

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

*In the Matter of:*

East Elko Station  
Elko, Nevada  
(Simon Sanchez, Jr., Petitioner)

Docket No. A2010-3

COMMENTS OF UNITED STATES POSTAL SERVICE  
REGARDING JURISDICTION UNDER (CURRENT) SECTION 404(d)

I. Introduction

These Comments address the longstanding difference in understanding between the United States Postal Service (“USPS” or “Postal Service”) and the Postal Rate Commission, and more recently also the Postal Regulatory Commission (both referred to herein as “Commission” or “PRC”)<sup>1</sup>, regarding 39 U.S.C. § 404(b).<sup>2</sup> That section of law is commonly understood as establishing a limited customer right to appeal a Post Office discontinuance decision by the Postal Service to the PRC; on appeal, the Commission may either approve the USPS decision or remand it back to the Postal Service based only upon the administrative record supporting the discontinuance decision.

Section 404(b) was originally enacted for the purpose of protecting small, rural Post Offices from formal discontinuance. Senator Randolph, author of the “Randolph amendment” that was subsequently enacted as section 404(b), and his supporters repeatedly praised the contribution of rural postmasters to the “human side of the Government”, bemoaned the fate of small towns when with the closing of the Post Office “the American flag really comes down”, and

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<sup>1</sup> While the two PRC organizations have never co-existed, and despite the fact that the latter one was, at first, staffed with that of the former, legal conclusions of the former are not necessarily binding upon the latter because of changes in the legal context identified in note 2.

<sup>2</sup> The *Postal Accountability and Enhancement Act (PAEA)*, Public Law 109-435 (December 20, 2006), incorporated former subsection 404(b) into subsection 404(d) with no substantive change beyond new application of the mailbox rule to the previous 30-day limit within which appeals of final determinations to discontinue a Post Office must be received at the Commission.

criticized postal management for (among other things) closing 1,200 Post Offices between 1971 and 1975.<sup>3</sup>

The Commission's interpretation of section 404(d) has ventured very far from small, rural Post Offices. In the last year's time, the Commission has advanced two interpretations of Congress' grant of subject matter jurisdiction in section 404(d) that 1) reflect the Commission's consistent expansion that grant since shortly after it became law in 1976, and 2) is at odds with the Postal Service's single and consistent interpretation that it has understood and applied since Post Office discontinuance regulation began to take shape. The short version of the agencies' difference derives from the Postal Service's understanding that Congress used the term "Post Office" in the same technical sense that it has for well over 100 years when it passed section 404(b), while the Commission instead concludes that Congress ignored the history of its own action and—without overtly signaling any change in its utilization<sup>4</sup>—instead used that term in other senses as the Commission has over the last thirty plus years.

The Commission's interpretation of the term "Post Office" has continued to evolve in the last half of 2009. The Commission currently maintains pending dockets in which it seemingly expects to formalize as conclusions of law both arms of its most recent preferences for the definitions of "Post Office": These include:

PRC Docket No.N2009-1, a Postal Service request for an advisory opinion regarding its *Station and Branch Optimization and Consolidation Initiative, 2009*, that concluded with a March 10, 2010 advisory opinion. The Commission agreed with the Postal Service that the docket provided no opportunity to resolve the longstanding difference between the two independent establishments of the federal executive branch, but indicated some interest in addressing that issue in this docket.<sup>5</sup>

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<sup>3</sup> See in particular, 122 Cong. Rec. 26092 (remarks of Sen. Randolph), 27108 (remarks of Sen. McGovern), 27128 (remarks of Sen. Stevens), 27392 (remarks of Sen. Abourezk), 27396 and 27424 (remarks of Sen. Humphrey).

<sup>4</sup> As noted *infra*, Senator Randolph, author of the legislative change that became law, actually signaled the absence of any change from the technical use of "Post Office".

<sup>5</sup> *Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches* (March 10, 2010) at 65-66, n.42. This Comment incorporates by reference materials submitted in that

PRC Docket No. PI2010-1 a public inquiry docket called *Investigation of Suspended Post Offices*, ongoing; the Commission has already announced its intention of formalizing its *de facto* and *de jure* conclusions that the suspension of Post Office operations by the Postal Service constitutes a discontinuance under section 404(d).<sup>6</sup>

PRC Docket No. A2010-3, *this docket* and a Post Office discontinuance series docket in which the Commission has accepted as an appeal a Postal Service decision to discontinue a station or branch, just like those discussed throughout Docket No. N2009-1, and in fulfillment of its broadcasted intention in the summer of 2009 to conclude that section 404(d) interpretation.

Statements by PRC officials recently have claimed that the statutory discontinuance requirements apply more broadly than the former Postal Rate Commission has previously expressed. Specifically, in his July 30, 2009, written statement before the U.S. House of Representatives, Mr. John Waller, PRC Director, Office of Accountability and Compliance, stated as follows:

If the Postal Service should determine to discontinue or consolidate a station or branch under this Initiative, it would be obligated under section 404(d) of title 39 to provide for thorough public notice and input into the decision. The Commission has long accepted the common usage of any retail location staffed by Postal Service personnel as the operative definition of a post office as used in the [Postal Law]. The Commission's definition of a post office includes stations and branches. The statute further confers upon the Commission the authority to hear customer appeals of decisions to close post offices. The Postal Service's proposed closure process does not include notifying the public of the right to appeal to the Commission. Participants have already submitted questions on this issue and it is likely to receive a thorough review over the next several months.

