

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Freistatt Post Office  
Freistatt, Missouri 65654

Docket No. A2013-8

PUBLIC REPRESENTATIVE'S  
OPPOSITION TO UNITED STATES POSTAL SERVICE MOTION TO DISMISS AND  
RESPONSE IN SUPPORT OF PETITIONER'S REQUEST TO EXTEND TIME FOR FILING  
(August 12, 2013)

## I. INTRODUCTION

On July 22, 2013, Deborah Schoen (Petitioner) filed an appeal of the closing of the Freistatt, Missouri Post Office, together with a request to extend the time for filing.<sup>1</sup> On August 1, 2013, the Postal Service moved to dismiss the appeal on the basis that it was not timely filed.<sup>2</sup> For the reasons discussed below, the Public Representative urges the Commission to deny the Postal Service's Motion and grant Petitioner's Request for an extension of the time for filing her appeal.

Section II provides background on the events leading up to the filing of Petitioner's appeal. Section III explains why the Commission has the legal authority to extend the time for filing an appeal of a post office closing. Section IV argues that the Commission should exercise its authority to extend the time for filing in this docket under the doctrine of equitable tolling (with respect to Petitioner's Request) or equitable estoppel (with respect to other customers of the Freistatt Post Office). The final section argues that it is in the public interest

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<sup>1</sup> Letter from Deborah Schoen, Clerk, Village of Freistatt, to the Postal Regulatory Commission, July 21, 2013 (filed July 22, 2013) (Request).

<sup>2</sup> Motion of the United States Postal Service to Dismiss Proceedings, August 1, 2013, at 1 (Motion).

for the Commission to deny the Postal Service's Motion and fully consider the merits of the appeal.

## II. BACKGROUND

The village of Freistatt, Missouri is a small rural community with a population of approximately 160.<sup>3</sup>

The Postal Service initiated a discontinuance feasibility study of the Freistatt Post Office on August 4, 2011.<sup>4</sup> The sole reason cited by the Postal Service for the study was "a steady decline in revenue and/or volume." Record, Item 10 at 1. Questionnaires were mailed to community members on August 15, 2011. Record, Item 29 at 1. A community meeting attended by 89 people was held at the Freistatt community building on August 25, 2011. Record, Item 20 at 1.

A proposal to close the Freistatt Post Office was posted at the Freistatt Post Office from August 29 through October 30, 2011. Record, Item 16 at 1. Again, the only rationale offered by the Postal Service for the closing was that the "revenue and/or the volume this office [sic] has been in a steady decline over the past several of [sic] years." Record, Item 19 at 2. On October 14, 2011, Petitioner transmitted to the discontinuance coordinator a petition signed by more than 200 people requesting that the Postal Service not close the Freistatt Post Office. Record, Item 27 at 1. The official record for the Freistatt Post Office was logged at Headquarters on January 1, 2012. Record, Item 29 at 1. The record reflects no further action regarding the Freistatt Post Office until late March 2013. *Id.*

It appears (but is not clear) that the Postal Service determined on or shortly before March 21, 2013, that lease negotiations concerning the Freistatt Post Office had failed.<sup>5</sup> On March 21, 2013, Postal Service representatives met with representatives of the village of

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<sup>3</sup> United States Census Bureau American FactFinder, available at [http://factfinder2.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml)

<sup>4</sup> Administrative Record (Record), Item 1 at 1. The Postal Service included the Freistatt Post Office on the list of post offices being considered for closure under its Retail Access Optimization Initiative. Docket No. N2011-1, USPS-LR-N2011-1/11- RAO Initiative Candidate Facility Status Update, September 21, 2011.

<sup>5</sup> Response of the United States Postal Service to Order No. 1791, August 1, 2013, at 2 (Response to Order No. 1791).

Freistatt to request permission to erect clusterbox units on village property. Record, Item 1 at 1.

The Postal Service notified customers of the emergency suspension of the Freistatt Post Office by letters dated March 26, 2013. *Id.*, Item 3 at 1. Three days later, the Freistatt Post Office was suspended. *Id.*, Item 1 at 1. On the day the emergency suspension took effect, the village of Freistatt agreed to allow the Postal Service to construct clusterbox units on village property. Response to Order No. 1791 at 2. The agreement was formalized on April 11, 2013. *Id.* Approximately 8 weeks later, the Postal Service approved plans for construction of the clusterbox units. *Id.* The clusterbox units became available to customers on or about June 11, 2013.<sup>6</sup>

On April 18, 2013, the Chairman of the Freistatt Board of Trustees attempted to appeal the suspension of the Freistatt Post Office to the Commission. Record, Item No. 38 at 2. Petitioner notified Senator Roy Blunt of Missouri of the efforts to appeal the suspension. *Id.* at 1. The Public Representative was unable to locate any record of a Commission response to the attempted appeal.

On June 14, 2013, the Postal Service posted a notice of final determination to close the Freistatt Post Office at the Stotts City, Missouri Post Office. Record, Item 36 at 2. The notice was posted at the Monett, Missouri Post Office on June 15, 2013. *Id.* at 1. On June 17, 2013, the Postal Service posted a notice of final determination on the back of the Freistatt clusterbox units. *Id.* at 3.

Petitioner filed an appeal with the Commission on July 22, 2013, along with a request for an extension of the time for filing. Request at 1. On August 1, 2013, the Postal Service moved to dismiss the appeal. Motion at 2. The basis for the Motion is that Petitioner's appeal was not timely filed. *Id.*

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<sup>6</sup> *Id.*; *but see* Request at 2 (asserting units became available 76 days after emergency suspension).

