

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

In the Matter of:

Neskowin Post Office
Neskowin, OR

Docket No. A2021-2

UNITED STATES POSTAL SERVICE MOTION TO DISMISS PROCEEDINGS
(June 7, 2021)

Pursuant to 39 CFR § 3010.160 and Order No. 5902,¹ the United States Postal Service (Postal Service or USPS) moves to dismiss David Benneth's appeal of the Postal Service's determination to close the Neskowin, Oregon Community Post Office (CPO) because, by operation of law, the Postal Regulatory Commission (Commission or PRC) lacks jurisdiction to hear this appeal.

On May 26, 2021, David Benneth (Petitioner) appealed the Postal Service's determination to close the Neskowin CPO, a type of contractor-operated retail facility, located in Neskowin, Oregon.² Petitioner requests that in "accordance with applicable law, 39 U.S.C. § 404(d)(5)," the Commission review the Postal Service's decision to close the Neskowin CPO.³ The Petitioner thereby implies that the Commission has jurisdiction pursuant to 39 U.S.C. § 404(d)(5) over the Postal Service's decision to close this contractor operated

¹ PRC Order No. 5902, Notice and Order Accepting Appeal and Establishing Procedural Schedule, PRC Docket No. A2021-2 (May 28, 2021).

² Handbook PO-101 refers to these types of facilities as contractor-operated retail facilities. See Handbook PO-101, Appendix A – Glossary of Terms; Postal Service Publication 156, Guide to Contract Postal Units for Postal Service Employees, January 2014; United States Postal Service, Contract Postal Units, <https://about.usps.com/suppliers/becoming/contract-postal-unit.htm> (last visited Jan. 5, 2021).

³ In the Matter of Neskowin, Oregon, 97149 / Appeal on Closing, May 26, 2021 (Appeal). See also Participant Statement, May 26, 2021 (Participant Statement).

retail unit. As the Postal Service has consistently maintained in other dockets over the years, the scope of 39 U.S.C. § 404(d) is limited to the discontinuance of Postal Service-operated “Post Offices” and does not apply to contractor-operated retail facilities, which are not owned or operated by the Postal Service. The Commission’s legal authority to receive appeals of the discontinuance of Post Offices does not include the Postal Service’s administration of its contracts. An appeal of a contract matter like the CPO in Neskowin, Oregon, falls outside the scope of 39 U.S.C. § 404(d)(5). Finally, as detailed below, the Commission recently declined to entertain appeals of the Postal Service’s closing of contractor-operated retail units under circumstances similar to those in Neskowin, Oregon.⁴ The Postal Service, therefore, respectfully requests that the Commission dismiss the Petitioner’s appeal.

FACTUAL BACKGROUND

Neskowin is an unincorporated community in the state of Oregon. Its independent Post Office was discontinued on July 31, 1959 and was replaced on August 1, 1959 by a contractor operated retail unit. Since that time, Neskowin has been served by contractor-operated retail units. On May 16, 2006, a CPO opened at the street address of 4340 Salem Avenue, Neskowin, OR 97149. The contract for this CPO was subsequently terminated, and the CPO closed on May 15, 2009. On March 1, 2010, a different supplier opened a CPO at the street address of 48990 Highway 101 S, Neskowin, OR 97149. The contract for this CPO was terminated on January 31, 2014. During this 9-month period, during

⁴ See discussion of Docket Nos. A2021-1, *Spanish Fort, AL*, A2017-2, *Rio Nido, CA*, A2012-88, *Alplaus, NY*, and A2015-2, *Careywood, ID*, *infra*.

which no retail units operated in Neskowin, OR, the Postal Service temporarily moved the Post Office Boxes housed in the CPO at the Salem Avenue address to the Cloverdale Post Office, located at a driving distance of 9.5 miles.⁵ The Postal Service later moved these boxes to, and installed them at, the CPO at 48990 Highway 101 S, Neskowin, OR 97149. A contract was formed with the most recent supplier for a CPO at the same street address on February 1, 2014; this contract was terminated upon the supplier's retirement on May 31, 2021. Under the Neskowin CPO's most recent contract with the Postal Service, the Neskowin CPO provided retail products and services similar to those provided by a Post Office, and offered 324 Post Office Boxes to customers, 277 of which were in use at the time of closure.

