

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**  
**No. 12-1095**  
**Consolidated with No. 12-1110 and No. 12-1157**

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

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ELAINE JOAN MITTLEMAN,

Petitioner,

v.

POSTAL REGULATORY COMMISSION,

Respondent,

UNITED STATES POSTAL SERVICE,

Intervenor.

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ON PETITION FOR REVIEW FROM ORDERS OF THE  
POSTAL REGULATORY COMMISSION

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REPLY BRIEF FOR PETITIONERS

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**GLOSSARY**

| <b>Term</b> | <b>Definition</b>                  |
|-------------|------------------------------------|
| APA         | Administrative Procedure Act       |
| Commission  | Postal Regulatory Commission       |
| ICC         | Interstate Commerce Commission     |
| PRC         | Postal Regulatory Commission       |
| JA          | Joint Appendix                     |
| NHPA        | National Historic Preservation Act |

## SUMMARY OF ARGUMENT

This Court has jurisdiction for appellate review pursuant to 39 U.S.C. § 3663 of orders of the Postal Regulatory Commission. *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013).

The provision in 39 U.S.C. § 404(d)(5) does not preclude APA review of Commission orders, as the Commission argued. The provision indicates that certain sections of the APA shall not apply to any review carried out by the Commission. Thus, there is no issue of seemingly inconsistent provisions in the same statute. The language of § 404(d)(5) and § 3663 refers to different situations. Those provisions are not contradictory or inconsistent, nor are they interrelated and closely positioned.

The Commission's own analysis as to what constitutes a relocation or rearrangement of facilities within a community cannot be credited because it fails to cite pertinent regulations, which include 39 C.F.R. § 241.3 and 39 C.F.R. § 241.4, concerning post office closings and relocations. Also, the Commission's interpretation of 39 U.S.C. §404(d) concerning post office closings and relocations is not entitled to *Chevron* deference.

The petitions for the Pimmit Branch, the Venice, California, post office and the Spring Dale, West Virginia, post office should be granted and the matters remanded to the Commission. The Commission has jurisdiction to review the

action taken by the Postal Service concerning the Pimmit Branch, which was a closing and not a rearrangement of facilities.

The Commission has failed to consider the issues concerning the historic preservation of the Venice, California, post office and its mural, including the commitment of the Postal Service that the public will have access to the mural.

The Commission decided the appeal of Spring Dale, West Virginia, post office by a 2-2 vote. A 2-2 tie vote cannot be considered an affirmance of the Postal Service determination to close the Spring Dale post office.

## ARGUMENT

### **I. This Court has jurisdiction for appellate review of orders of the Postal Regulatory Commission pursuant to 39 U.S.C. § 3663.**

This Court has jurisdiction for appellate review pursuant to 39 U.S.C. § 3663 of orders of the Postal Regulatory Commission. This Court recently noted its jurisdiction in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013). It should be clear that this Court has jurisdiction to review the Commission orders in these petitions for review.

In spite of the arguments presented in the Commission's brief at 15-26, the question of jurisdiction for this Court to review final orders of the Postal Regulatory Commission is plainly controlled by 39 U.S.C. § 3663. As noted in *GameFly*, this Court has jurisdiction to review orders of the Postal Regulatory



Commission. The statutory grant of jurisdiction is straightforward.

Moreover, the Commission's brief discusses cases concerning judicial review of Postal Service actions. Resp. Br. 18. This appeal concerns judicial review of orders of the Postal Regulatory Commission, not judicial review of Postal Service actions.

In its brief, the Commission asserts that its statutory interpretations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Resp. Br. 37. The Supreme Court has just addressed the question of applying the *Chevron* framework to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority. *City of Arlington, Texas v. Federal Communications Commission*, No. 11-1545 (May 20, 2013). Justice Scalia explained that *Chevron's* formulation involved a court being confronted with two questions when it reviews an agency's construction of the statute which it administers (slip op. at 4), *citing Chevron*, 467 U.S. at 842. In this appeal, if the Commission's interpretations are entitled to *Chevron* deference, as respondent's brief asserts at 37, then those interpretations must be reviewable by this Court. Judicial review of the Commission's orders is clearly available.

