

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

East Elko Station
Elko, Nevada

Docket No. A2010-3

REPLY BRIEF OF THE PUBLIC REPRESENTATIVE
(May 4, 2010)

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STATEMENT OF THE CASE

On February 22, 2010, the Commission received an appeal of the Postal Service's decision to close the East Elko Station in Elko, Nevada.¹ In a letter to the appellant dated February 25, 2010, the Commission's Secretary acknowledged receipt of the appeal, provided the appellant with a copy of PRC Form 61,² and advised the appellant of his right to file an initial brief in lieu of Form 61. Letter to Simon Sanchez, Jr., from the Commission's Secretary (February 25, 2010 Secretary's Letter). In that letter, the Secretary also advised the appellant that the deadline for submitting his Participant Statement or initial brief was March 29, 2010.

A notice of the appeal was served on the Postal Service by the Commission's Secretary on or about February 23, 2010.³ The Notice of Appeal advised the Postal Service of the need to begin assembling the administrative record of the East Elko Station closing for subsequent transmittal to the Commission as required by 39 CFR 3001.113(a).

On March 3, 2010, the Commission issued an order accepting the Sanchez Appeal.⁴ In that order the Commission stated that it would "be relying on its interpretation of 39 U.S.C. 404(d)(1) which accords customers of stations and branches the same treatment as customers of post offices for purposes of appeal." *Id.* at 5. In that connection, the Commission invited comments from the mailing community and the general public and stated that "it would be helpful for commenters to review whether precedent based ... [on] cases ... decided by the former Postal Rate Commission ...

¹ Request for Appeal to Post Office Closure of the East Elko Station, Elko, Nevada, signed by Simon Sanchez, Jr., Steward, Local 1992, American Postal Worker Union, February 19, 2010 (Sanchez Appeal). A second appeal was filed on March 4, 2010. Request for Appeal to Post Office Closure of the East Elko Station, Elko, Nevada, signed by Robert K. Stokes, Elko County Manager, on behalf of the Elko County Board of Commissioners, February 22, 2010 (Elko County Appeal).

² Form 61 is a form for preparing "Participant Statement" in support of an appeal of a post office closing. Form 61 includes instructions which summarize the Commission's authority to hear appeals of post office closures and consolidations; applicable appeal procedures, and the factors that the Postal Service is required to consider in closing or consolidating a post office.

³ Notice of Filing Under 39 U.S.C. 404(d), February 23, 2010 (Notice of Appeal). This notice acknowledged that the Sanchez Appeal did not necessarily conform to requirements of 39 CFR 3001.110, *et seq.*, but that it might ultimately be found to constitute an appeal under 39 U.S.C.404(d).

⁴ Notice and Order Accepting Appeal and Establishing Procedural Schedule, March 3, 2010 (Order No. 417).

should be controlling in the new regulatory environment established by the Postal Accountability and Enhancement Act.” *Id.*

On March 9, 2010, the Postal Service filed a notice advising the Commission that it “has no final administrative record supporting the discontinuance of the East Elko station, which was and is supervised by the postal officials in the Elko Main Post Office.”⁵ In that same notice, the Postal Service reminded the Commission of its position that the Commission lacks subject matter jurisdiction under 39 U.S.C. 404(d) to review Postal Service decisions to close stations or branches.⁶ *Id.*

Despite notification the March 19, 2010 deadline for filing either a Participant Statement or an initial brief, appellant failed to file anything further in support of his appeal.

On April 19, 2010, the Postal Service filed comments on the extent of the Commission’s jurisdiction to hear appeals of post office closings under 39 U.S.C. 404(d).⁷ An answering brief in support of the Postal Service was also filed on April 19, 2010, by a group of mailers.⁸

BACKGROUND

On July 2, 2009, the Postal Service filed its Station and Branch Optimization and Consolidation Initiative (Initiative) in Docket No. N2009-1.⁹ In its March 10, 2010 Advisory Opinion, the Commission noted that several participants, including the Public Representative, had argued that the Postal Service should follow the same

⁵ Notice of the United States Postal Service, March 9, 2010 at 1 (Postal Service Notice).

⁶ Because of earlier unsuccessful attempts to obtain dismissal of review proceedings, the Postal Service refrained from filing a motion to dismiss, although it did recommend that the Commission either dismiss the Sanchez Appeal *sua sponte*, or consider the East Elko Station closure in the proceedings in the *Investigation of Suspended Post Offices*, Docket No. PI2010-1. Postal Service Notice at 2.