### III. THE COMMISSION HAS THE AUTHORITY TO EXTEND THE TIME FOR FILING AN APPEAL OF A POST OFFICE CLOSING

Section 404(d)(5) of title 39, United States Code, provides that appeals of post office closings may be made to the Commission by a person served by the post office within 30 days after the determination to close the post office is made available to that person. The Commission has the legal authority to grant Petitioner's request to extend the time for filing established by 39 U.S.C. § 404(d)(5). In the extraordinary circumstances presented in this docket, the Public Representative strongly recommends that the Commission exercise its authority to equitably toll the statute of limitations established by 39 U.S.C. § 404(d)(5) or to equitably estop the Postal Service from asserting Petitioner's failure to timely file as a basis for its Motion.

The Postal Service's Motion characterizes the authority of the Commission with respect to the extension of the time for filing an appeal of a post office closing in a manner that is inconsistent with both Commission practice and Supreme Court jurisprudence. The Motion asserts that the "Commission has consistently dismissed appeals where petitions for review were received after the 30 day appeal period." Motion at 3. It further asserts that 39 U.S.C. § 404(d)(5) "is a limit upon the jurisdiction of the Commission that must be strictly construed." *Id.* at 4. The first assertion is not consistent with past Commission decisions and the second assertion is not consistent with Federal law.

#### A. *The Commission Has Denied Motions to Dismiss Based on Late-Filed Appeals*

The Postal Service's assertion that the Commission "consistently" dismisses late-filed appeals is not supported by Commission precedent. The Commission has previously denied at least two Postal Service motions to dismiss appeals on the basis that they were untimely filed.<sup>7</sup>

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<sup>7</sup> Docket No. A98-1, Order No. 1209, Order Denying Postal Service Motion to Dismiss, March 5, 1998 (Order No. 1209); Docket No. A2000-1, Order No. 1296, Order Denying Postal Service Motion to Dismiss, June 16, 2000. In Docket No. A98-1, the Commission denied a motion to dismiss, citing the Postal Service's failure to deliver the petitioner's appeal to the Commission in a timely fashion. See Order No. 1209.

In Docket No. A2000-1, the Commission denied the Postal Service's motion to dismiss, despite the fact that the petitioner filed his appeal more than *two years* after a notice of final determination was posted. See Order No. 1296. In that docket, the Postal Service posted notice of a final determination regarding the temporarily suspended Roanoke, Virginia Post Office at a post office providing alternative service by rural carrier to the customers of the Roanoke Post Office. *Id.* at 2. The Commission found that the Postal Service had failed to provide adequate notice of its intention to close the Roanoke Post Office, and that the "failure of the Postal Service to provide adequate notice prejudiced the petitioner's ability to file a timely appeal in accordance with section 404(b)(5) of title 39."<sup>8</sup>

The Postal Service bases its assertion that the Commission consistently dismisses late-filed appeals primarily on Docket No. A2011-41. See Motion at 3. That reliance is unjustified, given that the Commission issued no order in that docket. Instead, the Secretary of the Commission, apparently *sua sponte*, sent a letter to the petitioner informing him that the deadline for appeals occurred one day before he attempted to file his appeal and that the "Commission is, therefore, unable to consider your filing as a timely appeal."<sup>9</sup> This letter cannot be afforded the same weight as a Commission order, because it does not reflect a decision by the Commission.

In the first Commission order cited by the Postal Service in support of its position, the Commission granted a Postal Service motion to dismiss on the basis that it had provided adequate notice to customers of their right to appeal.<sup>10</sup> In the second order, the Commission found that the petitioner's understanding that he was required to appeal to the Post Office Review Coordinator (and not the Commission) would not excuse late filing when the notice of final determination specifically stated that appeals were to be filed with the Commission.<sup>11</sup>

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<sup>8</sup> *Id.* at 3. Although that appeal was taken before the passage of the Postal Accountability and Enhancement Act, there have been no substantive changes to the language concerning the time for appeals of post office closings since it was added to title 39 by section 9(a) of the Postal Reorganization Act Amendments of 1976, Public Law 94-421 (90 Stat. 1303).

<sup>9</sup> Docket No. A2011-41, Letter from Shoshana Grove, Secretary, Postal Regulatory Commission, to E.T. Hammerand, August 16, 2011.

<sup>10</sup> Docket No. A2011-3, Order No. 672, Order Dismissing Appeal, February 11, 2011, at 7.

<sup>11</sup> Docket No. A2012-64, Order No. 1189, Order Dismissing Appeal, February 1, 2012, at 3.

The Commission did not base its decision in either docket on a lack of jurisdiction to hear appeals that were not timely filed.<sup>12</sup>

It is apparent from a review of the Commission's past decisions that it has previously extended the time for filing appeals of post office closings.

*B. Supreme Court Decisions Allow Equitable Extensions of Statutes of Limitations*

The Postal Service's Motion cites a Supreme Court decision for the proposition that "[s]tatutory time limits for the initiation of legal action set by Congress, such as 39 U.S.C. 404(d)(5), are limited waivers of sovereign immunity that define the jurisdiction of the reviewing body" and that "such congressional waivers of sovereign immunity must be construed very narrowly." Motion at 2-3, *citing Irwin*, 498 U.S. 89. It asserts that the Court's holding in that case "militates in favor of dismissal" of the Petitioner's appeal. Motion at 3.