Finally, the Commission's brief confuses the meaning of the language in 39

U.S.C. § 404(d)(5) in its argument about general and specific statutory provisions. Resp. Br. 21. The Commission cites *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2071 (2012), for the canon that a specific provision is construed as an exception to the general one. In discussing this canon, Justice Scalia noted that the specific governs the general “particularly when the two are interrelated and closely positioned,” citing *HCSC-Laundry v. United States*, 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1981) (*per curiam*).

The provision in § 404(d)(5) does not preclude Administrative Procedure Act (APA) review of Commission orders, as the Commission argues. The provision indicates that certain sections of the APA shall not apply to any review carried out by the Commission. That provision does not concern the jurisdiction to file a petition in this Court.

Thus, there is no issue of seemingly inconsistent provisions in the same statute. The language of § 404(d)(5) and § 3663 refers to different situations. The provisions are not “interrelated and closely positioned.” Those provisions each have their own meaning. Section 404(d)(5) does not preclude the effect of § 3663, which provides for judicial review in this Court of Commission orders.

This Court recently addressed the question of the appropriate court for judicial review in *American Petroleum Institute, et al., v. Securities and Exchange*

*Commission*, No. 12-1398 (D.C. Cir. April 26, 2013). In that case, this Court explained that Exchange Act section 25 establishes the framework for initial appellate review of Commission actions. Specifically, section 25(a) provides that “a ‘person aggrieved by a *final order* of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals ... for the District of Columbia Circuit.’ 15 U.S.C. § 78y(a)(1) (emphasis added).” *Id.* (slip op. at 6).

The language in 39 U.S.C. § 3663 permits review in this Court of a final order or decision of the Postal Regulatory Commission. That language provides that “[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 language is similar to the language of section 25(a) of the Exchange Act.

As this Court noted in *American Petroleum Institute*, No. 12-1398 (slip op. at 7), section 25(a) gives this Court jurisdiction over challenges to all final orders issued by the Commission under the Exchange Act. The similar language in 39

U.S.C. § 3663 concerning appeals from the Postal Regulatory Commission supports the argument that this Court has jurisdiction over challenges to all final orders issued by the Postal Regulatory Commission.

It is clear that this Court has jurisdiction for appellate review of orders of the Postal Regulatory Commission pursuant to 39 U.S.C. § 3663.

**II. The Postal Service has continued to alter its strategies to address its financial problems and is no longer closing post offices.**

The Postal Service has continued to alter its strategies in an effort to address its difficult financial situation. One of the previous initiatives, which had been to close post offices, has been abandoned.

Another strategy was to end Saturday mail delivery. At a Senate hearing, several senators questioned whether the Postal Service could end Saturday delivery without Congressional approval. *See* Ron Nixon, *Debt Mounting, Postal Service Asks to Alter Business Model*, The New York Times, February 13, 2013 (available at <http://www.nytimes.com/2013/02/14/us/debt-mounting-postal-service-asks-to-alter-business-model.html>).

However, the Postal Service subsequently halted its plan to end Saturday deliveries. *See* Emmarie Huettelman, *Postal Service Halts Push to End Delivery of Mail on Saturdays*, The New York Times, April 10, 2013 (available at

[http://www.nytimes.com/2013/04/11/us/postal-service-halts-push-to-limit-](http://www.nytimes.com/2013/04/11/us/postal-service-halts-push-to-limit-saturday-service.html)

[saturday-service.html](http://www.nytimes.com/2013/04/11/us/postal-service-halts-push-to-limit-saturday-service.html)). The Postal Service abandoned its plan to stop Saturday mail deliveries after Congress passed spending measures which included language that prohibited the Postal Service from ending the six-day delivery schedule. See Ron Nixon, *Legal Memo Advised Postal Service Against Ending Saturday Delivery*, The New York Times, May 8, 2013 (available at <http://thecaucus.blogs.nytimes.com/2013/05/08/legal-memo-advised-postal-service-against-ending-saturday-delivery/>).

