

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

Before Commissioners:

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

Rules Applicable to Appeals of
Post Office Closings

Docket No. RM2011-13

ORDER ADOPTING FINAL RULES
REGARDING APPEALS OF POSTAL SERVICE
DETERMINATIONS TO CLOSE OR CONSOLIDATE
POST OFFICES

(Issued January 25, 2012)

I. INTRODUCTION

On August 18, 2011, the Commission issued a notice of proposed rulemaking.¹ That notice was intended, in part, to simplify the rules applicable to appeals of post office closings and consolidations and to make the rules consistent with current practice. See Order No. 814 at 1-3. On August 25, 2011, the Commission issued a supplemental notice proposing to remove from the current rules the requirement that the Commission publish notice of appeals in the *Federal Register*.²

¹ Notice of Proposed Rulemaking Regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices, August 18, 2011 (Order No. 814).

² Supplemental Notice Regarding Proposed Rules Governing Appeals, August 25, 2011 (Order No. 823).

Some of the proposed rules generated opposition. Others were relatively uncontroversial. The Commission finds that it will be beneficial to promptly adopt rules that were, for the most part, unopposed. The Commission will address the other proposed rules in a later order. This order is organized as follows. First, proposed rules that generated no opposition are described and adopted. Next, proposed rules that generated suggestions for improvement are described, modified as appropriate, and adopted or deferred for further consideration. Third, proposed rules that generated controversy that is easily resolved are described, modified as appropriate, and adopted. Finally, proposed rules that generated significant opposition that requires additional research and analysis are described and deferred to a later date.

II. UNOPPOSED RULES

Rules of general applicability. The Commission has proposed amendments to rules of practice 9, 10, 12, and 17 in 39 CFR Part 3001, subpart A. These amendments are intended to ease requirements for persons who file appeals of post office closings or consolidations but who do not or can not use the internet. They also correct cross-references and remove the requirement to publish in the *Federal Register* notice of an appeal of a post office closing or consolidation. The Commission confirms that it will continue to publish on its website a notice of each appeal containing the applicable procedural schedule.³ The proposed amendments to rules 9, 10, 12, and 17 in 39 CFR Part 3001, subpart A are unopposed and are adopted as proposed. The Commission also amends rule 3001.7(b) to replace the words “Subpart H” with “Part 3025”. Rule 7(b) would be incorrect if not amended, which constitutes good cause under 5 U.S.C. §553(d)(3) for not publishing proposed notice of this amendment.

³ See Initial Comments of the United States Postal Service, October 3, 2011, at 25 (Postal Service Comments).

Consolidation of appeals. Proposed rule 3025.12 explains that the Commission consolidates appeals relating to the same post office into a single docket. This rule is unopposed. Rule 3025.12 is adopted as proposed.

Participant statement. Proposed rule 3025.40, which describes participant statements (Form 61), is unopposed. It is adopted as proposed.

III. SUGGESTED IMPROVEMENTS

Rules of general applicability. The Public Representative suggests a change to rule 3001.5(m) as well as changes to the list of rules of general applicability contained in proposed rule 3025.2(b).⁴ Rule 5(m) defines the word *Appellant*. Proposed Part 3025 uses the word *Petitioner* instead of *Appellant*. Rule 5(m) is hereby amended accordingly. Proposed rule 3025.2(b) makes rule 3001.11 applicable in appeal proceedings. Rule 11(b) refers to notices of intervention, which are no longer required under proposed Part 3025. Interested persons may file comments without first intervening. Rule 11(g) concerns certificates of service for documents filed as hard copy. Amended rule 12 provides that the Secretary will serve hard-copy documents filed by participants in appeals cases. There is thus no need to refer to rules 11(b) and 11(g) in proposed rule 3025.2(b).

