

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

In the Matter of:

Bronx General Post Office
Bronx, New York 10451

Docket Number A2013-6

**RESPONSE TO THE UNITED STATES POSTAL SERVICE'S
SURREPLY**

(August 7, 2013)

On August 5, 2013, the Postal Service filed a Surreply to the petitioners' Reply to the Postal Service's Motion to Dismiss the appeal on the Bronx GPO. The Surreply deserves a response, so hopefully it will not further strain the Commission's patience to read a few more pages on this subject.

In the Surreply, the Postal Service offers an alternative reading of 241.4(d)(2) to the one presented in the Reply. The Postal Service's interpretation makes a lot of sense, and the Reply probably erred in arguing that this passage requires the Postal Service to follow the discontinuance procedures when a facility action covered by 241.4 also involves a historic property. *Mea culpa*. While the Reply may have gotten caught up in the technicalities of particular passages in the statutes and Rules associated with them, the main argument of the Reply nonetheless remains relevant.

The regulations on post office closings are intended to give communities the right to have input into the Postal Service's decision-making process and the right to have the final decision reviewed by the Commission. One would expect that the

Commission would want to hear these appeals and to make sure that the Postal Service has not made decisions in an arbitrary or capricious way or in a manner not in accordance with law. Unfortunately, however, by issuing orders dismissing appeals, the Commission has been narrowing the scope of what kind of closures can be appealed and thereby given the Postal Service more occasion to file motions to dismiss.

In the past, the Postal Service has sometimes filed a motion to dismiss an appeal because the case was “premature” — the office was under suspension and a Final Determination had not yet been issued. The Postal Service also has a long history of arguing that appeals on stations and branches are outside the scope of 404(d) and beyond the jurisdiction of the Commission. But it is only recently that the Postal Service has begun filing motions to dismiss on the grounds that the closure was a “relocation” or part of a “rearrangement of retail services.”

It is easy to fault the Postal Service for seeking to avoid having its decisions reviewed, but it is the Commission’s responsibility to ensure that the public’s right to an appeal is enforced. With its orders dismissing appeals, the Commission lays the groundwork for the Postal Service’s arguments that closing decisions are outside the scope of 404(d). The Postal Service is simply following the lead set by the Commission. By dismissing one appeal after another, the Commission is thus in danger of robbing itself of its own jurisdiction, rendering the appeals process irrelevant, and giving the Postal Service free rein to close post offices without following any procedures at all.

Just to cite one example. In *Pimmit Branch*, the Commission dismissed the

appeal because it viewed the closure as part of one of these “rearrangements” of retail services.¹ The case is now before the D.C. Circuit Court, so the issues raised by the order are being considered in the appeal and very much alive. The Commission used the “rearrangement” explanation in its order despite the fact that the Postal Service had clearly called the procedure a discontinuance and had gone through a complete discontinuance process. The Postal Service never filed a Motion to Dismiss, never mentioned “rearrangement” in its argument for affirming the final determination, and never suggested that closure was part of a “rearrangement” and hence outside the scope of 404(d). The Commission essentially contradicted the Postal Service in describing the facility action as a “rearrangement,” and thus expanded the opportunities for the Postal Service to use this argument later.

Now the Postal Service cites *Pimmit* in motions to dismiss two appeals currently before the Commission, *Glenoaks, California*, and *Fernandina Beach, Florida*.² Each of these cases is unique, but the ambiguity of the term “rearrangement” allows the Postal Service to find many occasions to use it. The term is not even in the statutes: It is a creation of the Commission, and now it has become a tool used by the Postal Service to avoid going through the appeals process. It has the potential to be used as a means for avoiding a discontinuance procedure entirely.

¹ Order No. 1159, Docket No. A2011-90, *Pimmit Branch, Falls Church, Virginia* (Jan. 20, 2012).

² Motion of United States Postal Service to Dismiss Proceedings, *Glenoaks Station Post Office*, Docket No. A2013-05 (July 15, 2013); Motion of United States Postal Service to

Within this broader context, then, let us turn to the Surreply and the “relocation” of the Bronx GPO.