As the above timeline indicates, several CPO suppliers have attempted to serve the community in Neskowin. Furthermore, when—as occurred between 2009 and 2010, and seemed likely to occur again—a contractual lapse occasions a change of address, the Postal Service has often incurred the cost of transporting the Post Office Boxes from the closing CPO to the new CPO. In order to avoid such costs in the future, Postal Service officials decided to move the Post Office Boxes offered by the Neskowin CPO to the nearby Cloverdale Post Office, located at a driving distance of 9.5 miles from the Neskowin CPO.⁶ The Cloverdale Post Office was chosen due to its status as the Administrative Post Office from which mail to the Neskowin CPO originated.

⁵ Google Maps indicates this distance from the CPO at Salem Avenue.

⁶ Google Maps indicates this distance, from the most recent Neskowin CPO.

By written notice dated May 10, 2021, and placed in each active Post Office Box of the Neskowin CPO on May 12, 2021, the Postal Service informed customers that the Neskowin CPO would permanently close effective May 31, 2021.⁷ The notice explained that customers receiving Post Office Box service at the facility could elect to continue to receive mail through a Post Office Box at the Cloverdale Post Office. All customers receiving Post Office Box service at the Neskowin CPO are eligible to be refunded for the pro-rated amount remaining on their Post Office Box fees. Those who elect to move their Post Office Boxes to the Cloverdale Post Office (an option currently available to all Post Office Box customers of the Neskowin CPO) will be allowed to retain the Post Office Box address and ZIP Code of the Neskowin CPO, and can continue to use their current Post Office Box keys. None of these Post Office Boxes qualify for Group E box service, which is provided to customers whose physical addresses are not eligible for any form of carrier delivery service.⁸

All customers of the Neskowin CPO will remain eligible to receive delivery services from a Highway Contract Route carrier. More specifically, customers will continue to receive normal delivery services and can in addition obtain pre-ordered stamps and packaging supplies. Indeed, the closure of the Neskowin CPO coincides with an expansion of access points for the Neskowin community. In addition to numerous individual boxes, customers in Neskowin currently have access to at least four banks of boxes—that is, venues which accommodate

⁷ Similar notices were also displayed at the Neskowin CPO and (by the retiring supplier) on the Neskowin community's Facebook page.

⁸ Domestic Mail Manual 508.5.2 ("Fee Group E — Free PO Box Service").

mailboxes purchased and installed by customers in a single cluster.⁹ In addition, Neskowin currently hosts two CBUs, one at the Sahhali Shores location, and one at the Pacific Overlook location. These points of access will remain operative, and customers can use them to send and receive mail and packages and to obtain pre-ordered stamps and packaging supplies. The Postal Service plans, in the near future, to add additional units to many of these existing points of access. The Postal Service also plans, in the near future, to install additional points of access (either banks of boxes or CBUs) at multiple locations, including in the “Villages” neighborhood, which sits near the recently closed Neskowin CPO. At these new installations, customers will be able to obtain the full array of delivery services now available at the currently existing points of access.

In addition to receiving retail and Post Office Box services at the Cloverdale Post Office, customers of the Neskowin CPO may obtain retail services at the nearby Otis, Pacific City, and Neotsu Post Offices (located 7.3, 9.3, and 10.5 driving miles away, respectively¹⁰), as well as at the Kennys IGA CPO (located 10.8 driving miles away¹¹). Furthermore, customers of the Neskowin CPO can purchase stamps through *usps.com*, and at the Safeway grocery store in Lincoln City, Oregon (located 10 driving miles away¹²). Finally, the Postal Service intends, in the near future, to initiate a bid solicitation process in order to secure a new contractor operated retail unit in Neskowin.

⁹ Note that such banks of boxes are distinct from Cluster Box Units (CBUs), which are centralized units of individually locked compartments for the delivery and collection of mail.

¹⁰ Google Maps indicates these distances, measured from the Neskowin CPO location.