A strategy that the Postal Service is now pursuing is to sell historic post office buildings. See Robin Pogrebin, *Post Office Buildings With Character, and Maybe a Sale Price*, The New York Times, March 7, 2013 (available at [http://www.nytimes.com/2013/03/08/arts/design/preservationists-fight-postal-service-over-sales.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/08/arts/design/preservationists-fight-postal-service-over-sales.html?pagewanted=all&_r=0)). This article discusses the Venice, California, post office, which has been sold to Hollywood producer Joel Silver. According to the article, Mr. Silver has agreed to restore and preserve the mural, “Story of Venice.” However, there appears to be uncertainty concerning the public’s access to the mural. Mr. Silver said through a spokesman that he planned to make the mural available to the public more often than the agreement, which apparently provides that the mural can be publicly viewed just six times a year and

by appointment only.

The Postal Service has negotiated agreements to loan murals from post offices to the pertinent city. According to Dallan Wordekemper, Federal Preservation Officer, the agreements benefit both parties. The Postal Service continues to own and serve as a steward of the mural and the community maintains its historic connection. *See USPS finding new homes for Post Office art*, Postal News Blog, May 22, 2013 (available at <http://postalnews.com/postalnewsblog/2013/05/22/usps-finding-new-homes-for-post-office-art/>).

The Postal Service has recently described its initiatives for the retail business. The strategies for the retail business include optimizing levels of service based on customer demand and preserving retail service in rural America by modifying window service hours to match the local customer demand. *See United States Postal Service Five-Year Business Plan*, April 2013 (available at <http://about.usps.com/strategic-planning/fiveyearplan-04162013-final.pdf>), at pp. 16, 18, 20.

The Postal Service has apparently abandoned any plan to close post offices. However, it is selling historic post office buildings and moving post offices to other buildings.

**III. The comments by the Postal Service concerning Pimmit Hills in its notice of decision not to file a brief are contradicted by the record.**

On March 18, 2013, the Postal Service filed a notice of its decision not to file a separate brief. In that notice, the Postal Service made comments that are contradicted or not supported by the record.

In the notice at p. 2, the Postal Service contended that “the argument that Pimmit Hills is not located in the same community as the Falls Church Main Post Office is unsupportable.” In the context of post office closings, the reference to “community” is part of the analysis conducted by the Postal Service. *See* 39 C.F.R. § 241.3(c)(4)(ii) [Effective to July 13, 2011], which provided that the proposal must include an analysis of the effect of the proposed discontinuance on the community served.

The Final Determination to Close the Pimmit Branch, VA Office, at 4, includes a section of the analysis titled, “Effect on Community.” JA 10. This section stated:

The Pimmit Area is an unincorporated community located in Fairfax County. The community is administered politically by the Fairfax County Government. Police protection is provided by Fairfax County and fire protection is provided by Fairfax County. The community is comprised of retired people, those who commute to work at nearby cities and work in local businesses.

There are numerous religious institutions and businesses in the

community. Residents conduct business in the Pimmit Area and travel to nearby communities for other supplies and services.

In addition, the Final Determination at 3 stated that one disadvantage of the proposal was “(t)he loss of a retail outlet in the community.” JA 9. There is no question that the community at issue is Pimmit Hills and not the city of Falls Church.

Finally, it should be noted that there is no longer any “Falls Church Main Post Office.” The only post office facility in the city of Falls Church is the Finance Station, which is located at 800 W. Broad Street, Suite 100, Falls Church, Virginia 22046. *See* USPS Post Office Locations in the Falls Church, VA area. JA 18 – 23, JA 25. On June 20, 2009, the Postal Service had relocated the retail operation from the Falls Church Main Post Office at 301 W. Broad Street, Falls Church, to the Finance Station at 800 W. Broad Street. *See Falls Church Post Office Moving*, Postal News, June 8, 2009 (available at [http://about.usps.com/news/state-releases/va/2009/va\\_2009\\_0608.htm](http://about.usps.com/news/state-releases/va/2009/va_2009_0608.htm)). Also, the facility for the carriers, which had been located at 301 W. Broad Street, has been moved to Merrifield, Virginia.