First, in making its decision to relocate retail services from the Bronx GPO and sell the building, the Postal Service has not followed its policy to comply with Section 106 of the National Historic Preservation Act, Executive Order 12072, and Executive Order 13006, as required by 241.4(d). The Postal Service’s explanation — a relocation is not covered by these statutes, and no final decision has been made on a sale — does not hold up. The claim that it has not made a decision to sell the building is not consistent with statements made by postal officials³ and with common sense — there would be no reason to do a relocation study if a decision had not been made to sell the building. The notion that closing down postal operations in the building is not an “adverse effect” has been contested by attorneys for the National Trust,⁴ and it should be obvious that closing the post office represents a significant “change of the character of the property’s use” [36 CFR 800.5(a)(2)(iv)]. A commitment to comply with the NHPA and related executive orders is part of 241.4(d). The Commission should hold the Postal Service to this requirement.

Second, while 241.4(d)(2) may not mean that a relocation involving a historic property requires a discontinuance procedure, the passage does make it

Dismiss Proceedings, Fernandina Beach Station Post Office, Docket No. A2013-07 (August 1, 2013).

³ See, for example, the letter to elected officials from USPS real estate specialist Joseph Mulvey as quoted in “Postal Service Considers Sale of Bronx General Post Office,” New York Times, Feb. 1, 2013.

clear that some facility actions covered by 241.4 may also involve a discontinuance covered by 404(d) and 241.3: “In the event a facility action is subject to both this section, and either the NHPA or the post office discontinuance requirements, all comment periods and other public participation matters shall be governed by those statutes.”

Relocations and discontinuances are thus not mutually exclusive categories. The Final Rule on 241.4 describes one example where both sets of regulations come into play: two post offices are closed and a new one is opened to replace them.⁵ When it published the Final Rule in 1998, the Postal Service said that in such a case it would do a discontinuance study for the closures and a relocation procedure about the new location. In its Surreply, the Postal Service states, “What Dr. Hutkins fails to draw to the attention of the Commission is that the example he references concerns the combination of two retail facilities and moving services to a new facility, not merely the relocation of single postal retail unit.”

The passage in the Final Rule was cited in the Reply not because it was exactly analogous to the Bronx GPO relocation. The point was simply that when it introduced the new 241.4 regulations the Postal Service acknowledged that some facility actions would be covered by both the relocation statutes and the discontinuance statutes. In the Surreply, the Postal Service does not challenge this view. Clearly, in some cases, a facility action can involve both a relocation and

⁴ Letter to Ms. Diana K. Alvarado, Manager, Property Management, USPS, from Brian R. Turner, Senior Field Officer/Attorney, and Elizabeth S. Merritt, Deputy General Counsel, National Trust, Sept. 28, 2012.

a discontinuance. Closing the Bronx GPO and opening a new facility elsewhere in the community should be seen as one such action. It is ultimately not important that the Bronx GPO involves a one-for-one replacement rather than a two-for-one.

In its Surreply, the Postal Service also cites *Knapp v. United States Postal Service*, 449 F. Supp. 158, 162 (E.D. Mich. 1978), to support its contention that “a relocation alone, however, would not trigger compliance with the discontinuance rules.” The Reply did not claim that the relocation of *any* postal facility should trigger a discontinuance rules. *Knapp* was about the relocation of bulk mail sorting operations, not a retail office. It is in fact similar to one of the examples described in the Public Relations Regulations Handbook associated with 241.4.⁶ As discussed in the Reply, the Handbook on relocations describes nothing like closing a retail post office.

It should also be noted that the passage the Postal Service quotes from *Knapp* — “Closing’ thus refers to the complete elimination of the post office” — is taken out of context. In context, it is part of a discussion about the meaning of “closing” in contrast to “consolidation” and as distinct from the *partial* closing of a facility, as when bulk mailing operations are transferred elsewhere while the retail facility remains. As stated in *Knapp*:

Postal customers will not be affected by these transfers. Indeed, due to the continuation of all postal services rendered to the public at each of the post offices in question, the public would not know whether the bulk mail sorting operations were being performed at the post office as was the case, were

⁵ Final Rule, 39 CFR Part 241, “Expansion, Relocation, Construction Of New Post Offices,” Federal Register, Sept. 2, 1998, pp. 46654-8.