The Public Representative also suggests that participants in appeals be given 14 days to respond to Postal Service motions and briefs rather than the 7 days allowed by rule 3001.20(b) and proposed rule 3025.43. This is based on the expectation that many, if not most, participants will be corresponding with the Commission by mail rather than using the internet. Seven days does appear to be inadequate. Most of the seven days could easily be consumed in transit to and from a participant. However, the proposed rules are also intended to expedite Commission consideration of appeals. Order No. 814 at 5. A 14-day response time, especially for motions to dismiss, could necessitate revisions to the procedural schedule. Under the Public Representative's

⁴ Comments of the Public Representative, October 3, 2011, at 7-8 (PR Comments).

proposed change, responses to motions to dismiss would be due 14 days after their filing, while participant statements are due 20 days after the filing of such motions. Proposed rule 3025.41. Ten days will be allowed for the response to Postal Service motions and briefs.

Definitions. The Public Representative suggests moving the definition of “Petition for Review” from proposed rule 3025.10(a) to the definitions section, proposed rule 3025.1. PR Comments at 6. That suggestion is adopted. The Public Representative also proposes additions to the definition of “Petition for Review,” such as permissible and impermissible modes of submission. This topic is covered in proposed rule 3025.11.

Applicability. Proposed rule 3025.2 explains when the rules in Part 3025 apply. It also sets out rules in Part 3001 that apply to appeals. The Postal Service suggests changing the phrase “wants to appeal” in proposed rule 3025.2(a)(2) to “appeals.” Postal Service Comments at 2-7, 13-19, 21. This change is adopted.

Petitions for Review. The Postal Service and the Public Representative suggest changes to proposed rule 3025.10. Postal Service Comments, Appendix at iv; PR Comments, Attachment A at 2-3. This rule explains what information must be included in a Petition for Review. The Public Representative suggests that a Petition for Review include a petitioner’s phone number, the ZIP Code of the post office involved, and the final determination. The Postal Service suggests that a Petition for Review include the date on which the final determination was posted. One of the purposes of the proposed rules is to reduce the burden involved in filing an appeal. See Order No. 814 at 2. Consideration of these suggestions is deferred. Rule 3025.10 is adopted as proposed, except for the addition of the word “only” between “appealed” and “by”. This tracks the statutory requirement that a petitioner be served by the office to be closed or consolidated.

Proposed rule 3025.11 explains how to submit a Petition for Review to the Commission. The Public Representative proposes changes to rule 11. PR Comments, Attachment A at 3. The Public Representative proposes that the means of submission

of appeals set out in rule 11 apply to all documents submitted by participants other than the Postal Service. Rule 3025.11 is adopted as modified by the Public Representative.

Proposed rule 3025.13 explains when a Petition for Review is considered timely. The statutory deadline for an appeal is 30 days from a final determination's being made available to patrons. The exact deadline depends on whether a petition is mailed, filed electronically, or delivered by someone other than the Postal Service. The Postal Service and the Public Representative suggest changing the event that triggers the running of the 30 days from the day the final determination is made available, to the date of posting of the final determination. Postal Service Comments, Appendix at v; PR Comments at 3-4. The phrase "made available" is the statutory description. Consideration of this proposed change is deferred. Rule 13 is adopted as proposed.

Record on review. Proposed rule 3025.20 describes the material that the Commission considers when reaching a decision on an appeal. Rules 20(1)-(4) are adopted as proposed and designated as paragraph (a). The Postal Service objects to proposed rule 20(5) and to the sentence that follows, both of which concern the Commission's treatment of factual matters. Postal Service Comments at 17-18, 21-22. Consideration of those proposals is deferred. The sentence in current rule 3001.112 that limits the record to all and only evidence considered by the Postal Service is retained as paragraph (b).

Administrative record. Proposed rule 3025.21 requires the Postal Service to notify participants who do not use Filing Online when the administrative record is filed with the Commission. The Postal Service points out that the administrative record is available at affected post offices while a proposal to close is under consideration and when a final determination to close is under appeal. *Id.* at 26-27. The Postal Service suggests that the Commission include information on the location of administrative records in the orders establishing procedural schedules or in the letters transmitting Form 61 to participants. *Id.* at 27, n.18. Proposed rule 3025.21 is amended to make the Secretary responsible for informing participants that the administrative record is available at the post office(s) where the final determination was posted.

