Service pursuant to 39 CFR 241.4. *Id.* at 5.

City of Santa Monica. The City contends that the Postal Service's decision to vacate and sell the Santa Monica post office constitutes a closing subject to 39 U.S.C. 404(d)(5). City Request at 2-3. In support of this contention, the City relies on dicta from several court cases, which held that the transfer of sorting operations from a post

⁷ The Postal Service also asserts that Petitioner is not a "person served" by the Santa Monica post office and is, therefore, not entitled to appeal. *Id.* at 2 n.3. Given the disposition of the Motion, it is not necessary to address this issue.

office did not constitute a closing. *Id.* at 3-4. The City also contends that the Postal Service failed to follow its own regulations for relocating retail operations, *id.* at 2 n.2, and failed to explain how it had complied with provisions of the National Historic Preservation Act. *Id.* at 6-7.

IV. COMMISSION ANALYSIS

Petitioner and the City contend that the Postal Service is closing the Santa Monica post office and in doing so has failed to follow the procedures prescribed by law, including those set forth in 39 CFR 241.3. Petition at 1; City Request at 2-3. Petitioner and the City also assert that the Postal Service has not explained how it complied with provisions of the National Historic Preservation Act. Petition at 2; City Request at 6-7. The Postal Service, on the other hand, argues that its decision to relocate postal operations from one retail facility to a nearby facility is not covered by section 404(d). Motion at 1-2. Both the Postal Service and Public Representative maintain that the Commission lacks jurisdiction over this matter and that this appeal should be dismissed. *Id.* at 5, 9; PR Response at 3-5.

The Postal Service is transferring retail operations from the Santa Monica post office to the Santa Monica carrier annex, a facility located in the same community less than 1 mile from the post office. The Commission has held on numerous occasions that the relocation of retail operations within a community does not constitute a closing or consolidation within the meaning of section 404(d).⁸

The facts of this case are essentially the same as those in *Ukiah*, Docket No. A2011-21. There, the Postal Service decided to close the *Ukiah*, California post office and transfer retail operations and services to the *Ukiah* carrier annex, located 1 mile from the *Ukiah* post office. The Commission found that after the transfer of retail

⁸ See Order No. 804, Docket No. A2011-21, Order Granting Motion to Dismiss, August 15, 2011 (*Ukiah*); Order No. 37, Docket No. A2007-1, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007; Order No. 1387, Docket No. A2003-1, Order Dismissing Appeal on Jurisdictional Grounds, December 3, 2003; Order No. 696, Docket No. A86-13, Order Dismissing Docket No. A86-13, June 10, 1986; Order No. 436, Docket No. A82-10, Order Dismissing Docket No. A82-10, June 25, 1982 (*Oceana*).

operations “to the Ukiah Carrier Annex, customers will continue to have the same level of access to retail services in the community.” *Ukiah* at 4. Just as in Ukiah, the Postal Service will maintain a post office in Santa Monica. As the Commission stated when it first addressed this issue, “[t]he requirements of section 404([d]) do not pertain to the *specific building* housing the post office; but rather are concerned with the provision of a facility within the community.” *Oceana* at 6 (emphasis added). The City has misconstrued the applicability of section 404(d) by applying it to the elimination of a specific building in Santa Monica as opposed to “the provision of a facility within the community.”⁹

For the foregoing reasons, the Motion is granted and the appeal is dismissed.

It is ordered:

The Motion of the United States Postal Service to Dismiss Proceedings, filed October 19, 2012, is granted.

Shoshana M. Grove
Secretary

Chairman Goldway not participating.

⁹ Petitioner and the City contend that the Postal Service has failed to demonstrate how it intends to comply with section 106 of the National Historic Preservation Act (NHPA). Petition at 2; City Request at 7. The Postal Service’s final decision to relocate retail services within the community specifically found that the “NHPA does not apply to this decision because the relocation of retail services is not an ‘undertaking’ within the meaning of section 106.” Motion, Exhibit 3 at 1. In any event, “[t]he Commission’s role in appeals under section 404(d)(5) does not include responsibility for enforcing the NHPA.” Order No. 1037, Docket No. A2011-49, Order Affirming Determination, December 12, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing addendum with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
Jeffrey E. Sandberg
Counsel for Respondent