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docket also discussing the scope of jurisdiction under section 404(d). See, Reply Brief of the United States Postal Service (December 16, 2009) at 6-12. Some effort is being made to avoid repetition of that material here; yet that discussion is directly on point and identifies the single most critical piece of legislative history indicating Congress' intention to limit section 404(b) to Post Offices, while excluding other types of retail facilities.

<sup>6</sup> Order No. 319 (October 19, 2009) at 10.

Mr. Waller stated that the PRC considers stations and branches within the scope of the statutory requirements, as well as "any retail location staffed by Postal Service personnel." This expands the scope of the former Postal Rate Commission's application of the statutory requirements, which previously limited its claimed scope of the statutory requirements to the 'sole' or 'last' retail facility serving a 'community,' which, presumably, was intended to refer to only a subset of the entire universe of stations and branches. Further, the former Commission considered community post offices, which are not staffed by Postal Service personnel, within the scope of the requirements, but no mention was made of them in Mr. Waller's written statement.

Similar views were expressed by Chairman Goldway, in her August 6, 2009, testimony before the U.S. Senate. In an exchange with Senator Lieberman, Chairman Goldway stated:

The Postal Regulatory Commission has a different interpretation [than] ... the service [in] ... defining Post Office in terms of its administrative organization. In other words, who reports to whom, whereas the Postal Regulatory Commission defines it in terms of the services actually provided in the community. So to the extent which branches and stations function like Post Offices the way you and I imagine a Post Office. We define those as Post Offices and ... expect and anticipate that all of the laws regarding closing Post Offices cover those stations and branches.

Again, the operative standard articulated by Chairman Goldway's exchange with Senators suggests that the Commission interprets the requirements to apply to stations and branches that "function like Post Offices," which presumably could represent a much broader scope of subordinate units subject to the statutory requirements.

The Postal Service infers that the Commission's latest preference for its jurisdiction is based on its understanding that, under some circumstances, it would entertain appeals of decisions to discontinue stations or branches. But so far as the Postal Service is aware, the first time the Commission signaled its claimed jurisdiction to consider all station and branch discontinuance decisions

was in the oversight testimony quoted above. Previous PRC decisions limited its claim of jurisdiction to the last or only retail facility in a community.<sup>7</sup>

The first arm of the 2009 definitions consists of a conclusion that Congress intended that the term “Post Office” also includes stations or branches (which are administered and supervised by Post Offices), but not to any of the rest of facility types, which can include non-personnel units, carrier annexes, plants, vehicle maintenance facilities, District or Area offices, Headquarters, Facility Service Offices, detached box units, Automated Postal Centers (APCs), collection box units, contract units, Community Post Offices, consignment units, ATMs, Accounting Service Centers, authorized shippers, and various others—despite the fact that many of these other facility types do provide customers with some retail service.

The second arm of the 2009 extensions, consisting of a conclusion that suspension of Post Office operations itself constitutes an appealable discontinuance (as would presumably also be true for a station or branch). In the Postal Service’s view, this interpretation suggests a Commission substitution of its own judgment on how to run postal operations for that of the Postal Service

## II. Discussion

Congress has used the term “Post Office” in its technical sense for well over a century, and it has done so while recognizing the need for postal officials to establish facilities, including Post Offices, stations and branches, and also to discontinue them. The authority of Congress "to establish post offices", U.S. Const. art. I, §8, cl. 7, has been consistently delegated to the Postmaster General since the establishment of the Nation's postal system.<sup>8</sup> Thus, the act establishing the general Post Office and post roads of the United States gave the

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<sup>7</sup> The inconsistency of the Commission’s more recent preference regarding Congress’ grant of subject matter jurisdiction is markedly inconsistent with its previous decisions. This is addressed, *infra*. What is most striking, and worrisome from the Postal Service perspective, is that the Commission sees itself as free to reconstruct its grant of jurisdiction as it sees fit, with no need to justify changes from one time to another. Such perceived freedom is incompatible with the ironclad nature of statutorily granted subject matter jurisdiction since it extends beyond a federal agency’s interpretative or rulemaking leeway.

<sup>8</sup> See, discussion in *Ware v. United States*, 71 U.S. 617, 630-633 (1866).