¹¹ Google Maps indicates this distance, measured from the Neskowin CPO location.

¹² Google Maps indicates this distance, measured from the Neskowin CPO location.

ARGUMENT

The Commission's authority regarding Post Office closing appeals is prescribed by 39 U.S.C. § 404(d)(5) and is limited.¹³ Petitioner's appeal does not fall within the scope of the Commission's jurisdiction under 39 U.S.C. § 404(d)(5), because the appeal requests the Commission to review a contract administration decision concerning the operation of a contractor-operated retail facility (*i.e.*, a CPO). Section 404(d) does not apply to the Postal Service's management of its contracts, or to the operation of a retail facility whose existence derives solely from the terms and conditions of a voluntary contract.¹⁴ Accordingly, issues related to the administration of a services contract for the CPO, including whether the Postal Service should continue its contract for operation of that facility, do not fall within the Commission's 39 U.S.C. § 404(d)(5) jurisdiction.

Additionally, in numerous recent appeals of the Postal Service's decisions to terminate contracts governing the operation of contractor-operated facilities, the Commission applied its "sole source" test to determine that section 404(d) procedures were intended to apply to contractor-operated retail facilities only when they are the "sole source" of postal services to a community.¹⁵ The Postal Service questions the Commission's "sole source" test to determine the applicability of section 404(d) procedures as a proper interpretation of section 404(d). That said, solely for purposes of argument, and without waiver of its prerogative to challenge the Commission's "sole source" test, the Postal Service

¹³ 39 U.S.C. § 404(d).

¹⁴ *Id.*

¹⁵ See discussion of Docket Nos. A2017-2, *Rio Nido*, A2012-88, *Alplaus* and A2015-2, *Careywood*, *infra*.

submits that its application here further buttresses the Postal Service's position that section 404(d) procedures do not apply to its decision to terminate the CPO. Therefore, the Petitioner's appeal should be dismissed.

I. 39 U.S.C. § 404(d) Does Not Apply to Contract Postal Units.

39 U.S.C. § 404(d)(5) provides that an appeal under that section must concern a "closing" of a "post office."¹⁶ Consistent with Handbook PO-101, *Postal Service-Operated Retail Facilities Discontinuance Guide*, a discontinuance occurs only from action directed toward a "Postal Service-operated retail facility."¹⁷ CPOs are part of the Postal Service's "Approved Postal Provider" network—retail outlets for postal products and services that include, inter alia, Community Post Offices, Village Post Offices, Approved Shippers, stamps on consignment locations, and Contract Postal Units.¹⁸ CPOs are located within existing communities in a variety of locations, including convenience stores, local businesses and libraries, and are operated by the management of those locations.¹⁹ The definition of "Postal Service-operated retail facility," therefore, specifically excludes CPOs like that in Neskowin.²⁰ Comparatively, the definition of "contractor-operated retail facility" specifically

¹⁶ *Id.*

¹⁷ Handbook PO-101 at Appendix A.

¹⁸ See Handbook PO-101, Appendix A – Glossary of Terms; Publication 156, Guide to Contract Postal Units for Postal Service Employees, January 2014; United States Postal Service, Contract Postal Units, <https://about.usps.com/suppliers/becoming/contract-postal-unit.htm> (last visited June 5, 2021).

¹⁹ *Id.*

²⁰ 39 C.F.R. § 241.3(a)(2)(i) ("USPS-operated retail facility' . . . does not include any station, branch, community post office, or other retail facility operated by a contractor.").

excludes any retail facility operated by a Postal Service employee.²¹ Thus, postal regulations are explicit in distinguishing between Postal Service-operated retail facilities and CPOs, and they eliminate any confusion regarding whether a contractor-operated retail facility, like that in Neskowin, is subject to 39 U.S.C. § 404(d).