The comments by the Postal Service in its notice do not accurately describe the community of Pimmit Hills and omit the fact that there is no longer a Falls Church Main Post Office.



**IV. The Commission's own analysis as to what constitutes a relocation or rearrangement of facilities within a community cannot be credited because it fails to cite pertinent regulations.**

In its brief at 27-34, the Commission relies upon its own orders as authority for what constitutes a relocation, rearrangement or realignment of facilities within a community. However, in simply using its own orders as authority, the Commission has failed to cite or rely upon the pertinent regulations concerning post office closings and relocations. The regulations concerning closings are set out in 39 C.F.R. § 241.3 and the regulations concerning relocations are set out in 39 C.F.R. § 241.4. The analysis of the Commission does not consider the definitions and procedures for closings and relocations, which are explained in those regulations.

The Commission simply ignores the pertinent regulations in its orders. Similarly, the pertinent regulations are not cited in the Commission's brief submitted to this Court. Further, the term, "rearrangement of retail facilities," is not part of the regulatory scheme, but appears to be a phrase created by the Commission.

In its brief at 29-30, the Commission discusses its own analysis, which was recognized in the case involving the Oceana Station in Virginia Beach, Virginia. *See* PRC Order No. 436, Docket No. 82-10 (Oceana Station, Virginia Beach, VA)

(June 25, 1982) (“*Oceana Station*”). The *Oceana* facility is different from the Pimmit Branch, because the *Oceana* facility was located in the city of Virginia Beach. See *Oceana Station* Order at 5 [Resp. Br. B-30], which notes that “(v)arious small communities in the county have also been blended into the city of Virginia Beach.”

By contrast, the Pimmit Branch was located in Fairfax County and not in the city of Falls Church. A city has been used by the Postal Service in its description of what constitutes a community. Thus, Pimmit Hills is its own community and is not part of the community of the city of Falls Church. The fact that Pimmit Hills has a Falls Church mailing address does not make it part of the city of Falls Church. Other post office locations, including Mosby, Seven Corners and Baileys Crossroads also have Falls Church mailing addresses. JA 18-23.

The failure of the Commission to rely upon the appropriate regulations in issuing orders concerning post office closings shows the need for judicial review of the Commission’s orders. The practice of the Commission has been to cite its own previous orders as authority, rather than the pertinent regulations. Thus, its own analysis is essentially self-contained and conducted outside the regulatory scheme. This practice by which a Commission simply fails to cite or rely upon pertinent regulations should be reviewed by this Court.

Further, the Commission has used its own definition of relocation (which it often describes as a rearrangement or realignment) to find that it does not have jurisdiction to review post office closings. The Commission should not be permitted to deny review of appeals based on a self-created doctrine that the Commission does not have jurisdiction to review rearrangements or realignments.

**V. The Commission has jurisdiction to review the action taken on the Pimmit Branch, which was a closing and not a rearrangement of facilities.**

The Commission erred in dismissing the appeal of the Pimmit Branch based on its finding that it did not have jurisdiction. The record plainly showed that the action taken concerning the Pimmit Branch was a closing or discontinuance, which is subject to the provisions of 39 U.S.C. §404(d) and 39 C.F.R. § 241.3. However, the Commission ignored the fact that the record showed that the action was a closing. Instead, the Commission applied its own analysis to describe the action as a rearrangement of retail facilities. Further, as discussed above, the Commission simply ignored the pertinent regulations concerning closings, even though those regulations applied to the closing of the Pimmit Branch.

In its order [PRC Order No. 1159 Dismissing Appeal in Docket No. A2011-90, January 20, 2012. JA 26], the Commission concluded that “(t)he closing of the Pimmit Branch was part of a rearrangement of retail facilities in the Falls Church,

Virginia area.” Order at 12, JA 37. This sentence exhibits the confusion of the Commission. Under the regulations, a closing, which is controlled by 39 C.F.R. § 241.3, is different from a relocation, which is controlled by 39 C.F.R. § 241.4. The Commission continues to use its self-created category of “rearrangement of retail facilities.”