Posting of filings during appeal. Proposed rule 3025.22 requires the Postal Service to maintain for public inspection copies of all filings related to an appeal at the post office whose closure or consolidation is under review. If the post office is suspended, the filings are to be maintained at the nearest open post office. Also, the Postal Service is to notify participants by mail where the filings may be inspected. The Postal Service points out that its own regulations require posting the filings in the same locations where the administrative record is available—*i.e.*, where the final determination was posted. *Id.* at 27. Rule 22 is amended to make the Secretary responsible for informing participants that all filings related to an appeal are available at the post office(s) where the final determination was posted.

IV. EASILY RESOLVED OPPOSITION

Participation by others. For the most part, the Commission is deferring consideration of proposed rules that generated opposition. One exception is proposed rule 3025.14(a), which defines the class of persons who may participate in an appeal initiated by someone else. This proposed rule is the analog of current rule 3001.111(b). The purposes of proposed rule 14(a) are: (1) to remove the requirement for filing notices of intervention, and (2) to simplify language. The Postal Service reads proposed rule 14(a) as expanding the class of persons who may participate in an appeal. Postal Service Comments at 20 (as revised October 7, 2011). American Postal Workers Union (APWU) reads proposed rule 14 as narrowing the class of persons who may participate in an appeal.⁵

In addition to persons served by a post office to be closed or consolidated, current rule 111(b) allows “*any other interested person*, or any counsel, agent or other person authorized or recognized by the Postal Service as such interested person's representative or the representative of such interested person's recognized group, such

⁵ American Postal Workers Union, AFL-CIO Comments on Proposed Rules, October 5, 2011, at 2-4 (APWU Comments).

as Postmasters” to intervene in an appeal (emphasis added). Proposed rule 14(a) intended no change in the class of persons currently allowed to intervene. The language of current rule 3001.111(b) will be retained as rule 14(a).

Filing deadlines. Proposed rules 3025.41-.43 set deadlines for participant statements, briefs, or comments. The Postal Service objects to categorizing participants as supporting either the Postal Service or the Petitioner. It asks, “[a]re participants supposed to decide what due date to use based on their alignment with or against the Postal Service regarding a particular issue, the ultimate issue, or some combination?” Postal Service Comments at 23. The wording of these rules will be changed to categorize participants as either supporting or opposing a Commission order that the entire matter be returned to the Postal Service for further consideration.⁶ Proposed rule 3025.14(b) is also changed to categorize comments as supporting or opposing an order returning the matter for further consideration.

Oral argument. The proposed rules do not include a provision for oral argument. As was explained in the notice of proposed rulemaking, the Commission has never held oral argument in an appeal proceeding. Order No. 814 at 6. Oral argument would also extend the time needed to decide an appeal, which the new rules are intended to shorten. See *id.* at 5. APWU requests preservation of the right to appeal in unusual situations. APWU Comments at 4. Participants in appeal proceedings may request oral argument or any other relief pursuant to rule 3001.21(a) (Motions) when circumstances warrant.

V. SUBSTANTIAL OPPOSITION—CONSIDERATION DEFERRED

Definitions. Proposed rule 3025.1 (Definitions) has been changed by removing definitions of the terms “administrative record,” “post office,” and “relocate” and by adding the definition of “Petition for Review.” Proposed rule 1 defines “administrative

⁶ See section 404(d)(5) (“The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration, but the Commission may not modify the determination of the Postal Service.”)

record” as “all documents and materials created by the Postal Service or made available by the public to the Postal Service for its review in anticipation of the action for which review is sought.” It defines “post office” as “a Postal Service operated retail facility.” It defines “relocate” to mean a situation in which “the location of a post office within a community changes, but the total number of post offices within the community remains the same or increases.”

The Postal Service objects to the definitions of “administrative record” and “post office” as overbroad and to the definition of “relocate” as too narrow. Postal Service Comments at 2-7, 13-19, 21. Valpak objects to the definition of “post office” as overbroad.⁷ APWU objects to the definition of “relocate” as overbroad. APWU Comments at 1-2. Consideration of these proposed definitions is deferred.