Petitioner requests that in “accordance with applicable law, 39 U.S.C. § 404(d)(5),” the Commission review the Postal Service’s decision to close the Neskowin CPO.²² Petitioner further states that the Postal Service failed to observe the notice requirement mandated by 39 U.S.C. § 404(d)(5), according to which Postal Service may not close or consolidate a post office until 60 days after its written Final Determination is made available to persons served by the Post Office.²³ As explained above, however, the Postal Service was not subject to such requirements because its decision concerned the administration of a contract by which a third-party contractor offered retail services. For purposes of 39 U.S.C. § 404(d), a discontinuance is limited to the discontinuance of a “post office,” and that term is understood as a retail facility “operated or staffed by a postmaster or by another type of postal employee at the direction of the postmaster. . . .”²⁴ The term “discontinuance” does not extend to operations at a

²¹ 39 C.F.R. § 241.3(a)(2)(ii) (“‘Contractor-operated retail facility’ includes any . . . community Post Office, or other facility, including a private business, offering retail postal services that is operated by a contractor, and does not include any USPS-operated retail facility.”).

²² Participant Statement.

²³ *Id.*

²⁴ 39 C.F.R. § 241.1.

CPO.²⁵ Thus, the Petitioner's appeal in this matter does not concern the discontinuance of a Post Office subject to Title 39.

II. Postal Customers are Served by Nearby Post Offices and Alternate Methods of Access; thus, the Neskowin CPO is not the "Sole Source" of Retail Services for Neskowin.

In recent orders, the Commission found that it did not have jurisdiction to review a Postal Service decision to terminate a contract governing the operation of contractor-operated facilities because these contractor-operated facilities were not the sole source of postal services to the affected community. The Commission has consistently used its "sole source" test to determine its jurisdiction to hear an appeal of a Postal Service decision to close or consolidate contractor-operated offices Community Post Offices (CPOs).²⁶ Because the Neskowin CPO does not fall within the Commission's own stated "sole source" exception espoused in *Knob Fork* and its progeny, the Commission does not have jurisdiction to hear the Petitioner's appeal concerning this CPO.²⁷

Most recently, the Commission dismissed an appeal initiated by the City of Spanish Fort, Alabama, requesting to apply 39 U.S.C. § 404(d) to the Postal Service's decision to terminate a contract governing the operation of the Spanish Fort Community Post Office (Spanish Fort CPO).²⁸ Forty-five days in advance of

²⁵ See Handbook PO-101 Section 233.1.

²⁶ See discussion of Docket Nos. A2021-1, *Spanish Fort*, A2017-2, *Rio Nido*, A2012-88, *Alplaus*, and A2015-2, *Careywood*, *infra*. As noted above, the Postal Service applies the Commission's "sole source" test solely for purposes of argument, and without waiver of its prerogative to challenge this test or its application in future proceedings before the Commission or in other fora.

²⁷ Commission Order Remanding Determination for Further Consideration, Docket No. A83-80, *Knob Fork, WV* (January 18, 1984) (*Knob Fork*).

²⁸ PRC Order No. 5831, Order Granting Motion to Dismiss, PRC Docket No. A2021-1 (February 10, 2021) (*Spanish Fort*). The City of Spanish Fort subsequently filed an appeal of the Commission's Order with the District of Columbia's Court of Appeals, *See City of Spanish Fort*,

this termination, the Postal Service provided notice to customers of its decision permanently to close the Spanish Fort CPO. The notice advised customers of the availability of postal services, including Post Office Box service, at the nearby Daphne Post Office, located 4.8 miles from the Spanish Fort CPO; it further informed customers receiving Post Office Box service at the Spanish Fort CPO that they could elect to move their Post Office Boxes to the Daphne Post Office. In its Order granting the Postal Service's motion to dismiss, the Commission specifically distinguished between traditional Post Offices and non-Postal Service-operated contract offices like the Spanish Fort CPO.²⁹ It also echoed previous Orders, noting that "the Commission only possesses jurisdiction over CPO, VPO, and CPU closure and consolidation cases where the facility in question is the 'sole source' of postal services for the community;"³⁰ and specifying that the "sole source standard" focuses not on "the most convenient or desirable source of postal services," but instead on "whether postal services are available."³¹ Based on the proximity of neighboring Daphne's traditional post office, the availability of rural carrier service, and customers' access to the postal services provided by usps.com, the Commission concluded that the Spanish Fort CPO was not the sole source of postal services to the Spanish Fort community,

Alabama v. The Postal Regulatory Commission, Case No. 21-1089. The Commission then filed a motion to dismiss. The outcome of this litigation is pending.