The Commission continued the confusion of categories in its brief. For example, it asserts [Resp. Br. 34] that the “Postal Service undertook the closure of the Pimmit Branch as part of a realignment of services in Falls Church.” The closing of a facility, such as the Pimmit Branch, is not a “realignment of services.” Instead, a closing is “an action in which Post Office operations are permanently discontinued without providing a replacement facility in the community.” 39 C.F.R. § 241.3(a)(2)(iii) [Effective July 14, 2011].

In addition, the Commission ignored the important criterion in its own analysis, which is that the action must be “within a community.” In its brief at 36, the Commission questions whether a community should necessarily be coextensive with jurisdictional boundaries. However, 39 C.F.R. § 241.2(a)(1) provides that stations are within the corporate limits or boundary and branches are outside the corporate limits or boundary of the city in which the main post office is located.

Moreover, as discussed above, with the present strategy of the Postal Service

to move facilities, there no longer is a main post office in Falls Church. Thus, the Pimmit Branch could not be realigned with a non-existent Falls Church Main Post Office.

The Commission failed to explain how Pimmit Hills is within the community of the city of Falls Church. In the sentence from the Commission's order cited above, the Commission referred to "the Falls Church, Virginia area." The term, "area," has no meaning in the analysis of closings and their effect on the community.

Pimmit Hills is its own community. The Postal Service should acknowledge the Pimmit Hills community and provide a retail facility in that community. The Pimmit Branch was closed because of an expensive new lease at the Falls Church Finance Station. It was not closed because of an initiative of the Postal Service to reduce costs or improve service. Further, it should be obvious that a store which sells stamp booklets cannot be an adequate substitute for the services provided by a post office.

Moreover, it would be a prudent business decision for the Postal Service to provide a retail facility in Pimmit Hills. It was recently chosen by the real estate company, Redfin, as one of the hottest neighborhoods in the D.C. area. A Redfin agent explained that "Pimmit Hills is right between the commercial haven and

employment hub of Tysons Corner and charming main street-esque Falls Church City. With an abundance of flat large lots, enhancement of the Tysons Corner area and additional transportation options, Pimmit Hills looks to be a popular place for years to come.” See *Pimmit Hills, Petworth and Fallsmead Listed as Hottest Local Neighborhoods for 2013*, dcist.com, January 15, 2013 (available at [http://dcist.com/2013/01/pimmit\\_hills\\_petworth\\_listed\\_as\\_hot.php](http://dcist.com/2013/01/pimmit_hills_petworth_listed_as_hot.php)).

The petition concerning the Pimmit Branch should be granted and the matter remanded to the Commission.

**VI. The Commission’s interpretation of 39 U.S.C. §404(d) concerning post office closings is not entitled to *Chevron* deference.**

The Commission asserts in its brief at 37-40 that the Commission’s interpretation of 39 U.S.C. §404(d) is entitled to *Chevron* deference. In making this argument, the Commission does not cite the pertinent regulations concerning post office closings and relocations, which include 39 C.F.R. § 241.3 and 39 C.F.R. § 241.4.

Further, the Commission does not refer to passages of 39 U.S.C. §404(d), but only references the terms, “close,” “closing,” “closure,” and “consolidation.” Resp. Br. 39. The pertinent regulations discuss closings and consolidations, so the Commission should have used those regulations in any effort of its own to define those terms. It is clear that a realignment or a rearrangement is not a closing.

Moreover, the Commission argues in its brief at 39 that “Congress did not decide whether the relocation of a postal facility within the community would constitute a ‘closing.’” However, the regulations plainly set out provisions for closings [39 C.F.R. § 241.3] and for relocations [39 C.F.R. § 241.4]. The Commission cannot ignore regulations in creating its own categories, such as realignment or rearrangement of facilities.

The analysis of the Commission is not entitled to *Chevron* deference.

**VII. The Commission has failed to consider the issues concerning the historic preservation of the Venice, California, post office and its mural, including the public’s right to have access to the mural.**

The Commission has failed to address the historic preservation issues related to the Venice, California, post office, including the preservation and availability of the mural. The Final Decision about the Venice Post Office includes this commitment, JA 57, concerning the mural:

The Postal Service will include measures to ensure the mural will remain available for public viewing in any plan for reuse or disposal of the Post Office property.