Postmaster General authority "to appoint an assistant, and deputy postmasters, at all places where such shall be found necessary." Each deputy postmaster was directed to keep an office "in which one or more persons shall attend at such hours as the Postmaster General shall direct, for the purpose of performing the duties thereof."<sup>9</sup> Seven years following, Congress proclaimed in more explicit terms:

That there be established at the seat of government of the United States a General Post-office, under the direction of a Postmaster General. The Postmaster General shall appoint an assistant, and such clerks as may be necessary for performing the business of his office; he shall establish post-offices, and appoint postmasters, at all such places as shall appear to him expedient, on the post roads that are or may be established by law ...<sup>10</sup>

As contained in later revisions of the postal statutes, similar language was supplemented by provisions specifically concerning the discontinuance of post offices.<sup>11</sup> A general revision and consolidation of the postal statutes in 1872 specified that the Postmaster General should "establish and discontinue post offices", that he should "establish post-offices at all such places on post-roads established by law as he may deem expedient", and that he might discontinue any office "where the safety and security of the postal service and revenues are endangered from any cause whatever, or where the efficiency of the service shall require such discontinuance."<sup>12</sup>

Indeed, even without specific statutory language, the authority to establish Post Offices and other facilities carried with it by implication the power to discontinue those postal facilities, except where expressly limited by statute. As

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<sup>9</sup> Act of February 20, 1792, ch. 7, §§3, 7, 1 Stat. 234; Act of May 8, 1794, ch. 23, §3, 1 Stat. 357.

<sup>10</sup> Act of March 2, 1799, ch. 43, §1, 1 Stat. 733. See also, Act of April 30, 1810, ch. 37, §1, 2 Stat. 593; Act of March 3, 1825, ch. 64, §1, 4 Stat. 102.

<sup>11</sup> In response to current events, the Act of February 28, 1861, ch. 61, 12 Stat. 177-178, allowed the Postmaster General to discontinue service and post offices on a post route "whenever ... the postal service cannot be safely continued, or the post office revenues collected, or the postal laws maintained, ... by reason of any cause whatsoever."

<sup>12</sup> Act of June 8, 1872, ch. 335, §§6, 61, 91, 17 Stat. 285, 292, 296.

the Supreme Court explained, the authority to discontinue facilities is essential for the efficient operation of the national postal system:

... [T]he power to discontinue post-offices is incident to the power to establish them, unless there is some provision in the acts of Congress restraining its exercise. ... Strong necessity exists that the power of the Postmaster-General in this behalf should be upheld so long as the offices are established by his authority. New facilities for transportation may call for change of location, or it may appear that the location was unadvisedly selected, either from want of proper information or through misrepresentation. Some of these causes must be constantly operating in a sphere of action so vast and diversified as that of the Post-office establishment.<sup>13</sup>

Codified in more contemporary terms, former 39 U.S.C. §701<sup>14</sup> empowered the Postmaster General to "establish [P]ost [O]ffices as he deems expedient", discontinue Post Offices "when the efficiency of the service requires or revenues are endangered from any cause", and consolidate post offices with the restriction that a post office could not be discontinued at a county seat as a result of a consolidation.<sup>15</sup> Former 39 U.S.C. §705 permitted the Postmaster General to establish stations or branches "within the delivery limits of a [P]ost [O]ffice", or within 20 miles of a town of 1,500 or more inhabitants in which the principal office was located. This authority could not be used as a basis for discontinuing an established post office. Apart from these restrictions, however, the closing of Post Offices was left to the discretion of the Postmaster General, as illustrated by the dismissal of an attempt to enjoin the closing of the Post Office in Isleta, Ohio:

[The statute] authorizes the Postmaster General to discontinue any post office "\*\*\* where the efficiency of the service requires \*\*\*." There is no objective criterion, such as amount of mail handled or dollar volume of business, established by the statute. It leaves the decision as to whether efficiency requires the closing of a post office solely to the judgment of the Postmaster General and his designated agents. The discontinuance of the post office was a

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<sup>13</sup> *Ware v. United States*, *supra*, 71 U.S. 632-633.

<sup>14</sup> Pub. L. No. 86-682, 74 Stat. 582 (September 2, 1960).

<sup>15</sup> Reflecting the historical efforts of postal officials to centralize control over the operations of smaller offices, the term "consolidation" refers to the conversion of a post office into a station or branch under the administrative direction of another post office.

matter clearly within the authority of the statute, no matter how unwise the action may have been.

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It is not hard to imagine the chaos which would result if all authorized acts of government executive officers could be restrained merely because a court believed them to be ill advised. Since the closing of the Isleta post office was in accordance with the statute and since no question relating to the constitutionality of the statute itself has been raised, it follows that this was an action of the sovereign which is not subject to judicial review and cannot be enjoined.<sup>16</sup>

From the Postal Service's point of view, the distinction between an independent Post Office and the subordinate units attached to that office is clearly established in postal regulations and operating instructions. See Handbook PO-101 *Post Office Discontinuance Guide, Postal Operations Manual (POM)* 123.6. As the Commission noted in the opinion generated in PRC Docket No. N2009-1, the Postal Service has separate and distinct procedures that apply to the discontinuance of a station, branch, or contract unit, as opposed to the closing or consolidation of a post office. *Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches* (March 10, 1020) at 3, 12, 65-66.

Postal regulations reflect the statutory distinction between an independent Post Office, and its subordinate stations and branches, which Congress has followed for well over a century.<sup>17</sup> As codified in former title 39, postal statutes gave the Postmaster General authority to establish and discontinue Post Offices, and to "consolidate" Post Offices by making them into stations or branches of another Post Office. See, former 39 U.S.C. §§701, 705.

