

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

)
Hacker Valley Post Office) Docket No. A2009-1
Hacker Valley, WV 26222)
(Retha Casto, Petitioner))
_____)

**RESPONSE OF THE PUBLIC REPRESENTATIVE
IN OPPOSITION TO UNITED STATES POSTAL SERVICE
MOTION TO DISMISS PROCEEDING**

(July 22, 2009)

On July 15, 2009, the United States Postal Service (Postal Service) filed a motion pursuant to rule 21 of the Commission's rules of practice, 39 CFR 3001.21, seeking dismissal of the instant proceeding.¹ For the reasons set forth below, the Public Representative submits that the Commission should defer action on the Motion to Dismiss pending the receipt of additional information regarding the status of the Hacker Valley post office.²

The Postal Service's Motion to Dismiss

The Motion to Dismiss is grounded on the Postal Service's assertion that it "has not initiated a discontinuance study or issued any final determination to close the Hacker Valley Post Office" Motion to Dismiss at 1. To support that assertion, the Postal Service has attached three documents. Attachment 1 is a May 22, 2009, "Dear Customer" letter notifying customers that the operation of the Hacker Valley post office would be suspended upon close of business on June 30, 2009 (Dear Customer Letter). Attachment 2 is a *Notice of Post Office Emergency Suspension* (Notice of Emergency

¹ United States Postal Service Motion to Dismiss Proceeding, July 15, 2009 (Motion to Dismiss).

² In a companion motion being filed simultaneously herewith, the Public Representative requests that the instant proceeding be held in abeyance. Motion of the Public Representative to Hold Proceeding in Abeyance, July 22, 2009.

Suspension).³ Attachment 3 is a *Property Detail Report* from the Postal Service's Facility Management System (Property Report).⁴

Argument

The Petition for Appeal seeks Commission review of a post office closing under 39 U.S.C. 404(d)(5). The Postal Service argues that the petitioner's claim is not yet ripe because the operation of the Hacker Valley post office has been "suspended," not "discontinued." *Id.* at 3, n.8. If the Postal Service is correct that operations have been "suspended" and not "discontinued," then a grant of the Motion to Dismiss would be appropriate. However, the record before the Commission leaves unclear whether the actions taken by the Postal Service constitute a bonafide "suspension" or a de facto "discontinuance." Until the Postal Service provides more definitive support for its contention that this is a bona fide suspension, the Motion to Dismiss should not be granted.

As a practical matter, from the perspective of residents served by the Hacker Valley post office, the distinction between an indefinite suspension and a permanent discontinuance is academic. In both cases, access to the post office has ended. In both cases, there is no assurance that access will ever be reestablished. In that regard, neither the Dear Customer Letter, nor the Notice of Emergency Suspension, gives any clue as to when a decision will be reached regarding the future, if any, of the Hacker Valley post office. The indeterminate duration of the suspension has left residents in limbo.

From a legal standpoint, however, the distinction between a "suspension" and a "discontinuance" has both an immediate and a substantial significance. A "suspension" denies customers: any rights under 39 U.S.C. 404(d)(1) to comment on the closing; a written decision under 39 U.S.C. 404(d)(3) that addresses the factors enumerated in 39 U.S.C. 404(d)(2); a right to appeal to the Commission under 39 U.S.C. 404(d)(5); and

³ Attachment 2 is unsigned and undated. Counsel for the Postal Service appears to represent that the Notice of Emergency Suspension was in fact issued. Motion to Dismiss at 2, n.4. Assuming that is the case, an executed and dated copy of the Notice of Emergency Suspension should be supplied for the record.

⁴ The purported purpose of the Property Report is to corroborate the Dear Customer Letter. Motion to Dismiss at 2, n.5.

continued service under 39 U.S.C. 404(d)(4) during the 60 days following the Postal Service's written determination. By contrast, a "discontinuance" accords all of those rights to customers.

While the rights given to postal customers by 39 U.S.C. 404(d) may be limited, they are not inconsequential. Although the Postal Service has the right to close post offices, it must do so in compliance with the procedures in section 404(d) and subject to the Commission's oversight. The Commission, for its part, has an obligation to ensure that alleged "suspensions" are, in fact, bona fide suspensions and not de facto closings.

The facts presented thus far do not permit the Commission to reach a reasoned decision regarding whether operation of the Hacker Valley post office has been suspended, or whether the Postal Service has in fact already determined that this post office should be closed. The Postal Service states that the landlord had "directed the Postal Service [to] vacate the property [occupied by the post office] by July 2, 2009, the lease expiration date." *Id.* at 3. The Public Representative accepts that to be true. However, that does not necessarily end the inquiry since it appears from a review of the Property Report attached to the Motion to Dismiss that the recently expired lease for the Hacker Valley post office was the latest in a series of three five-year leases.⁵ Given this history of lease renewals, it is unclear why the lease was not, or could not, be renewed. Perhaps the lessor refused to renew because he wished to lease to another party. On the other hand, the Postal Service might have been more interested in terminating operations at the facility and therefore not seriously interested in a lease renewal. Unless the Postal Service actively attempted to renew the lease, its failure to do so could constitute a de facto decision to close the Hacker Valley facility and not a suspension dictated by circumstances beyond its control.