Also, there are regulations concerning the procedures when historic preservation issues are involved. *See* 39 C.F.R. § 241.4(d). These regulations provide that it is the policy of the Postal Service to comply with Section 106 of the general provisions of the National Historic Preservation Act, 16 U.S.C. § 470, *et*

*seq.* In reviewing the petition for the Venice, California, post office, the Commission failed to address 39 C.F.R. § 241.4(d), the Postal Service policy concerning compliance with Section 106, and the Postal Service commitment to provide public access to the mural.

The Commission is the forum through which postal customers could bring their concerns about the Venice post office following their administrative appeal pursuant to 39 C.F.R. § 241.4. The Commission should have addressed the provisions in 39 C.F.R. § 241.4(d), concerning historic preservation issues.

Moreover, the PRC failed to consider the commitment by the Postal Service that the mural will remain available for public viewing. If the Postal Service makes a commitment in the process of closing or relocating a post office, there should be a procedure to ensure that the Postal Service keeps its commitment. The Venice residents and postal customers have expressed serious concerns about the mural and having access to it. The relocation process should include a review of the Postal Service obligations and commitments concerning the mural.

In its brief at 46, the Commission noted the order for the Village Station in Pinehurst, North Carolina, which presented issues about historic preservation. *See* Docket No. A2011-49, Order Affirming Determination, December 12, 2011 (Village Station, Pinehurst, NC). In that order, there was a dissent by Chairman



Goldway [Resp. Br. B-116 – B-119], which included the following analysis.

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 section 404(d), fully independent of the Postal Service's position on its obligations under the NHPA and its regulations implementing that Act.

The Commission should have addressed the concerns about the historic nature of the Venice post office and the mural. That responsibility is independent of any duty to enforce the National Historic Preservation Act.

In light of the important historic preservation issues and the commitment of the Postal Service that the public have access to the mural, the Venice, California, petition should be granted and the matter remanded to the Commission.

**VIII. The Commission cannot affirm the determination to close the Spring Dale, West Virginia, post office by a tie vote.**

The Commission decided the appeal of Spring Dale, West Virginia, post office by a 2-2 vote. Petitioners submit that a 2-2 tie vote cannot be considered an affirmance of the Postal Service determination to close the Spring Dale post office.

The Commission asserts in its brief at 40-44 that the Commission reasonably decided that a tie vote can be considered an affirmance of the Postal Service determination to close the Spring Dale post office. In addressing the question of a tie vote, the Commission argues in its brief at 42 that petitioners' suggestion about a different voting rule "does nothing to call into question the reasonableness of the voting rule that the Commission has *actually* decided, unanimously, to adopt."

This statement in the brief gives the impression that the Commission has adopted a voting rule concerning tie votes. However, the Commission has not adopted any rule. Instead, the Commission began putting footnotes in orders after the occurrence of numerous tie votes had revealed that there was an issue about the effect of a tie vote.

The Commission clearly faced a significant problem in light of the quantity

of tie votes. The Commission FY 2012 Annual Report (available at [http://prc.gov/Docs/86/86069/PRC\\_2012\\_Annual\\_Report\\_w-links.pdf](http://prc.gov/Docs/86/86069/PRC_2012_Annual_Report_w-links.pdf)) reported that the Commission considered and concluded 207 post office closing appeals in FY 2012. The Commission affirmed the Postal Service in 162 cases. Further, 133 of those cases were decided by a tie vote, which the Commission treated as an affirmance of the Postal Service. Thus, 133 of the 162 cases that affirmed the Postal Service were decided by a tie vote, but were considered to be an affirmance. *See* 2012 Annual Report at 44 n. 4.

The Commission notes in its brief at 42 that Congress had vested the Commission with the discretion to promulgate rules. The fact that the Commission could have promulgated a rule about tie votes does not show that the Commission has promulgated any such rule. In the absence of a rule about tie votes, the Commission's 2-2 vote cannot be considered an affirmance. Even if there were a rule about tie votes, it is not clear that a tie vote can properly be construed as an affirmance in a vote by the Commission concerning appeals of post office closings.