Numerous other postal statutes, not directly concerned with the establishment of postal facilities, have also illustrated the distinction between a

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<sup>16</sup> *Sergeant v. Fudge*, 238 F.2d 916, 917 (6th Cir. 1956).

<sup>17</sup> See, Act of March 3, 1847, ch. 63, §10, 9 Stat. 201; Act of April 16, 1862, ch. 56, §1, 12 Stat. 379-380; Act of March 3, 1863, ch. 71, §13, 12 Stat. 703-704; Act of June 8, 1872, ch. 335, §98, 17 Stat. 296; Act of June 9, 1896, ch. 386, 29 Stat. 313; Act of August 24, 1912, ch. 389, §1, 37 Stat. 545; Act of May 18, 1916, ch. 126, §15, 39 Stat. 163; Act of October 28, 1919, ch. 86, 41 Stat. 323; Act of March 10, 1952, Pub. L. No. 277, ch. 98, §1, 66 Stat. 23; Act of September 2, 1958, Pub. L. No. 85-893, §1, 72 Stat. 1713.

station or branch and a Post Office. For example, former 39 U.S.C. §§3524-3530, which set compensation levels for postmasters and other management employees, clearly show the administrative distinction between a Post Office, supervised by a postmaster, and its subordinate stations and branches, generally under the direction of an office in charge. Similarly, in extending the protection of criminal statutes to postal facilities and operations, Congress was careful to apply those statutes not only to Post Offices, but to their subordinate service units. See, for example, 18 U.S.C. §§1703, 1708, 1709, 1712, and 1721.

The Postal Service further believes that Congress was well aware of the longstanding distinction between Post Offices and other types of postal facilities when it enacted 39 U.S.C. §404(b). Thus, in proposing the legislation which provided the foundation for current section 404(b), Senator Randolph expressed his opposition to the "indiscriminate closing of our rural and small town post offices" as well as to the decision "to create branches out of many post offices close to large cities." To curtail such actions, he offered legislation requiring the Postal Service to "substantiate any proposal to change or eliminate independent post offices." See, 122 Cong. Rec. 6314 (March 11, 1976).

The "Randolph Amendment" accordingly provided for local participation in determinations to discontinue small rural Post Offices, or to consolidate them under the management of another Post Office. In its analysis of this section, the conference report on H.R.8603 explicitly limited its application to Post Offices:

The conference substitute adopts the Senate provision except that the right of appeal to a United States court of appeals is deleted and instead there shall be a right of appeal to the Postal Rate Commission. The managers intended that an appeal to the Commission under this new provision may be made only by a regular patron of a post office which has been ordered to be closed or consolidated. Also, the managers intend that this provision apply to post offices only and not to other postal facilities.

H.R. Rep. No. 94-1444, 94th Cong., 2d Sess. 17 (1976). The Postal Service was and is well aware that discontinuance of any postal facility requires careful consideration and often involves discussion with elected officials. However, as a

legal matter, the Postal Service conclusion that section 404(b) then, and section 404(d) now, still as a matter of law applies only to Post Offices.

The Commission's contrary opinion is that the right of appeal for discontinuance decisions is broader than Post Offices alone,<sup>18</sup> although exactly how broad has varied over the years. For example, the matter cited in the foregoing footnote, *Reed, Oklahoma 73563*, entails a Commission conclusion that its jurisdiction under section 404(b) extended to include Community Post Offices, which are contract units; hence the Commission's assertion of jurisdiction necessarily interferes with the Postal Service's administration of its contractual rights.

On January 18, 1984, the Commission defined another standard for its jurisdiction pursuant to section 404(b) in *Knob Fork, West Virginia 26579*, PRC Docket No. A83-30: the last retail facility in a community.

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." ... In ordinary usage, "post office" is a retail facility where patrons may purchase postal services, and dispatch and possibly receive mail.

Commission Opinion at 3, Docket No. A83-30, *Knob Fork, West Virginia 26579* (January 18, 1984)(footnote omitted). In support of this decision, the Commission offered the following analysis of the scope and purpose of section 404(b):

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<sup>18</sup> Disturbed by the Postal Service's "lack of understanding and acceptance of the Postal Rate Commission's review role if, in fact, a community post office is phased out following the contract period", Commissioner Bright subsequently called for clarifying legislation to address and resolve the question "once and for all." Concurring Opinion, Docket No. A83-13, *Reed, Oklahoma 73563* (March 15, 1983). The Commission has continued to request Congressional expansion of section 404(d) so that stations and branches are included expressly. While numerous bills to that effect have been submitted Congress has never done so. The same sequence events took place in the months and years leading up to the *PAEA*; one might think that Congress' addition of the mailbox rule to section 404(d)(5), yet refusal to include stations and branches would persuade the Commission that its unilateral expansion of Congressionally limited subject matter jurisdiction is not sustainable, but so far that has not proven true. Apparently Congress recognizes the need for the Postal Service to manage its own business, even if the Commission cannot.