The Motion misstates the holding of *Irwin*. That decision expressly approves the application of the doctrine of equitable tolling to a statutory time limit in a suit against the Federal Government.<sup>13</sup> *Irwin* is consistent with previous Supreme Court decisions holding that the time for filing claims against the Federal Government can be equitably tolled or waived, especially when those claims are brought by individuals unaccustomed to legal proceedings or when the Federal Government's actions have prevented timely filing.<sup>14</sup>

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<sup>12</sup> This is especially probative given that the Postal Service's motion to dismiss in Docket No. A2011-3 included an argument about the limiting effects of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), a case discussed at greater length in section III.B., *infra*. Docket No. A2011-3, Motion of United States Postal Service to Dismiss Proceedings, December 7, 2010, at 3-4.

<sup>13</sup> Specifically, the Court held that "[o]nce Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. ... We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96 (emphasis added).

<sup>14</sup> See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (holding that the statutory time for filing a Title VII suit was "not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires") and *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (holding that the 60-day limit on appeals of disability determinations under 42 U.S.C. § 405(g) could be equitably tolled because tolling was "consistent with congressional intent, and called for by the facts of the case"). In *Bowen*, the Court balanced the need for speedy resolution of administrative cases against the "secretive conduct" of the Secretary of Health and Human Services and found that "[t]olling, in the rare cases such as this, does not undermine the purpose of the 60-day limitations period when viewed in connection with the underlying statute." *Id.* at 481.

The Supreme Court recently declined to extend the equitable tolling principles of *Irwin* to administrative proceedings under 42 U.S.C. §1395oo(a)(3), which involved a 180-day statutory deadline for appeals by Medicare providers to the Provider Reimbursement Review Board.<sup>15</sup> However, the Court was careful to distinguish claims subject to the time limit established by §1395oo(a)(3), which are generally brought by “sophisticated institutional providers assisted by legal counsel” (internal quotations omitted), from the statutes of limitations in the Court’s other equitable tolling decisions, in which “laymen, unassisted by trained lawyers, initiate the process” (internal quotations omitted). *Id.* at 828. Its holding was expressly limited to “administrative appeals of the kind here considered.”<sup>16</sup> As Justice Sotomayor explained in her concurring opinion, “with respect to remedial statutes designed to protect the rights of unsophisticated claimants..., agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.” *Id.* at 830.

Taken together, *Irwin*, *Zipes*, *Bowen*, and *Auburn Regional Medical Center* suggest that the 30-day time for filing an appeal of a post office closing may be tolled. Equitable extension of the time for filing under 39 U.S.C. § 404(d) is consistent with congressional intent, takes into consideration the rights of unsophisticated claimants who are not represented by counsel, and is justified by the facts of this docket.

The language of 39 U.S.C. § 404(d)(5) itself supports the conclusion that the 30-day period may be equitably extended. The time for filing an appeal of a post office closing is “within 30 days after [the] determination is made available to [a] person under paragraph (3).” 39 U.S.C. § 404(d)(5). The statute focuses on the actual availability of the notice, not the date stamp on a notice of final determination.

Similar to the statutory schemes at issue in *Irwin*, *Zipes*, and *Bowen*, 39 U.S.C. § 404 is designed to protect the interests of individuals who are likely to be unrepresented by counsel and unfamiliar with the legal framework at issue. The very limited legislative history

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<sup>15</sup> See *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013).

<sup>16</sup> *Id.* at 829. In other words, the holding is limited to statutes of limitations for claims brought by sophisticated institutions that are repeat players familiar with the administrative and statutory scheme.

of 39 U.S.C. § 404(d) does not indicate that Congress intended the 30-day time limit for appeals to act as a restriction on the jurisdiction of the Commission or express disapproval of equitable tolling or estoppel.<sup>17</sup> For the reasons discussed in section IV, *infra*, the facts of this docket justify an extension of the time for filing.

#### **IV. AN EXTENSION OF THE TIME FOR FILING IS JUSTIFIED BY THE FACTS OF THIS DOCKET**

The Public Representative is cognizant of the demands that post office closing appeals place on Commission resources. The Commission has an interest in managing its own caseload, and a statute of limitations can be a useful tool to promote those efforts.<sup>18</sup> There is no doubt that the Commission has received and will receive appeals filed after the 30-day period provided by 39 U.S.C. § 404(d)(5) that it should dismiss as not timely filed. This, however, is not one of those appeals.

The Petitioner has diligently and consistently pursued her rights with respect to the Freistatt Post Office, but she was prevented by unavoidable circumstances from timely filing an appeal. These facts counsel in favor of equitably tolling the statute of limitations. Additionally, the Record contains facts suggesting that the Postal Service's actions may have created the false impression that a final determination to close the post office had not yet been made. These facts support a determination that the Postal Service should be equitably estopped from asserting the statute of limitations in support of its Motion.

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<sup>17</sup> See *Bowen*, 476 U.S. at 480 (“we conclude that application of a ‘traditional equitable tolling principle’ to the 60-day requirement of § 405(g) is fully ‘consistent with the overall congressional purpose’ and is ‘nowhere eschewed by Congress.’”) (quoting *Honda v. Clark*, 386 U.S. 484, 501 (1967)). The 30-day time for filing appeals with the Commission was established by section 9(a) of the Postal Reorganization Act Amendments of 1976, Public Law 94-421 (90 Stat. 1303). The Committee of Conference for H.R. 8603 explained only that the procedure for appealing post office closures to the Commission represented a compromise between the original Senate bill, which provided for appeal of a determination to close a post office to a United States Court of Appeals “for a judicial determination,” and the House bill, which did not establish any procedures for closing post offices. H.R. Conf. Rep. 94-1444 at 18; 1976 U.S.C.C.A.N. 2434, 2440.