⁶ Community Relations Regulations for U.S. Postal Facilities Projects,” 2nd Edition, May 1999. A more recent version can be found in the *Postal Bulletin*, (May 26, 2005).

being transferred to a different facility, or were even being performed on a train en route to the destination of the mail being sorted as such services were once performed.

This is not the situation in the Bronx. There the post office *is* closing completely, postal customers will most definitely be affected, and they will surely know that that their post office closed and that retail services were transferred elsewhere.

As for 241.3(a)(1)(C), which states that the discontinuance requirements apply when a post office is permanently discontinued “without providing a replacement facility in the community,” it is important to note that the Postal Service has not provided a replacement facility in the Bronx. It has merely stated that it would find one. Elected officials and the public have simply been told that the Postal Service has “decided to relocate retail operations at the Bronx GPO to an undetermined location within the community.”⁷ At least in the cases of *Ukiah*, *Venice*, and *Santa Monica*, the Postal Service did a relocation procedure with the new location (a carrier annex in each case) included as part of the procedure.⁸ With the Bronx GPO, the Postal Service has made a decision to close the post office before it has even found a new location. As the Public Representative observes, it is possible that the Postal Service will not come through on its commitment.⁹ Then the relocation decision will have turned into a discontinuance decision, without having gone through a discontinuance procedure. By then, of

⁷ Motion to Dismiss, p. 7.

⁸ Order No. 804, PRC Docket No. A2011-21, *Ukiah Main Post Office, Ukiah, California* (August 15, 2011); Order No. 1166, PRC Docket No. A2012-17, *Venice Post Office, Venice, California* (January 24, 2012); Order No. 1588, PRC Docket No. A2013-1, *Santa Monica Main Post Office, Santa Monica, California* (August 15, 2012).

course, it will be far too late for appeals to the Commission. The building will probably have been sold by then.

In any case, the 241.4 relocation procedures now being used to close post offices were never intended for that purpose. As discussed in the Reply, they were supposed to be about expanding a current facility, siting a new one, and replacing one that had become too small. They should not be used to make a decision on the magnitude of closing the main post office of a city like the Bronx GPO.

The broader argument made in the Reply is that the Postal Service is using the vague language of “relocations” and “rearrangements” to narrow the scope of what kind of closures are covered by 404(d) and 241.3. The ambiguity in the terminology makes it possible to apply the terms to almost any closure. For example, when the Commission added a sentence to its regulations on appeals saying that “relocations” could not be appealed, it was not able to come up with a definition satisfactory to the stakeholders. According to the Postal Service, “Relocation concerns the transfer of service access within a community,” and “the number of brick and mortar facilities used to provide service within a community is not dispositive of whether a relocation has occurred.”¹⁰ The Commission deferred action on this issue, so we are left in the ambiguous territory of relocation decisions being unavailable for appeal, without knowing what a relocation is. When it closes a post office, the Postal Service always directs customers to other post offices, so

⁹ Public Representative Response in Support of United States Postal Service Motion to Dismiss Proceedings, July 24, 2013, regarding the Bronx General Post Office, PRC Docket No. A2013-6.

¹⁰ Initial Comments of The United States Postal Service (October 3, 2011), Rules

according to its definition, any closing could conceivably be viewed as a “relocation.”

The term “rearrangements” is even more problematic. It has now come to cover almost anything. In *Oceana* and most of “its progeny,” at least there were other facility actions taking place in the vicinity of the office that closed. Now the Postal Service uses the term to cover a situation like Glenoaks, California, or Fernandina Beach, Florida, where there are no other actions taking place other than the closure of the post office.¹¹ As with the Postal Service’s proposed definition of “relocation,” viewing “rearrangements” in this way opens the door to closing any post office without following the discontinuance requirements or having the decision reviewed by the Commission.

There are five open dockets on appeals before the Commission at this moment. The Postal Service would have the Commission dismiss all of them.

The Postal Service says that the appeal on Freistatt, Missouri, was “untimely” because it was filed about a week after the 30-day limit had expired.¹² The final determination notice could not be posted at the Freistatt office because it has been suspended since March, so customers may not have readily discovered the notices posted at other post offices. In addition, the City Clerk who assumes responsibility for matters like filing such appeals was called away for a family

Applicable to Appeals of Post Office Closings, Docket No. RM2011-13.