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.

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 ... policies of the Postal Reorganization Act ... . 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.

*Id.* at 7-8 (footnotes omitted). Citing these reasons, the Commission has consistently exhibited its willingness to remand similar appeals of CPO closings to the Postal Service. See, Commission Opinion, Docket No. A84-5, *Foraker, Indiana 46525* (March 6, 1984); Commission Opinion, Docket No. A85-17, *Ranchita, California 92066* (June 12, 1985). See also, PRC Order No. 808, Docket No. A89-1, *North Egremont, Massachusetts 01252* (November 17, 1988)(dismissing case as moot following new contract agreement between Postal Service and CPO contractor).

The Commission has also issued various decisions exploring the question of what constitutes a "community" in the context of its derived statutory standard: 'last retail facility in a community'. One leading case is *Oceana Station, Virginia Beach, Virginia 23453*, PRC Docket No. A82-10. In that case, the Commission concluded that discontinuance of *Oceana Station*, one facility among many serving customers of Virginia Beach, was part of a reorganization of the mix and

locations of postal facilities serving the needs of the Virginia Beach community.<sup>19</sup> This PRC decision contained comments describing the community involved, and the distinction between a closing and a consolidation.

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 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.

PRC Order No. 436 at 7-8, Docket No. A82-10, *Oceana Station, Virginia Beach, Virginia 23453* (June 25, 1982). This language clarifies that for purposes of section 404(b), the entire city is a single community. With regard to "consolidations", however, the Commission seemingly narrowed the impact of its earlier remarks in Docket No. A78-1, *Gresham, S.C., Route #1, infra*, by concentrating upon managerial considerations:

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

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<sup>19</sup> Virginia Beach has an absolutely huge area of nearly 500 square miles, all of which are formally a part of the city; it includes large areas that are rural in nature. As such, it is far larger than perhaps any city in which a station or branch reporting to an EAS-level 24 Post Office, the universe of stations and branches that were the initial focus of attention in PRC Docket No. N2009-1.

PRC Order No 436, *supra*, at 8-9 (footnote omitted). This discussion by the Commission examines section 404(b) and recognizes that consolidation itself implies a functional and meaningful distinction between stations and branches (which is what a consolidated Post Office becomes) and Post Offices exists in the statute. The Commission has never explained why that distinction exists in the statute with respect to “consolidations” when it does not exist with respect to “Post Offices”. This failure illustrates the accuracy of the Postal Service position.

Most recently, the Commission discussed its approach to these matters while dismissing an appeal of the relocation of the post office in Wellfleet, Massachusetts. In that proceeding, the Postal Service had decided to move the Wellfleet Post Office from the center of the village of Wellfleet to a shopping center development approximately 1.2 miles away. The petitioners contended that the new location was actually within the neighboring village of South Wellfleet.<sup>20</sup> Following the path blazed in Docket No. A80-10, Saratoga, California 95070, *supra*, the Commission requested the Postal Service to discuss whether the village of Wellfleet was a "community" for the purposes of section 404(b), and whether the planned site for the Wellfleet Post Office was located outside the boundaries of the village. In its response, the Postal Service supplemented its arguments regarding the inapplicability of section 404(b) with a map showing the lack of a defined border between the villages of Wellfleet and South Wellfleet, and other evidence suggesting that the Town of Wellfleet, rather than either village, should be considered a "community" for purposes of the statute. Viewing this situation from the perspective of Docket No. A82-10, Oceana Station, Virginia Beach, Virginia 23453, *supra*, the Commission found the lack of an official boundary between the villages to be dispositive:

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.

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<sup>20</sup> Wellfleet and South Wellfleet are both villages within the Town of Wellfleet, Massachusetts.

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. ... 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. ...

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.

PRC Order No. 696, Docket No. A86-13, *Wellfleet, Massachusetts 02667* (June 10, 1986). The Commission's decision in this case accordingly leaves open the possibility that, notwithstanding the result of *Oceana Station*, the "rearrangement" of facilities among different "communities" in the same city or township might at some future date be found to be covered by section 404(b).

The duration over which the Commission considered the 'last retail facility in a community' as its operative definition of jurisdiction granted by section 404(b) consisted of many years. However, since neither the customers nor the Postal Service then had a legal right to appeal PRC determinations pursuant to section 404(b), this standard was difficult to test in the federal courts.

Thus far, one court has considered section 404(b) in a factual context similar to that presented by *Knob Fork*. In *Citizens for the Hopkins Post Office v. United States Postal Service*, Civ. No. 3-89-317-0 (D.S.C.), Order entered March

14, 1989, the court applied the PRC's test of 'last retail facility in a community'. In this action, the Postal Service announced its intention to move the Hopkins Post Office, a landmark in the unincorporated community of Hopkins for nearly 100 years, approximately 5 miles as the crow flies (and 9 miles as the crow drives) to a newly constructed building in another unincorporated community known as Horrell Hill. In its order directing the Postal Service to suspend work on the new facility pending compliance with the procedures of 39 U.S.C. §404(b), the Court analyzed the proposed action from the viewpoint of Hopkins residents:

The evidence presented establishes that the relocation of the post office will diminish the quality of service that is available to the Hopkins residents through their current post office. When the post office is moved to Horrell Hill, the residents of Hopkins will be served primarily by rural carriers. Although the postman can sell money orders and stamps, pick up and deliver mail, weigh and deliver packages, he does not supply post office boxes or provide these other services at the customer's convenience. Whereas now many residents walk to the post office daily, the new location will make these frequent visits impractical for many poor and elderly residents.