<sup>18</sup> See *Bowen*, 476 U.S. at 481; *Sebelius*, 133 S.Ct. at 826.



A. *The Doctrine of Equitable Tolling Should be Applied to Petitioner's Appeal*

In *Irwin*, the Supreme Court explained that equitable tolling of a statutory time for filing is appropriate when a defective pleading is filed within a statutory period or when the defendant's misconduct induces a complainant to allow the filing deadline to pass.<sup>19</sup> *Irwin*, 498 U.S. at 96. The Court is "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.*

Since 2011, the Petitioner has diligently pursued her rights with respect to the closing of the Freistatt Post Office. The record indicates that she attended the community meeting held in Freistatt,<sup>20</sup> submitted comments in response to the proposal to close the post office,<sup>21</sup> and gathered more than 200 signatures for a petition in support of the Freistatt Post Office.<sup>22</sup> When she learned of the emergency suspension of the Freistatt Post Office in 2013, the Petitioner requested assistance from Senator Roy Blunt regarding an attempted appeal of the suspension to the Commission. Record, Item 38 at 4.<sup>23</sup> The Petitioner submitted her Request to the Commission on July 22, 2013. If the time for appeal were calculated in the manner most favorable to the Postal Service (from the date of posting at the Stotts City Post Office), the appeal would have been timely filed on July 15, 2013.<sup>24</sup> At most, Petitioner's filing was seven days out of time.

Petitioner's Request is based on her need to attend to a serious family medical emergency at the time an appeal would have been timely filed. Request at 1. This

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<sup>19</sup> See also 4 Fed. Prac. & Proc. Civ. § 1056 (3d ed.) (equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct").

<sup>20</sup> Record, Item 11 at 3.

<sup>21</sup> Record, Item 27 at 1.

<sup>22</sup> *Id.*

<sup>23</sup> It is important to note that there is no record of the Commission responding to the attempt to appeal the suspension of the Freistatt Post Office. Compare this treatment to the treatment of a similar appeal in Docket No. A2013-3. In that situation, the Commission established a docket for consideration of an appeal of the suspension of the Climax, Georgia Post Office and issued an order dismissing the appeal as premature. Docket No. A2013-3, Order No. 1693, Order Granting Motion to Dismiss, April 8, 2013.

<sup>24</sup> July 14, 2013, was a Sunday. Under the Commission's rules for the computation of time, if the last day of a period for filing falls on a Sunday, the last day of a period is considered to be the first day which is neither a Saturday, Sunday, or legal holiday. 39 C.F.R. § 3001.15.

circumstance could not have been avoided by the Petitioner. *Id.* In light of evidence that the Petitioner has been diligently pursuing her rights in connection with this post office for two years, it would not be in the interests of justice to reject her appeal on the basis that it was filed, at most, seven days out of time. In this unusual circumstance, the Commission should equitably toll the time for filing.

The Postal Service routinely requests, and is granted, extensions of the time for filing its documents, for a variety of reasons.<sup>25</sup> In one recent filing, the Postal Service, without any explanation or request for extension of time, provided required notice of an international bilateral agreement under 39 U.S.C. § 407(d) approximately five weeks after the statutory deadline.<sup>26</sup> It is somewhat disingenuous for the Postal Service – a multi-billion dollar organization fully represented by attorneys who routinely request extensions on its behalf – to advocate for the strict application of a time limit for filing by an individual petitioner unrepresented by counsel and in the grip of circumstances beyond her control. The inequity reflected in the Postal Service's Motion is even more striking when considered in light of the Postal Service's statements to Freistatt Post Office customers with respect to process for making a final determination and its choice of timing and location for the posting of its notice of final determination. See section IV.B., *infra*.

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<sup>25</sup> See, e.g., Docket Nos. MC2013-22 and CP2013-44, Motion for Late Acceptance of Response to Request for Supplemental Information, February 7, 2013 (the response was due January 29, 2013 and the basis for late filing was absence of counsel and the need to coordinate with the customer), *motion granted* Order No. 1652, Order Adding Express Mail & Priority Mail Contract 12 to the Competitive Product List, February 11, 2013; Docket Nos. MC2013-32 and CP2013-41, Motion for Late Acceptance of Response to Chairman's Information Request No. 1, January 23, 2013 (the response was due January 18, 2013), *motion granted* Order No. 1640, Order Adding Express Mail Contract 13 to the Competitive Product List and Conditionally Approving the Associated Negotiated Service Agreement, January 25, 2013.

<sup>26</sup> See Letter from Anthony F. Alverno, Chief Counsel, Global Business and Service Development, United States Postal Service, to Shoshana Grove, Secretary, Postal Regulatory Commission, May 6, 2013 (effective date March 13, 2013, filed on May 6, 2013).

*B. The Postal Service Should be Equitably Estopped from Asserting Failure to Timely File as a Basis for its Motion*

Tolling of a statute of limitations “on estoppel grounds is proper where a claimant has received inadequate notice, ... where the court has led the plaintiff to believe she has done everything required of her, ... [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.”<sup>27</sup> The Postal Service’s assurances to Freistatt Post Office customers that it would gather input from the community after the emergency suspension of the post office but before a final determination may have led individuals served by the Freistatt Post Office to believe that they would receive individualized notice and an opportunity to comment before the posting of the notice of final determination. Furthermore, it is likely that the Postal Service’s failure to prominently post the notice of final determination regarding the Freistatt Post Office at a location consistent with its handbook resulted in inadequate notice and prevented other customers of the Freistatt Post Office from timely appealing the closing.