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 5.

³¹ *Id.* at 10.

and accordingly determined that it lacked jurisdiction to hear the appeal of the closing of the Spanish Fort CPO.³²

The Commission likewise granted the Postal Service's motion to dismiss an appeal of the Postal Service's decision to close the Rio Nido, California Community Post Office (Rio Nido CPO).³³ Like the Spanish Fort CPO, the Rio Nido CPO was not a Postal Service-operated retail facility.³⁴ As in the Spanish Fort case, the Commission distinguished between traditional Post Offices and non-Postal Service-operated contract offices like the Rio Nido CPO, and noted that "the Commission, through over 30 years of precedent, has established that the Postal Service's decision to close or consolidate a CPO is only within the Commission's jurisdiction if the CPO is the sole source of postal services to the affected community."³⁵ As was the case with customers of the Spanish Fort CPO, customers of the Rio Nido CPO were found to have alternate means of access to postal services, including at the Guerneville Post Office, located 2.1 miles away; through Post Office Boxes relocated to Guerneville Post Office; and via usps.com, as well as alternative stamp purveyors such as grocery stores. Thus, the Commission concluded that the Rio Nido CPO was not the sole source of postal services to the Rio Nido community,³⁶ and on this basis determined that it lacked jurisdiction to hear the appeal of the closing of the Rio Nido CPO.³⁷

³² *Id.* at 14.

³³ PRC Order No. 4088, Order Affirming Determination, PRC Docket No. A2017-2 (September 1, 2017) (*Rio Nido*).

³⁴ *Id.* at 8.

³⁵ *Id.* at 8.

³⁶ *Id.* at 10-11.

³⁷ *Id.* at 12.

Similarly, the Commission granted the Postal Service's motion to dismiss an appeal of the Postal Service's decision to close the Careywood, Idaho Community Post Office (Careywood CPO).³⁸ Like the Rio Nido CPO and the Spanish Fort CPO, the Careywood CPO was not a Postal Service-operated retail facility.³⁹ The Postal Service made a determination not to renew a contract with a third-party contractor for operation of the Careywood CPO, and informed customers of this decision, noting that Post Office Box service would be relocated to the Athol, Idaho Post Office, located 7 miles away from Careywood.⁴⁰ In its Order granting the Postal Service's motion to dismiss, the Commission noted that "while approved shippers, contract units such as village post offices, and automated postal centers may not be currently available to many postal customers, other categories, such as another postal retail facility approximately a 7 minute drive away, rural carriers, www.usps.com, and the Internet, are available."⁴¹ The Commission further noted that although these alternatives may not be as convenient as the Careywood CPO, "the Commission's review focuses on whether the Careywood CPO is the sole source of postal services to the community, not whether it is the most convenient or desirable source of postal services."⁴² The Commission concluded, therefore, that the Careywood CPO was not the sole source of postal services to the

³⁸ PRC Order No. 2505, Order Dismissing Appeal, PRC Docket No. A2015-2 (May 27, 2015), at 15 (*Careywood*).

³⁹ *Id.* at 2-3.

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 12.

⁴² *Id.* at 12-13.

community of Careywood and that there was no basis to remand the matter to require the Postal Service to follow the 404(d) closing procedures.⁴³

Moreover, the Commission dismissed an appeal in which a postal customer petitioned the Commission to apply section 404(d) to a decision to terminate a contract governing the operation of the Alplaus, NY Community Post Office (Alplaus CPO).⁴⁴ Like the Spanish Fort CPO, the Rio Nido CPO, and the Careywood CPO, the Alplaus CPO was also not a Postal Service-operated retail facility.⁴⁵ The Postal Service provided notice to customers of its decision to terminate the contract governing the operation of the Alplaus CPO, a contractor-operated retail facility, and the availability of service at a nearby Post Office, Rexford Post Office, which was located approximately one mile away.⁴⁶ Because postal customers of the Alplaus CPO were served by the nearby Rexford Post Office and had numerous other retail service options available to them, the Commission determined that section 404(d) did not apply under the *Knob Fork* “sole source” standard.⁴⁷

Akin to the facts in the *Spanish Fort*, *Rio Nido*, *Careywood*, and *Alplaus* cases, customers of the Neskowin CPO will also still be served by a nearby Post Office. Customers of the Neskowin CPO will be served by the Cloverdale Post Office, located 9.5 miles from the Neskowin CPO; the Otis Post Office, located 7.3 miles from the Neskowin CPO; the Kennys IGA CPO, located 10.8 miles from

⁴³ *Id.* at 13.