From the perspective of the customers of the present Hopkins facility, there is no question that their post office is being closed. It is being physically eliminated. The Post Office that once stood at the center of their community will soon be gone. A look at the legislative history of this statute shows that this is the very situation that the statute was meant to address. [Citation omitted].

This Court finds that the decision to close the post office facility at Hopkins, South Carolina and build a new facility at Horrell Hill is a "closing or consolidation" within the meaning of 39 USC '404(b) which warrants the procedural safeguards set forth therein.

*Id.*, Order for Preliminary Injunction at 3-4. The Court vacated its preliminary injunction and dismissed the action after the Postal Service terminated the contract for construction of the new facility. Citizens for Hopkins, *supra*, Order (May 11, 1989). The outcome of this proceeding suggests as a practical matter that the applicability of section 404(b) to post office relocations may vary in proportion to the distance between the old and new locations.

The analysis of the section 404(b) in cases involving somewhat different situations, however, suggests that the Postal Service's "technical or specialized" interpretation of "post office" is eminently reasonable. Thus, in *Wilson v. United States Postal Service*, 441 F. Supp. 803 (C.D.Cal. 1977), and *Knapp v. United States Postal Service*, 449 F. Supp. 158 (E.D.Mich. 1978), it was alleged that the transfer of mail processing operations from several local post offices to other facilities constituted a "consolidation" of post offices covered by 39 U.S.C. '404(b).<sup>21</sup> In analyzing (and rejecting) these claims, the Courts heeded Senator Randolph's objections to the "indiscriminate closing of our rural and small town post offices" as well as to the Postal Service's decision to "create branches out of many post offices close to large cities."<sup>22</sup> In the view of the *Knapp* court, 449 F. Supp. 162, the "closing" and "consolidation" rules of section 404(b) applied to Post Offices under the direction of a postmaster:

The type of "closing" and "consolidation" which induced Senator Randolph to introduce the bill that became §404(b) is the same type of "closing" and "consolidation" addressed by §101(b) and, evidently, is the same type of "closing" and "consolidation" to which §404(b) should be construed to refer. "Closing" thus refers to the complete elimination of the post office. "Consolidation", while more difficult to describe, certainly has the characteristic of subordinating the day to day overall management of one office having a postmaster to the administrative personnel of another office.

Similarly, the *Wilson* court, at 441 F. Supp. 806, adopted the plaintiff's explanation that "when a [P]ost [O]ffice loses its postmaster, it becomes a postal station or branch if it remains operational. If the station or branch is then made subordinate to another Post Office and its postmaster, a consolidation has arguably occurred. Thus, plaintiffs contend that the existence of a postmaster distinguishes a Post Office from a postal station or branch."

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<sup>21</sup> See also, *Foy v. United States Postal Service*, Civ. No. C-83-567-WS, Slip. Op. at 4 (M.D.N.C. 1983).

<sup>22</sup> Hearings on S. 2844 before the Senate Comm. on Post Office and Civil Service, Part 4, 94th Cong., 2d Sess. 142 (1976), quoted in *Wilson*, supra, 441 F. Supp. 806; *Knapp*, supra, 449 F. Supp. 161-162.

The question whether an urban station constitutes a "Post Office" within the terms of 39 U.S.C. §404(b) was squarely presented in *Shepard Community Association v. United States Postal Service*, Civ. No. C2-82-425 (S.D.Ohio 1985). In that case, plaintiffs claimed that the closing of a station of the Columbus Post Office was an action subject to the procedural requirements of the statute. After examining and quoting the legislative history of section 404(b), the Postal Service's explanation of its regulations implementing the provision,<sup>23</sup> the explanation of the statute presented in *Wilson and Knapp, supra*, and the Commission's ruling in Docket No. A82-10, *Oceana Station, Virginia Beach, Virginia 23453*, the Court determined at page 14 of its Memorandum and Order:

This Court agrees with the decisions to the effect that section 404(b) does not apply to the closing of a postal station. The Shephard<sup>24</sup> station was not an independently run post office with its own postmaster and supervisory personnel. It was a postal station already under the direction of the postmaster of the Columbus post office. While the Postal Service is required to consider community input when closing that community's post office or consolidating the post office with that of a larger city, the Service must have the flexibility to control the arrangement of other postal facilities within the jurisdiction of a city's main post office. As has been previously discussed, a primary responsibility of the Postal Service is to provide improving, efficient, and economical postal service to the public. The Service would be unduly hampered if section 404(b) were construed to apply to every decision to rearrange the location of postal facilities within a city to better serve areas experiencing shifts in population, to accommodate for the building of new, more efficient nearby facilities, or simply to discontinue unnecessary or outdated postal facilities. Since the Court determines that the section 404(b) notice and hearing requirements do not apply to the closing of postal stations, defendants' motion to dismiss this cause of action is **GRANTED**.