The Record indicates that, when given the opportunity to provide input regarding the Freistatt Post Office, a significant portion of Freistatt Post Office customers are inclined to provide that input. More than half the residents of Freistatt attended the community meeting held in August 2011. Record, Item 35 at 1. When the Postal Service sent 88 questionnaires to Freistatt residents as part of its discontinuance feasibility study, it received 77 responses. Record, Item 29 at 1. Approximately 50 residents and businesses submitted comments in response to the proposal and invitation for comment. *Id.*

When the Postal Service posted its notice of final determination, it elicited only one response: Petitioner’s appeal. The absence of any additional appeals is striking given Freistatt’s history of public participation in proposals regarding its post office. There are facts

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<sup>27</sup> *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998) (internal quotations omitted), quoting *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988), which in turn quoted *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). On one occasion, the Commission considered a timely appeal as evidence that the Postal Service’s failure to provide customers notice of their right to appeal caused no injury to customers. Docket No. A2011-1, Order No. 673, Order Affirming Final Determination, February 15, 2011, at 6. This reasoning implies that the opposite might be true: failure to file a timely appeal could be considered evidence that the Postal Service has failed to provide proper notice.

in the Record suggesting that the Postal Service's notice of emergency suspension led Freistatt customers to believe that the Postal Service would solicit and consider community input before making a final determination to close the Freistatt Post Office. There are also facts suggesting that the Postal Service did not provide the residents of Freistatt with adequate notice of the closing of their post office.<sup>28</sup>

These facts lead the Public Representative to conclude that the Postal Service's actions contributed to the failure of other potential petitioners to file timely appeals (or any appeals at all).

1. *Statements in the Notice of Emergency Suspension Could Have Misled Customers*

The Record suggests that the notice of emergency suspension sent to Freistatt customers contained inaccurate information about the procedures the Postal Service would follow in determining whether to close the Freistatt Post Office.

The letter the Postal Service sent to Freistatt residents informing them of the emergency suspension of the post office stated:

The FREISTATT POST OFFICE is currently suspended. Failed lease negotiations. Therefore, it will be necessary to suspend services at the FREISTATT POST OFFICE at the close of business on 03/29/2013. This change is *tentative and will not lead to a formal proposal* unless we conclude that it will provide a maximum degree of regular and effective postal services. ... *No final decision to permanently discontinue the Post Office has been made.* A community meeting will be held at or near the MONETT in the coming weeks to explain or [sic] plans and solicit your comments concerning possible alternate means of providing postal and other services. In the interim, we are confident that carrier delivery will continue to provide FREISTATT POST OFFICE customers with effective and regular postal services.<sup>29</sup> Record, Item 3 at 1. (Emphasis added).

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<sup>28</sup> The Public Representative recognizes that Petitioner had actual notice of the final determination. The Petitioner became aware of the notice of final determination because she happened to be at the Freistatt clusterbox units when the Monett Postmaster posted the notice. Exhibit A at 1. However, statute and regulation clearly place the burden of notifying affected customers of a post office closing on the Postal Service. See 39 U.S.C. § 404(d)(3). Petitioner had no duty to provide notice of the closing to other customers. Nor can Petitioner's knowledge of the notice of final determination fairly be attributed to other customers.

<sup>29</sup> Note that carrier delivery was not provided to the customers of the Freistatt Post Office. Nearly all residents received their mail through general delivery. Record, Item 2 at 1.

There is no indication in the Record that a community meeting was held or that comments were solicited from customers prior to the posting of the notice of final determination. Upon receipt of the Postal Service's letter, it would have been reasonable for the customers of the Freistatt Post Office to assume that a final determination would not be made until the Postal Service held a community meeting and solicited comments.<sup>30</sup> Because no community meeting had been held and no comments had been solicited before mid-June 2013, Freistatt customers has no reason to be on the lookout for a notice of final determination at that time.

2. *The Postal Service Failed to Adequately Notify Customers of the Final Determination*

The Postal Service contends that its postings at the Stotts City and Monett Post Offices were the only actions required by its regulations.<sup>31</sup> It asserts that it posted notice of the final determination at the clusterbox units in Freistatt "even though not required by statute or regulation." *Id.* However, upon review of the Record, the Public Representative concludes that 1) the Postal Service's statements may have led the residents of Freistatt to believe that a notice of final determination would be posted at the Freistatt Post Office; 2) 39 C.F.R. § 241.3(g)(1)(i) required the Postal Service to prominently post notice of its final determination at the Freistatt clusterbox units; and 3) the Postal Service failed to prominently post the notice.

When the Postal Service was completing its discontinuance feasibility study of the Freistatt Post Office in 2011, it notified customers that its final determination would be posted in the Freistatt Post Office. Record, Item 24 at 1. From that point on, the residents of

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<sup>30</sup> The installation of clusterbox units adjacent to the suspended Freistatt Post Office cannot be construed as notice that a final determination was likely to be posted. See Record, Item 38 at 3.

<sup>31</sup> Motion at 2. It appears that Freistatt customers also viewed "Mt. Vernon" as a facility available to them if the Freistatt Post Office closed (although they explained the reasons it would be difficult to access this facility). See, e.g. Record, Item 25 at 7. There is a post office located in Mount Vernon, Missouri, approximately 10 miles from Freistatt. However, the Stotts City Post Office, approximately 9 miles from Freistatt, is located on Mount Vernon Street. The Record does not contain information about why the Postal Service considers the Stotts City Post Office, but not the Mount Vernon Post Office, to be an affected facility.