The Commission noted in its brief at 42 n. 24 that a provision, codified at 39 U.S.C. § 504(a), no longer contains a majority-vote requirement. However, the previous provision had provided that all final acts of the Commissioners should be

by a vote of an absolute majority. The rule about an absolute majority is not determinative of the effect of a tie vote, so the fact that the rule had been stricken is not instructive on the tie vote issue.

In its brief at 43, the Commission cites several cases to support the claim that other administrative agencies treat a tie as an affirmance in cases where the decision under review would have independent effect absent vacatur or reversal. However, the cases are not concerning situations similar to the Commission's review of a Postal Service determination. In *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n. 8 (4<sup>th</sup> Cir. 1995), the Benefits Review Board was reviewing the decision of an administrative law judge. This situation was described in n. 8 as an administrative agency evenly dividing over a lower-tier ruling. By contrast, the determination by the Postal Service is not a "lower-tier ruling," such as the ruling of the administrative law judge in *Curry*. The Postal Service is a different agency than the Commission. A Postal Service determination is not comparable to a decision of an administrative law judge.

In *Ford Motor Co. v. I.C.C.*, 714 F.2d 1157, 1163 (D.C. Cir. 1983), the decision of Division 1 of the Interstate Commerce Commission was the final judgment after the full Commission divided 3-3. It was noted that Commissioner Sterrett, joined by two other Commissioners, set out his reasons for concurring in

the result. However, his statement did not qualify as a Commission opinion in the record on the petition for review to the D.C. Circuit. The situation in the case concerning the Interstate Commerce Commission involved full Commission review of a decision of Division 1. The issue concerning the tie vote of the Postal Regulatory Commission presents a different question. The Postal Regulatory Commission was not reviewing a decision of a division of that Commission, but a determination of the Postal Service.

Again in its brief at 44, the Commission refers to the “tie-vote rule adopted by the Commission” and describes it as plainly reasonable. In its brief, the Commission gives no citation to a rule or describes when it was promulgated. Further, the Commission asserts that the tie-vote policy “has been routinely and consistently employed.”

The Commission cites to no authority that the tie-vote policy has been routinely and consistently employed. In fact, some of the orders did not note or comment on the existence of a tie vote. *See, e.g.,* Docket No. A2012-8, Order Affirming Determination, January 25, 2012 (Rhodell, West Virginia) (included in Addendum of PRC Orders at 25) at 2. In the Rhodell appeal, the Order stated that “(t)he Final Determination to close the Rhodell post office is affirmed,” but there was no footnote about the tie vote. In light of the numerous orders that had been

decided with tie votes, the Commission began using a footnote similar to the one in the Spring Dale, West Virginia, appeal. The footnote indicated that the Final Determination would stand when there is a tie vote. Spring Dale Order at 2 n. 4. JA 115.

The addition of a footnote to some of the Commission's orders to point out the existence of a tie vote was done presumably as an expedient to support the claim that the Postal Service's determination to close a post office, such as the one in Spring Dale, West Virginia, is affirmed. The Commission should not be permitted to create voting rules to address a tie-vote stalemate that faced the Commission when it reviewed appeals of post office closings at a time when post office closings were controversial and a subject of public debate. As discussed above, the Postal Service has now abandoned its strategy to close post offices. The tie votes were an indication of the differences of opinion about the merits and factual support for closing post offices. The Commission should not be permitted to evade its duties to decide appeals by simply claiming that a tie vote is an affirmance.

The Spring Dale, West Virginia, petition should be granted and the matter remanded to the Commission.

## CONCLUSION

Wherefore, for the foregoing reasons, petitioners respectfully request that these petitions be granted and that these matters be remanded to the Postal Regulatory Commission for further consideration.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)**

Pursuant to Fed. R. App. P. 32(a)(7), I certify that the attached reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The reply brief contains 6,265 words.

I also certify that this reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The reply brief has been prepared in a proportionally-spaced typeface using 14-point Word Times New Roman typeface.

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Appellate CM/ECF system on May 24, 2013. Participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Respectfully submitted,

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