⁴⁴ PRC Order No. 1293, Order Dismissing Appeal, PRC Docket No. A2012-88 (March 21, 2012) (*Alplaus*).

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.*; see *Knob Fork*, *supra*.

the Neskowin CPO; and the Pacific City Post Office, located 9.3 miles from the Neskowin CPO. This is similar to the availability of the nearest Post Office in the Careywood case (about 7 miles). Additionally, the Postal Service will relocate Post Office Box service from the Neskowin CPO to the Cloverdale Post Office, as in the *Spanish Fort*, *Rio Nido* and *Careywood* cases. Moreover, customers of the Neskowin CPO will not only remain eligible for carrier service; they will enjoy expanded delivery services via multiple new access points. They will also have access to the postal services provided by usps.com and alternative stamp purchasing options offered by at least one retail business in the area.⁴⁸ Finally, the Postal Service intends in the near future to initiate a bid solicitation process in order to secure a new contractor operated retail unit in Neskowin. Based on these facts, the Commission should also determine in this case that section 404(d) does not apply to the Postal Service's decision to close the Spanish Fort CPO under the Commission's *Knob Fork* "sole source" standard.⁴⁹

⁴⁸ This illustrates the Postal Service's continuing commitment to provide postal services through more than traditional "brick and mortar," USPS-operated retail facilities. Since the time of the *Knob Fork* decision, the Postal Service has made considerable strides in providing increased access to retail postal services through a myriad of methods, including traditional Post Offices, contract postal units, rural and highway carriers, Village Post Offices, Self-Service Kiosks, Approved Shippers, usps.com, and consignment stamp retailers. The Commission and Commissioners have taken note of these newer avenues of postal access in past dockets. See *Careywood*, *supra*. See also *Alplaus*, *supra* (concurring opinion of Commissioner Taub).

⁴⁹ See *Knob Fork*, *supra*.

III. Strong Policy Reasons Support the Postal Service's Position that the Commission Lacks Jurisdiction to Consider the Appeal of a Contract Administration Decision for a Contract with a Third-Party CPO Operator.

The procedures imposed by 39 U.S.C. § 404(d) are not compatible with the requirements of contract management, negotiation, and implementation.⁵⁰ The Postal Service's ability to negotiate reasonable contractual terms for the operation of a contract unit, or to require satisfactory contract performance, would be harmed if parties had the option of appealing contractual decisions. A third party, the Commission, would essentially become a party to contract negotiations, injecting more complexity into the contract negotiation process. In many situations, applying the section 404(d) procedures to CPO contract decisions would provide contractors with a bargaining advantage over the Postal Service, and force the agency to continue operating a contract, or enter a new contract, even where sound business judgment would clearly suggest otherwise. This imbalance in bargaining power would arise most acutely where a CPO operator is the only person in the community capable of operating the CPO. Because the participation of the CPO operator would be necessary to perform the analysis required by section 404, a CPO operator could prevent the Postal Service from satisfying section 404 by refusing to cooperate, or it could extort premium compensation from the Postal Service in exchange for cooperation.

⁵⁰ See 76 Fed. Reg. 41416-41417, Section I (July 14, 2011).

CONCLUSION

For the reasons discussed, the Postal Service respectfully requests that the Commission dismiss the Petitioner's appeal of the Postal Service's determination to close the Neskowin CPO.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorneys:

Anthony F. Alverno
Chief Counsel
Global Business & Service Development

Andrew L. Pigott
Mikhail Raykher
Attorneys

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 341-6419
Andrew.L.Pigott@usps.gov
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