Freistatt could reasonably expect that a notice concerning the Freistatt Post Office would be posted in Freistatt.

The Postal Service's regulations concerning the posting of a final determination require it to "[p]rovide notice of the Final Determination by posting a copy prominently in the USPS-operated retail facilities in each affected USPS-operated retail facilities where the proposal was posted under paragraph (d)(1) of this section, including the USPS-operated retail facilities likely to be serving the affected customers." 39 C.F.R. § 241.3(g)(1)(i).<sup>32</sup>

Section 241.3(g)(1)(i) speaks in terms of the retail facilities "serving" customers. From the point of view of a customer, it is reasonable to assume that the location where customers carry out retail transactions, such as the purchase of stamps or the mailing of packages, is the location serving those customers. Beginning on or about June 11, 2013, the residents of Freistatt were carrying out retail transactions at the newly constructed clusterbox units adjacent to the suspended Freistatt Post Office. Furthermore, the notice of final determination states that, since the emergency suspension, Freistatt "customers have *received* delivery and retail services by rural route service emanating from the Monett Post Office." Record Item 35 at 1 (emphasis added). From the point of view of the residents of Freistatt, they were *receiving* delivery and retail services at the clusterboxes, regardless of the location from which those services emanated. As a result, the Postal Service was obligated to prominently post notice of its final determination at or near the clusterbox units.

Exhibit A demonstrates the inadequacy of the Postal Service's notice at the Freistatt clusterbox units. The notice was posted on the back of the clusterboxes, where it was invisible to customers retrieving their mail and to casual passersby. The back of the clusterboxes faces an empty lot not regularly traversed by Freistatt residents. This posting does not constitute adequate notice.

The Postal Service made statements to the residents of Freistatt about the timeline for the final determination regarding the Freistatt Post Office that were likely to lead them to

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<sup>32</sup> For purposes of §241.3, the term " 'USPS-operated retail facility' *includes* any Postal Service employee-operated post office, station, or branch...". 39 C.F.R. § 241.3(a)(2)(i) (emphasis added). Here, the use of the word "includes" (rather than the more restrictive "means") signals an intent to include Postal Service employee-operated locations that are not post offices, stations, or branches.

believe that a final determination had not yet been made in June 2013. The Postal Service also failed to provide adequate notice of the final determination, as required by statute and regulation. The absence of appeals to the Commission is a foreseeable result of those actions. For all these reasons, the Commission should equitably estop the Postal Service from asserting Petitioner's late filing as a justification for its motion to dismiss.

#### **V. IT IS IN THE PUBLIC INTEREST FOR THE COMMISSION TO CONSIDER THE ISSUES RAISED BY THE CLOSING OF THE FREISTATT POST OFFICE**

In this docket, it is in the interests of the general public for the Commission to fully evaluate whether the Postal Service's actions in advance of the closing of the Freistatt Post Office conformed with 39 U.S.C. § 404(d) and the Postal Service's own regulations and guidance.

The Postal Service's actions with respect to the Freistatt Post Office raise significant issues of fact that are not addressed by the Postal Service's Motion. These issues include questions about the Postal Service's compliance with obligations that affect the public in general, not just the residents of Freistatt.

In particular, the Record raises questions of fact that bear on whether the Postal Service has complied with the prohibition on closing rural post offices solely on the basis that they are operating at a deficit (39 U.S.C. § 101(b)), the prohibition on closings that are arbitrary, capricious, or unsupported by substantial evidence on the record (39 U.S.C. § 404(d)(5)), and the requirement to consider the factors listed in 39 U.S.C. § 404(d)(2). At this juncture, the Public Representative has no recommendations for how the Commission might resolve these questions. However, the Public Representative urges the Commission to at least consider these questions, preferably by requiring the Postal Service to submit additional information explaining the basis for its determinations to study, suspend, and ultimately close the Freistatt Post Office. Below is a summary of some of the important questions of fact raised by the Record and the Request that are not resolved by the Postal Service's Motion.

A. *Was the Postal Service's Determination to Close the Freistatt Post Office Based Solely on the Post Office Operating at a Deficit, and Will the Closing Result in Cost Savings?*

There are facts in the Record suggesting that the Postal Service's decision to initiate a discontinuance study of the Freistatt Post Office in 2011 was based solely on "a steady decline in revenue and/or volume." Record, Item 10 at 1. At least two Freistatt customers specifically requested the Postal Service to explain how this rationale for studying the post office conforms with 39 U.S.C. § 101(b).<sup>33</sup> The Postal Service's reply to these customers did not respond to their questions. *Id.* at 71-72 and 185-186.

More troubling are facts suggesting that revenues at the Freistatt Post Office actually increased during the period being studied. Freistatt customers asserted in 2011 that revenues at their post office were increasing. See, e.g. Record, Item 25 at 79 and 84. The Postal Service's reply to one such customer failed to address this concern. Record, Item 25 at 77. Another customer received only a boilerplate response.<sup>34</sup> The customers' assertions appear to be borne out by the notice of final determination, which shows that from fiscal year 2008 through fiscal year 2011, revenue at the Freistatt Post Office steadily increased. Record, Item 35 at 1. In fiscal year 2012, revenue decreased from the 2011 level by only \$55. *Id.*

The evidence of increasing revenues may have carried less weight if the Postal Service anticipated realizing cost savings from the closing of the post office, but it appears that the most significant savings the Postal Service expects to realize are in the area of labor costs.<sup>35</sup> The notice of final determination states that the Postal Service intends to move the Freistatt postmaster (the only employee mentioned in its discussion of the effect of the

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<sup>33</sup> Record, Item 25 at 74 ("How can you justify closing Freistatt P.O. on the statement 'walk in review was not high enough' when Federal law PROHIBITS the closing of a P.O. just to save money?") and 188. See also *id.* at 84.