Notice. Proposed rule 3025.3 requires the Postal Service to post notice of proposals and final determinations to close or consolidate a post office. It also requires the Postal Service to mail such notices to patrons of suspended offices. The Postal Service and Valpak object to this rule. They claim that the Commission has no authority to regulate Postal Service actions that occur before an appeal has been filed. Postal Service Comments at 7-11; Valpak Comments at 5-7. Consideration of proposed rule 3025.3 is deferred. Two sentences from current rule 3001.110 setting out existing notice requirements, with minor editorial corrections to accurately state statutory language are retained as rules 3025.3(a)-(b).

Automatic suspension. Proposed rule 3025.30 would replace current rule 3001.114 and automatically suspend a final determination to close or consolidate a post office when a timely appeal is filed. The Postal Service and Valpak object to this proposed rule as *ultra vires*. Postal Service Comments at 11-13; Valpak Comments at 7-8. Consideration of this proposal is deferred. The language of current rule 3001.114 related to suspension pending review is retained as rule 3025.30, except that a

⁷ Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments Regarding Proposed Rules Applicable to Appeals of Post Office Closings, October 3, 2011, at 4-5 (Valpak Comments).

sentence referring to notices of intervention and a sentence referring to the filing of the record are deleted.

It is ordered:

1. Amendments to Part 3001 of title 39, Code of Federal Regulations, as set forth below, are hereby adopted, effective 30 days after publication in the *Federal Register*.
2. A new Part 3025 of title 39, Code of Federal Regulations, as set forth below, is hereby adopted, effective 30 days after publication in the *Federal Register*.
3. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Shoshana M. Grove
Secretary

The following amendments are made to title 39, Code of Federal Regulations.⁸

Paragraph 3001.5(m) is amended by deleting the word “*Appellant*” and replacing it with “*Petitioner*”.

Paragraph 3001.7(b) is amended by deleting the words “Subpart H” and replacing them with “Part 3025”.

Paragraph 3001.9(a) is amended by adding the following sentence at the end thereof: The requirements of this paragraph do not apply to participants other than the Postal Service in proceedings conducted pursuant to Part 3025.

Paragraph 3001.10(b) is amended by removing the sentence “Participants in proceedings conducted under subpart H who are unable to comply with these requirements may seek to have them waived.”

Section 3001.10 is amended by adding the following paragraph (d):

(d) *Exception for appeals of post office closings and consolidations.* The requirements of this section do not apply to participants other than the Postal Service in proceedings conducted pursuant to Part 3025.

Paragraph 3001.12(a) is amended by adding the following subparagraph (3):

(3) In proceedings conducted pursuant to Part 3025, the Secretary will serve documents (except an administrative record) on participants who do not use Filing Online. Service will be by First-Class Mail.

⁸ The version published in the *Federal Register* may reflect minor editorial revisions to conform with official publication requirements.

Section 3001.17 is amended as follows.

- Remove subparagraphs (a)(1) and (2) and redesignate subparagraphs (a)(3), (4), and (5) as (a)(1), (2), and (3), respectively;
- Revise redesignated subparagraph (a)(2) by changing “subpart E of this part” to “part 3030 of this chapter”;
- Revise redesignated subparagraph (a)(3) by changing “to institute any other proceeding under the Act.” to “it is appropriate.”;
- Remove paragraph (b) and redesignate paragraphs (c) and (d) as (b) and (c), respectively;
- Revise redesignated paragraph (b) by inserting “and” after “on the Postal Service,” and by striking “, and the appellant in the appeal of a Postal Service determination to close or consolidate a post office”;
- Revise redesignated subparagraph (c)(1) by changing “paragraphs (a) and (b)” to “paragraph (a)”;
- Revise redesignated subparagraph (c)(3) by inserting “and” after “nature of postal services;”, and by striking “or, in the case of an appeal, an identification of the appellant and a summarization of the Postal Service determination to close or consolidate under review”.⁹

⁹ With these amendments, Rule 17 reads as follows:

§ 3001.17 Notice of proceeding.