¹¹ Motion of United States Postal Service to Dismiss Proceedings, Glenoaks Station Post Office, Docket No. A2013-05 (July 15, 2013); Motion of United States Postal Service to Dismiss Proceedings, Fernandina Beach Station Post Office, Docket No. A2013-07 (August 1, 2013).

¹² Motion of United States Postal Service to Dismiss Proceedings, Freistatt, Missouri Post Office, Docket No. A2013-8 (August 1, 2013).

emergency.¹³ The Postal Service does not acknowledge the extenuating circumstances and argues that a deadline is a deadline (even though it regularly asks the Commission for extensions).

In Glenoaks, California, and Fernandina Beach, Florida, the Postal Service has asked the Commission to dismiss the appeals because the closures are part of a “rearrangement of retail services” and because customers will not “lose access to postal services in their community” since there are other retail facilities in “close proximity.” The Postal Service has long argued that stations and branches are outside the scope of 404(d), and it filed Motions to Dismiss *Ukiah*, *Venice*, and *Santa Monica* because they were “relocations,” but Glenoaks and Fernandina Beach appear to be the first times the Postal Service has filed Motions to Dismiss using the “rearrangement” argument. This shows how the Postal Service is increasingly using the Commission’s previous orders to further narrow the scope of what can be appealed under 404(d). In the Fernandina Beach case, a contract postal unit was opened to replace the post office — a perfect example of a “consolidation” under the new definition introduced in 2011 and hence covered by 404(d)¹⁴ — but the Postal Service nonetheless argues the appeal should be dismissed.

In the case of the Bronx GPO, the Postal Service asks the Commission to dismiss the appeal because the closure is not a closure but simply a relocation, even though the Postal Service went through a relocation process without

¹³ Administrative Record, Docket No. A2013-8 (August 1, 2013).

¹⁴ Handbook PO-101 Revision: Management of Post Offices by Postmasters; Definition of

identifying the new location. The situation is the same in Berkeley, and the Postal Service will undoubtedly be filing a motion to dismiss that appeal over the coming days.

In all five cases, the Postal Service argues that that the matter is outside the Commission's jurisdiction, and in four it is because the closures are "relocations" or "rearrangements." For the average person, the arguments offered by the Postal Service are difficult if not impossible to understand. The post office is closing, but people are told it is not actually a "closure." Even elected officials like Congressman Henry Waxman, the Mayor of Berkeley, and many others — no doubt many of them with law degrees — have had the same difficulty.¹⁵ People are incredulous, frustrated, and angry when the Postal Service says it is closing the post office but it does not need to follow the discontinuance laws and the decision cannot be appealed to the Commission.

Public perception in these matters is very significant. For years now, the Commission has rejected the Postal Service's argument that stations and branches are not "post offices" under 404(d). In its Advisory Opinion on Stations and Branches, the Commission explains why:

The Postal Service recognizes that postal patrons can not distinguish between Post Offices, classified stations, and classified branches. The closing of a Postal Service operated retail facility has substantially the same effect on patrons regardless of how the Postal Service might classify the facility. Thus, the Commission concludes that patrons of all retail Postal

Consolidation

¹⁵ See, for example, Petition for Review from Henry A. Waxman Regarding the Santa Monica, CA Post Office 90401, Oct. 9, 2012, Docket No. A2013-1, and Letter of Appeal Regarding USPS Final Determination, Berkeley Main Post Office, Aug. 1, 2013, Docket No. A2013-9.

Service facilities should be provided with the same opportunity to assure that established procedures are adhered to, whether or not it is required by statute.¹⁶

In much the same way, patrons cannot distinguish between a “discontinuance” and a “relocation” or a “rearrangement” (or a “suspension,” for that matter). They all have “substantially the same effect” — the post office is closed. With respect to stations and branches, the Commission says that patrons “should be provided with the same opportunity to assure that established procedures are adhered to, whether or not it is required by statute.” The same should apply to closing post offices, whatever the circumstances.

For the reasons discussed above and in the Reply, we therefore respectfully urge the Commission to reject the Postal Service’s Motion to Dismiss and to hear the appeal on the Bronx General Post Office.

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¹⁶ Advisory Opinion Concerning The Process For Evaluating Closing Stations And Branches, March 10, 2010, Docket No. N2009-1.