<sup>34</sup> *Id.* at 83 ("You expressed a concern about the cost savings obtained by the Postal Service from the closure of Post Offices. The Postal Service has developed and begun implementing a range of cost-reducing initiatives. These include: consolidating operations, adjusting delivery routes, restructuring administrative and processing functions and closing district offices. We also have introduced several new products and services, including Priority Mail Flat Rate boxes and Adult Signature service, in an effort to grow revenue.").

<sup>35</sup> Record, Item 35 at 13. It also reflects a "Relocation One-Time Cost" of \$20,720. *Id.*



closing on employees) to another facility if possible and to begin providing delivery by rural or contract carrier. *Id.* The record does not contain any evidence of how the Postal Service, as an organization, would realize savings in labor costs if it transferred the Freistatt postmaster and began providing service by rural or contract carrier. In 2011, one Freistatt customer specifically asked the Postal Service how it would calculate cost savings “if our current post master is transferred to another location & local carriers have to work longer hours at an extra cost?” Record, Item 25 at 28. She received only a boilerplate response.<sup>36</sup>

It would serve the public interest for the Commission to resolve the factual questions about cost savings and compliance with 39 U.S.C. § 101(b) raised in the Record. It will not be able to consider these matters if it grants the Postal Service’s Motion.

*B. Is the Postal Service Using an Emergency Suspension Based on Failed Lease Negotiations to Close a Post Office It Would Otherwise Be Prohibited from Closing?*

The Record raises a question about Postal Service’s stated rationale for the emergency suspension of the Freistatt Post Office. In doing so, it raises an issue of greater concern to the public in general: whether the Postal Service is using the failure of lease negotiations as the basis for suspending and closing a post office it might otherwise be prohibited from closing.

The Public Representative recognizes that the Postal Service faces a difficult financial situation that requires it to make hard choices about the level and type of service provided to each community. Furthermore, she agrees with the Postal Service that “carefully negotiating leases that serve the best interests of the Postal Service is an example of prudent management and sensible stewardship of public funds.”<sup>37</sup> Nonetheless, the Record in this docket contains facts suggesting that the Postal Service may not have acted diligently in its

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<sup>36</sup> *Id.* at 26 (“You expressed a concern about the cost savings obtained by the Postal Service from the closure of Post Offices. The Postal Service has developed and begun implementing a range of cost-reducing initiatives. These include: consolidating operations, adjusting delivery routes, restructuring administrative and processing functions and closing district offices. We also have introduced several new products and services, including Priority Mail Flat Rate boxes and Adult Signature service, in an effort to grow revenue.”).

<sup>37</sup> Docket No. N2012-2, Reply Brief of United States Postal Service, July 27, 2012, at 22.

efforts to renew the lease of the Freistatt Post Office. It also contains facts suggesting that the Postal Service had no other rationale for suspending or closing the Freistatt Post Office apart from failed lease negotiations.

Petitioner's Request asserts that lease negotiations failed despite the owner of the property presenting a signed lease agreement to the Postal Service before the expiration of the lease. Request at 2. She further asserts that these agreements were offers made by the Postal Service and accepted by the owner of the post office. *Id.* If proven, these assertions would indicate that the Postal Service failed to act diligently with respect to the lease negotiations. The Commission should have the opportunity to inquire into the circumstances of the lease negotiations.

The Postal Service has assured the Commission that "Postal Service policy provides that suspensions should be avoided," particularly if those suspensions are the result of failed lease negotiations.<sup>38</sup> If lease negotiations fail, Handbook PO-101 directs Postal Service employees to attempt to find suitable alternative facilities (presumably within the community), and, if no alternative facilities can be found, initiate a discontinuance study.<sup>39</sup> In this docket, the Postal Service did not initiate a new discontinuance study. Instead, it relied on its 2011 discontinuance study.<sup>40</sup> It provided only two days notice of the suspension of the Freistatt Post Office. There is no evidence in the Record that the Postal Service initiated the discontinuance process "sufficiently in advance of the circumstance prompting the emergency suspension (for example, anticipated cancellation of a lease or rental agreement) to allow a meaningful opportunity for public input to be taken into account before services are suspended," as required by Handbook PO-101. Handbook PO-101, § 617. Instead, the Postal Service provided two days notice of the suspension to Freistatt customers, allowed no

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<sup>38</sup> Docket No. N2012-2, United States Postal Service Responses to Questions 1-3 of Presiding Officer's Information Request No. 5, July 16, 2012, question 3.

<sup>39</sup> *Id.*; see also Handbook PO-101, Postal Service-Operated Retail Facilities Discontinuance Guide, July 2011, § 212.2 (Handbook PO-101).

<sup>40</sup> As discussed above, the Record shows that the 2011 study was based solely on decline revenues, but the Record also shows that revenues at the Freistatt post office increased from fiscal years 2008-2011 (with a decline of only \$55 in fiscal year 2012).

opportunity for public input, and took at least 74 days to install the clusterbox units that would provide alternative service in Freistatt.