(a) *When issued.* The Commission shall issue a notice of a proceeding to be determined on the record with an opportunity for any interested person to request a hearing whenever:

(1) The Postal Service files a request with the Commission to issue an advisory opinion on a proposed change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis;

(2) The Commission in the exercise of its discretion determines that an opportunity for hearing should be provided with regard to a complaint filed pursuant to part 3030 of this chapter; or

(3) The Commission in the exercise of its discretion determines it is appropriate.

(b) *Publication and service of notice.* Each notice of proceeding shall be published in the Federal Register and served on the Postal Service, and the complainant in a complaint proceeding.

(c) *Contents of notice.* The notice of a proceeding shall include the following:

(1) The general nature of the proceeding involved in terms of categories listed in paragraph (a) of this section;

(2) A reference to the legal authority under which the proceeding is to be conducted;

(3) A concise description of proposals for changes in rates or fees, proposals for the establishment of or changes in the mail classification schedule, proposals for changes in the nature of postal services; and in the case of a complaint, an identification of the complainant and a concise description of the subject matter of the complaint;

(4) The date by which notices of intervention and requests for hearing must be filed; and

(5) Such other information as the Commission may desire to include.

Part 3001, subpart H, is repealed.

A new Part 3025, Rules for Appeals of Postal Service Determinations to Close or Consolidate Post Offices, is adopted as follows:

§ 3025.1 Definitions. The following definitions apply in this Part 3025:

(a) “Final determination” means the written determination and findings required by 39 U.S.C. § 404(d)(3).

(b) “Petitioner” means a person who files a petition for review.

(c) “Petition for Review” means a written document that the Commission accepts as an appeal of a post office closing or consolidation.

§ 3025.2 Applicability.

(a) The rules in this part apply when (1) the Postal Service decides to close or consolidate a post office, and (2) a patron of that post office appeals the closing or consolidation.

(b) The following rules in Part 3001, subpart A apply to appeals of post office closings or consolidations: rules 1-9, 11(a), 11(c)-(f), 12-17, and 21-22.

(c) Answers to motions filed by the Postal Service are due within 10 days.

§ 3025.3 Notice by the Postal Service.

(a) Pursuant to section 404(d) of title 39, United States Code, any decision to close or consolidate a post office must be preceded by 60 days notice to persons served by such post office, the opportunity for such persons to present their views, and a written determination based upon consideration of each of the factors listed in section 404(d)(2).

(b) This notice must include a provision stating that, pursuant to section 404(d)(5) of title 39, United States Code, a final Postal Service determination to close or consolidate a post office may be appealed by any person served by such office to the Postal Regulatory Commission at 901 New York Avenue NW, Suite 200, Washington, DC 20268–0001, within 30 days after such determination is made available to such person by the Postal Service.

§ 3025.10 Starting an appeal.

(a) A Postal Service decision to close or consolidate a post office may be appealed only by a person served by that office. An appeal is commenced by submitting a Petition for Review to the Postal Regulatory Commission.

(b) The Petition for Review must state that the person(s) submitting it are served by the post office that the Postal Service has decided to close or consolidate. The petition should include the name(s) and address(es) of the person(s) filing it and the name or location of the post office to be closed or consolidated. A petitioner may include other information deemed pertinent.

§ 3025.11 Submitting appeal and other documents.

Petitions for Review, comments, motions, answers, and other documents may be submitted by persons other than the Postal Service by mail, electronically through the Commission's website, *www.prc.gov*, or by delivery to the Commission's offices at 901 New York Avenue NW, Suite 200, Washington DC 20268-0001.

§ 3025.12 Duplicate appeals.

If the Commission receives more than one Petition for Review of the same post office closing or consolidation, the petitions will be considered in a single docket.

§ 3025.13 Deadlines for appeals.

(a) *In general.* If the Postal Service has issued a final determination to close or consolidate a post office, an appeal is due within 30 days of the final determination being made available in conformance with section 3025.3(b).

(b) *Appeals sent by mail.* If sent by mail, a Petition for Review must be postmarked no later than 30 days after the final determination has been made available.