Second, even if the suspension resulted solely from actions of the former landlord, there is no clear and comprehensive statement of what the Postal Service has done, is currently doing, or has concrete plans to do in order to find an alternative facility

⁵ It appears from the Property Report that the first lease commenced July 3, 1994, at an annual rent of \$1,920.00, and that the third and final five-year term commenced July 3, 2004, at an annual rent of \$2,016.00.

or site for a replacement post office.⁶ Without a genuine effort to replace the previously leased facility, the result could be viewed as a determination to close the facility.

Third, to support its assertion that operation of the Hacker Valley Post Office has been suspended, not closed, the Postal Service points to the fact that it does not have an administrative record available for filing as required by 39 CFR 241.3 (*Id.* at 1) and to the further fact that no notice has as yet been given in the “Post Office Changes” section of the *Postal Bulletin*. *Id.* at 2, n.1. While the absence of an administrative record and the lack of notice in the *Postal Bulletin* are consistent with the Postal Service’s claim that it has not yet determined to close the Hacker Valley Post Office, they could also be interpreted as evidence that the requirements of 39 U.S.C. 404(d) have been violated.

What is needed is further evidence to support the claim that the operation of the Hacker Valley post office has been suspended and not closed. The Commission should, for example, require the Postal Service to provide: an explanation of steps taken by the Postal Service to renew the lease for the post office facility and the reason(s) why the lease was not renewed; what alternative post office sites or facilities were considered when it was clear that the prior lease would not be renewed and why those alternatives were unavailable or were rejected; the current status of the plans to find another post office site, including the status of the discussions regarding the building of another post office; and a projected date by which a decision on whether to permanently close the Hacker Valley post office will be made. The Commission should also require reports from the Postal Service every 90 days regarding the status of its efforts to determine whether the Hacker Valley post office will be reopened or permanently closed.⁷

⁶ The Motion to Dismiss refers to a failure to find an alternative site or facility and to apparent discussions of building a new post office. *Id.* at 2. Beyond these general statements, however, no facts are offered to support the claim that the suspension is temporary or that a real effort is being made to replace the former post office. Nor, for that matter, are there any facts available to the Commission that give an indication of just how long it will take for a final determination to be made on whether to permanently close the Hacker Valley post office.

⁷ The need for such periodic reports is demonstrated by the Postal Service’s suggestion in its Motion to Dismiss that “discussion of building a new facility for the Hacker Valley Post Office means the office may yet re-open.” *Id.* at 2. A decision on whether to build a new facility may take longer than the time needed to provide information concerning the facts and circumstances surrounding the decision to suspend operation of the post office.

Nor can there be any doubt that the Commission has the authority necessary to require submission of information of the type suggested above. In footnote 8 to its Motion to Dismiss, the Postal Service argues that “[a] *formal* determination by the Postal Service to close or consolidate a Post Office is a section 404(d)(5) prerequisite for appellate review by the Commission [emphasis in original].” If by that statement the Postal Service means to suggest that it can preclude Commission review of a post office closing by simply failing or refusing to prepare the record required by 39 U.S.C. 404(d)(5), that statement is overly broad and, if accepted, could potentially read the Commission’s review authority out of the statute. Section 404(d)(5) gives the Commission the authority to review a Postal Service “determination” to close a post office, not just a “*formal* determination.” By suggesting that the Postal Service be required to provide the Commission with additional information regarding the suspension of the Hacker Valley post office operations, the Public Representative is simply urging that the Commission use its inherent power to exercise jurisdiction in order to determine whether it has jurisdiction over the Postal Service’s actions. See *Government of the Territory of Guam v. Sea-Land Service, Inc.*, 958 F.2d 1150, 1155, 294 U.S. App.D.C. 292, 297 (1992) (“... ‘an agency has jurisdiction to determine the scope of its authority, in the first instance’ ... [citation omitted].”; and *I.C.C. v. Peninsula Shippers Association, Inc.*, 789 F.2d 1401, 1402-03 (9th Cir. 1986) (“...an agency has “jurisdiction to determine jurisdiction” ... [citations omitted].”).

Conclusion

For the reasons set forth above, the Public Representative submits that action on the Postal Service’s Motion to Dismiss should be deferred pending the submission of additional information needed for the Commission to make a reasoned decision.

Respectfully submitted,

/s/ Richard A. Oliver

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