Yet today, the Commission's claims of jurisdiction under section 404(d) no longer limit themselves to the small, rural offices that Congress originally sought to protect in section 101(b), and later in section 404(b). While the Postal Service

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<sup>23</sup> Quoting the Postal Service's justification at 42 Fed. Reg. 59082 (1977) for establishing separate rules for the closing of stations and branches, the Court noted at page 11 of its Memorandum and Order that Congress had "made no attempt to express its disapproval of that interpretation of the statute." This remains true today.

<sup>24</sup> For reasons unknown, the Court's opinion used the spelling "Shephard" throughout.

had no legal right to appeal any discontinuance decision of the Commission's under the *Postal Reorganization Act*, that is no longer true under the *PAEA*.

The Commission's assertion now that it has jurisdiction under section 404(d) to entertain appeals relating to Post Offices (and stations, branches) whose operations have merely been suspended also constitutes a change from its historic practice. For once upon a time, the Commission agreed with the Postal Service that proceedings under 39 U.S.C. §404(b) are not appropriate where the Postal Service has temporarily suspended the operation of a post office for emergency reasons.<sup>25</sup>

The Commission's new stance appears to abandon the previously expressed criterion based on 'the last retail facility in a community', in favor of a less limited standard that encompasses all stations and branches, whether operations are merely suspended or discontinued. This view runs counter to the very decision the Commission cites as establishing for the first time its assertion of jurisdiction beyond mere Post Offices.

In its decisions under section 404(b)(5), the Commission appears to have developed the view that a "closing" occurs whenever a retail postal facility is removed from the community it has traditionally served. The origins of this doctrine (and of the Commission's definition of "post office") are apparent in PRC Order No. 208, Docket No. A78-1, *Gresham, S.C., Route #1*. Considering the petitioner's argument that a consolidation of rural routes constituted a "partial

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<sup>25</sup> Commission Opinion at 7-9, Docket No. A82-3, *West Barnet, Vermont 05870* (February 9, 1982); PRC Order No. 685 at 2-3, Docket No. A86-8, *Quaker Street, New York 12141* (April 18, 1986); PRC Order No. 829, Docket No. A89-8, *Lafontaine, Kansas 66750* (June 29, 1989); PRC Order No. 833, Docket No. A89-10, *Fineview, New York 13640* (July 19, 1989). In a case later dismissed by the plaintiffs, one Federal court has denied an application for an *ex parte* temporary restraining order to prevent the suspension of an office pending action under section 404(b). *Ettawageshik v. United States Postal Service*, Civ. No. G89-50475-CA7 (W.D.Mich., motion denied May 26, 1989, voluntarily dismissed September 5, 1989). Such relief, however, has been granted by the elected judges of State courts in cases subsequently removed to United States District Court. *Hinks Petroleum Co., Inc. v. United States Postal Service*, Case No. 89C24 (Kingman Cnty. Kan., order issued July 11, 1989), removed, Civ. No. 89-1400-K (D.Kan., notice filed July 28, 1989); *Burks v. United States Postal Service*, Case No. 89C16 (Jewell Cnty. Kan., order issued August 30, 1989), removed, Civ. No. 89-4191-R (D.Kan., notice filed September 13, 1989).

consolidation" of post offices, the Commission focused upon the functional, rather than the managerial characteristics of a Post Office:

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. [Citations omitted] 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 that some former Gresham patrons will receive delivery later in the day, and be otherwise inconvenienced. 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 -- 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.

PRC Order No. 208, Docket No. A78-1, *Gresham, S.C., Route #1*.

The Postal Service tailored, in part, its presentation of the direct case in PRC Docket No. N2009-1 to the Commission's standard of the 'last retail facility in a community' in several respects. By focusing upon large cities with multi-facility Post Offices, it could not result in the taking away of the last retail facility in a community; by definition, lots of facilities would remain in that same community so plenty of traditional brick and mortar stations and branches provided full, traditional access to retail services. Of course, the growing use of alternate access was also a key method by which customers would retain access to retail services. But what the Postal Service could not know, when that Request was filed on July 2, 2009, was that the Commission was then in the process of, once again, reformulating the standard by which it measured its

jurisdiction under 404(d). A direct consequence of this change by the Commission is that legal challenges thought to have been finessed were revived.