(c) *Appeals sent by other physical delivery.* If sent by some other form of physical delivery, a Petition for Review must be received in the Commission's docket section no later than 4:30 pm, eastern time, on the 30th day after the final determination has been made available.

(d) *Appeals sent electronically.* If submitted electronically, a Petition for Review must be received in the Commission's docket section no later than 4:30 pm, eastern time, on the 30th day after the final determination has been made available.

§ 3025.14 Participation by others.

(a) A person served by the post office to be closed or consolidated pursuant to the Postal Service written determination under review who desires to intervene in the proceeding, or any other interested person, or any counsel, agent or other person authorized or recognized by the Postal Service as such interested person's representative or the representative of such interested person's recognized group, such as Postmasters, may participate in an appeal by sending written comments to the Postal Regulatory Commission in the manner described in section 3025.11.

(b) Persons may submit comments supporting or opposing a Commission order returning the entire matter to the Postal Service for further consideration. Comments must be filed in accordance with the deadlines established in sections

3025.41 through .43 of this Part. Commenters may use PRC Form 61, which is available on the Commission's website, <http://www.prc.gov>.

§ 3025.20 The record on review.

(a) The record on review includes:

- (1) the final determination;
- (2) the notices to persons served by the post office to be closed or consolidated;
- (3) the administrative record; and
- (4) all documents submitted in the appeal proceeding.

(b) The record shall contain all evidence considered by the Postal Service in making its determination and shall contain no evidence not previously considered by the Postal Service.

§ 3025.21 Filing of the administrative record.

The Postal Service shall file the administrative record within 10 days of the date of posting of a Petition for Review on the Commission's website. The Commission may alter this time for good cause. The Secretary will notify participants that they may view the administrative record at post offices where the final determination was posted.

§ 3025.22 Making documents available for inspection by the public.

Copies of all filings (including the administrative record) related to an appeal shall be available for public inspection at the post offices where the final determination was posted. The Secretary will notify participants that they may view copies of filings at post offices where the final determination was posted.

§ 3025.30 Suspension pending review.

(a) *Application.* Application for suspension of a determination of the Postal Service to close or consolidate any post office pending the outcome of an appeal to the Postal Regulatory Commission shall be made at the time of the filing of a Petition for Review. The application shall show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the application shall be supported by affidavits or other sworn statements or copies thereof. The applicant must be a person served by the affected post office. Immediate notice of the application shall be given to all parties to the proceeding. The application shall be filed with the Secretary of the Commission.

(b) *Answer and filing of the relevant record by the U.S. Postal Service.* Within 10 days after the application for suspension is filed, the Postal Service shall file with the Secretary of the Commission and serve on the petitioners an answer to the application supported by affidavits or other sworn statements or copies thereof.

§ 3025.40 Participant statement.

When a timely Petition for Review of a decision to close or consolidate a post office is filed, the Secretary shall furnish petitioner with a copy of PRC Form 61. This form is designed to inform petitioners on how to make a statement of his/her arguments in support of the petition. The instructions for Form 61 shall provide:

- (1) a concise explanation of the purpose of the form;
- (2) a copy of section 404(d)(2)(A) of title 39, United States Code; and
- (3) notification that, if petitioner prefers, he or she may file a brief in lieu of or in addition to completing PRC Form 61.

§ 3025.41 Due date for participant statement.

The statement or brief of petitioner, and of any other participant seeking to have the Commission return the entire matter to the Postal Service for further consideration, shall be filed not more than 20 days after the filing of the administrative record.

§ 3025.42 Due date for Postal Service response.

The statement or brief of the Postal Service, and of any other participant opposing return of the matter for further consideration, shall be filed not more than 14 days after the date for filing of petitioner's statement.

§ 3025.43 Due date for replies to the Postal Service.

Petitioner, and any other participant seeking to have the Commission return the matter for further consideration, may file a reply to the Postal Service response not more than 10 days after the date of the Postal Service response. Replies are limited to issues discussed in the responses of the Postal Service and other participants seeking affirmation of the Postal Service determination.