Had the failure of lease negotiations not resulted in an emergency suspension, it is an open question whether the Postal Service had a legal basis for proceeding with the closing of the Freistatt Post Office. As discussed in section V.A., *supra*, the only rationale offered by the Postal Service for its initial discontinuance study was declining revenues. The Record shows that revenues increased at the Freistatt Post Office during this period. The Record also contains facts supporting an argument that closing the Freistatt Post Office would run afoul of the prohibition on closing rural post offices solely on the basis that they are operating at a deficit. See 39 U.S.C. § 101(b). The Postal Service may have suspended the Freistatt Post Office on the basis of failed lease negotiations while it was actively engaged in lease negotiations regarding the Freistatt Post Office. These facts suggest that the determination to close the Freistatt Post Office may have been arbitrary, capricious, and unsupported by substantial evidence on the record. See 39 U.S.C. § 404(d)(5).

For all these reasons, it is in the interests of the general public for the Commission to examine the circumstances and results of the failed lease negotiations in this docket. It will be unable to do so if it grants the Postal Service's Motion.

C. *Did the Postal Service Consider All Necessary Factors Before Determining to Close the Freistatt Post Office?*

Section 404(d)(2) of title 39, United States Code, requires that the Postal Service take certain factors into consideration when determining whether to close a post office. As discussed in section V.A., *supra*, there is evidence that the Postal Service may have failed to consider whether the closing was consistent with 39 U.S.C. § 101(b) (as required by 39 U.S.C. § 404(d)(2)(A)(iii)) and the economic savings to the Postal Service resulting from the closing (as required by 39 U.S.C. § 404(d)(2)(A)(iv) ). In addition, facts in the Record suggest that the Postal Service may have failed to consider the effect of the closing on the community, as required by 39 U.S.C. § 404(d)(2)(A)(i).

The Freistatt community raised several issues during the 2011 discontinuance study that the Postal Service did not adequately address.<sup>41</sup> These issues are unique to the Freistatt community and deserve consideration, or at least a response, by the Postal Service.

The Record and the Request identify a unique feature of the Freistatt Post Office. Due to its location on Missouri Highway H, it is a popular and particularly advantageous post office for truck drivers seeking to mail their work logs and packages. Request at 2; Record Item 25 at 7, 79, and 173. It seems reasonable to conclude that the truck drivers who regularly use the Freistatt Post Office are customers of the post office. These customers were not afforded individualized notice of the suspension of the Freistatt Post Office, and it does not appear that the Postal Service considered the effect of the closing on their ability to mail their work logs in a timely fashion.

Additionally, it appears from the Record that several residents of Freistatt routinely mail packages that contain Braille Bibles for the blind. See, e.g. Record Item 20 at 44, 63, 68, and 165. Congress has expressed particular interest in the treatment of mail matter for the blind. See 39 U.S.C. § 3403 (providing free mailing privileges for matter for the use of the blind). There is no indication in the record that the Postal Service considered the effect of the closing of the Freistatt Post Office on the ability of Freistatt residents to mail matter to the blind.<sup>42</sup>

Finally, like many communities, Freistatt is home to a significant number of seniors and persons with disabilities. See, e.g., Record, Item 20 at 48; *id.*, Item 25 at 7. The Record shows that the village of Freistatt installed a crosswalk to allow seniors and persons with disabilities safer and easier access to the Freistatt Post Office, at a cost of approximately \$10,000.<sup>43</sup> See Record, Item 25 at 48, 79, and 174. There is no evidence in the Record that

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<sup>41</sup> The Postal Service responses contained in the Record are almost exclusively boilerplate. At one point, the Postal Service's summary of comments received from Freistatt residents refers to "the Huggins Post Office," indicating that parts of its summary were simply copied from another proceeding. Record, Item 26 at 5 (response to concern 45).

<sup>42</sup> The Postal Service's boilerplate reply to questions about package pickup states only that rural carriers will pick up packages under 13 ounces and that "[p]ackages over 13 ounces may be picked up if the postage was printed online or with a traceable meter." Record, Item 26 at 1.

<sup>43</sup> One resident wrote, "The late Chester George, a resident of Freistatt senior housing, worked tirelessly to have a special crosswalk constructed in front of the post office for the benefit of all the mobility

the Postal Service considered the effect of the closing of the Freistatt Post Office on residents who had become accustomed to accessing the post office using this crosswalk.

If the Commission grants the Postal Service's Motion, it will be unable to evaluate whether the Postal Service complied with its duties under 39 U.S.C. § 404(d)(2).

## **VI. CONCLUSION**

The Public Representative urges the Commission to exercise its legal authority to grant Petitioner's request to extend the time for filing established by 39 U.S.C. § 404(d)(5). In the extraordinary circumstances presented in this docket, the Commission should equitably toll the statute of limitations under 39 U.S.C. § 404(d)(5), or equitably estop the Postal Service from asserting Petitioner's failure to timely file as a basis for its Motion. An extension of the time to file this appeal would ensure that the Commission has the opportunity to fully consider the issues raised in this docket.

Respectfully submitted,

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Alison J.W. MacDonald  
Public Representative

901 New York Ave., N.W.  
Suite 200  
Washington, D.C. 20268-0001  
(202) 789-6837; Fax (202) 789-6861  
Email: alison.macdonald@prc.gov

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impaired residents who use the Freistatt post office. For his selfless efforts, Chester George was awarded the 2010 Freistatt Community Service Award. He passed away only a few weeks after receiving the award. Please don't let Chester George's labor of love be completely in vain." Record, Item 25 at 48.