The Postal Reorganization Act carried on the freedoms to open and close Post Offices on terms similar to those under the former title 39.<sup>26</sup> Protection was built in, however, for postal services in small communities by the requirement in section 101(b) that “No small [P]ost [O]ffice shall be closed solely for operating at a deficit,” as a means for preserving “a maximum degree of effective and regular postal services” to “rural areas, communities, and small towns”.<sup>27</sup> The year 1976 brought more substantial restrictions on the authority of the Postal Service to determine its own need for Post Offices emerged in the Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1303 (September 24, 1976). As reported by the Senate Committee on Post Office and Civil Service, section 2 of this legislation<sup>28</sup> authorized two successive appropriations of \$500 million to defray the operating indebtedness of the Postal Service. As part of the *quid pro quo* for this funding, the same section of the bill established a temporary moratorium on the closing of post offices.<sup>29</sup> The accompanying Senate report

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<sup>26</sup> Section 403(b) directed the Postal Service to establish and maintain postal facilities that, consistent with reasonable economy, sustained ready access to essential postal services, as further supported by the general powers of subsections 401 (5), (6) and (9) and the specific power of subsection 404(a)(3). It has been held that the general duty and purpose sections of title 39 do not create a private cause of action to compel the establishment or relocation of a Post Office. *Tedesco v. United States Postal Service*, 553 F. Supp. 1387 (W.D.Pa. 1983); *Azzolina v. United States Postal Service*, 602 F. Supp. 859 (D.N.J. 1985). The Postal Rate Commission has refused to entertain service complaints on such matters under 39 U.S.C. §3662, finding that they involve “individual, localized, or temporary service issues not on a substantially nationwide basis” within the terms of 39 C.F.R. §3001.82. See PRC Order No. 512, Docket No. C83-1, *Complaint of Cranberry Township, et al.* (July 12, 1983); PRC Order No. 524, Docket No. C83-2, *Complaint of Joseph Azzolina, et al.* (September 2, 1983).

<sup>27</sup> It should be noted that section 101(b) specifically bars the closing of a post office for operating at a deficit. This prohibition would accordingly not prevent the conversion of a post office to a station or branch for economic reasons. See *City of Rossford v. Klassen*, 359 F. Supp. 1036, 1037 (N.D. Ohio 1973).

<sup>28</sup> H.R. 8603, 94th Cong., 2d Sess. (1976).

<sup>29</sup> Under the terms of this provision, subsequently enacted as 39 U.S.C. §2401(e)(3), (4), the Postal Service was directed not to close any post office where 35 or more families regularly received their mail, and could close a smaller office only upon the written consent of “at least 60 percent of the regular patrons of such office who are at least 18 years of age.” This moratorium expired on March 15, 1977, the deadline for the final report of the Commission on Postal Service established under section 7 of the bill.

demonstrates that these provisions were intended, at least in part, to extinguish suggestions from the Comptroller General that the Postal Service could save approximately \$130 million by closing 12,000 third- and fourth-class post offices.<sup>30</sup>

Dissatisfied with the temporary nature of this moratorium, and determined to remove small Post Offices from the list of endangered species, a considerable majority of Senators supported the "Randolph Amendment" to H.R. 8603. Identical to a bill Senator Randolph had introduced earlier in the session, the Randolph Amendment intended to secure local participation in any determination to discontinue a small rural post office, or to consolidate an office under the management of a larger post office. Describing this proposal, Senator Randolph expressed his opposition to the "indiscriminate closing of our rural and small town post offices" as well as to the decision "to create branches out of many post offices close to large cities." Continuing, he declared at 122 Cong. Rec. 6314 (1976):

It is important that the independence and integrity of communities continue and that good mail service is maintained. To insure this, I introduced legislation, S.3082, on Thursday, March 4, to provide for an open and participatory review of Postal Service changes. Under this legislation the U.S. Postal Service must substantiate any proposal to change or eliminate independent post offices.

With one significant change,<sup>31</sup> the Randolph Amendment was adopted by the conference committee on H.R. 8603, and became current 39 U.S.C. §404(b). As enacted, section 404(b)(1) requires the Postal Service, before making a determination to close or consolidate a Post Office, to provide "adequate notice" of its intentions at least 60 days before the proposed date of the action to ensure

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<sup>30</sup> See S. Rep. No. 94-966, 94th Cong., 2d Sess. 8-11 (1976).

<sup>31</sup> As originally adopted, the Randolph Amendment would have permitted the determination to close or consolidate a Post Office to be appealed to "any court of appeals of the United States." The conference substitute replaced this provision with one allowing a regular patron of the post office to appeal the Postal Service's decision to the Postal Rate Commission. See, H.R. Rep. No. 94-1444, 94th Cong., 2d Sess. 17 (1976).

that the "persons served by such post office" will have an "opportunity to present their views" on the matter.

### III. CONCLUSION

The Commission should recognize section 404(d) for what it says; Congress used the term "Post Office" in its technical sense, in full accordance with its longstanding and historically specific use of the term. The legislative history plainly supports the fact that Congress knowingly used the term "Post Office" in its technical sense in 404(b) as in many other statutes. The Commission itself recognizes this in its discussion distinguishing consolidations from closings. The federal court decisions that have had cause to consider the dispute between the Commission and Postal Service have all agreed with the Postal Service interpretation, one that is consistent with the reasoned apportionment of management responsibility and the accountability and transparency of management decisions. As such, the Commission should simply agree that appeal rights under section 404(d) exist only for the consolidation or closing of an independent Post Office.

Respectfully submitted,

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