⁷ Comments of United States Postal Service Regarding Jurisdiction Under (Current) Section 404(d), April 19, 2010 (Comments of the Postal Service). Those comments were filed in response to both Order No. 417 and the Commission’s March 10, 2010 advisory opinion regarding the Postal Service’s proposal for evaluating the closing of stations and branches. Advisory Opinion Concerning the Process for Evaluating Closing of Stations and Branches, March 10, 2010 (Advisory Opinion). The Advisory Opinion is discussed, *infra*.

⁸ Answering Brief of Valpak Direct Marketing Systems, Inc., Valpak Dealers’ Association, Inc., and Association of Priority Mail Users, Inc., April 19, 2010 (Valpak Brief).

⁹ Request of the United States Postal Service for an Advisory Opinion on Changes in Postal Services, July 2, 2009; and Notice of the United States Postal Service of Filing Erratum to Request, July 2, 2009.

discontinuance procedures for classified stations and branches as are required for Post Offices by 39 U.S.C. 404(d). Advisory Opinion at 62. Some of these same participants argued that section 404(d)(5) provides a right of appeal to the Commission of Postal Service determinations to close stations and branches. *Id.* at 65. The Postal Service and others argued that section 404(d)(5) applies only to post offices, not to stations or branches. *Id.* This latter position is contrary to the Commission's long-standing position that section 404(d)(5) applies to all retail facilities manned by Postal Service employees. *Id.*

In its March 10, 2010 Opinion, the Commission agreed with the Postal Service that the disagreement over the scope and coverage of section 404(d)(5) should not be resolved on the basis of the record in Docket No. N2009-1. Advisory Opinion at 65-66. In doing so, the Commission referenced the pendency of the instant case and noted that it had "requested additional views on whether stations and branches are post offices within the meaning of section 404(d)." Advisory Opinion at 66, note 42.

ARGUMENT

I. THE APPEAL IN THIS DOCKET SHOULD BE DISMISSED BECAUSE THE POSTAL SERVICE'S ACTIONS ARE NOT SUBJECT TO SECTION 404(d)

In order to be subject to the provisions of section 404(d), the Postal Service's actions must constitute either a "closing" or a "consolidation." The Commission has long held that a rearrangement of retail facilities within a community does not constitute a "closing" or "consolidation" for purposes of section 404(d). See Order No. 436, Oceana Station, June 25, 1982 (*Oceana*). The Commission has recently had occasion to confirm its position in an Order issued April 27, 2010, involving the closing of the Sundance Plaza Station, a classified station in Steamboat Springs, Colorado. Order No. 448, Sundance Post Office, April 27, 2010 (*Sundance*).

The East Elko Station, like the Sundance Plaza Station, is relatively close to the nearest alternate retail postal facility available to serve postal customers. Customers who would otherwise be served by the East Elko Station would be served by the Elko

Main Office.¹⁰ These facilities are approximately 1.5 miles apart.¹¹ In *Sundance*, the distance between the Sundance Plaza Station and the Steamboat Springs Post Office was 1.3 miles. *Sundance* at 2. After reviewing the facts presented by the appellants, the Postal Service, and U.S. Senator Mark Udall of Colorado concerning the facilities at issue in *Sundance*, the Commission concluded that the actions of the Postal Service constituted “a rearrangement of retail facilities in the community, and thus section 404(d) is inapplicable.” *Id.* at 4. In reaching this decision, the Commission expressly relied upon its earlier ruling in *Oceana*. *Id.* at 5-6.

In both *Sundance* and *Oceana*, the Postal Service’s actions included the proposed construction of a new post office as part of its rearrangement of facilities. By contrast, the very limited record developed by the appellants and the Postal Service in this case makes no reference to the possible construction of a new post office.¹² The absence of any reference in the instant case to the possible construction of a new post office does not, however, by itself preclude a finding that the East Elko Station closing constitutes a rearrangement of retail facilities within a community. Indeed, neither *Oceana* nor *Sundance* makes the construction of a new post office a *sine qua non* of a rearrangement of retail facilities.

Rather, in assessing whether the closing of the East Elko Station constitutes a “closing” under section 404(d), the Commission must, as it has in the past, employ a “rule of reason.” As the Commission stated in *Oceana*:

Because of the implicit tension between the goals of economical operation and comprehensive community service, we must avoid undue literalism in construing sections 404(b).¹³ A rule of reason, rather than an approach which either ignores the relevant facts of the case or adheres to an extreme or mechanical interpretation of the word “close”, is needed. [explanatory footnote added].

¹⁰ See *East End Post Office to Close February 19*, Elko Daily Free Press, available at www.elkodaily.com/articles/2010/01/23/news/local_news/doc4b5b1def714b3799617286.txt.

¹¹ *Id.* The East Elko Station was located at 2082 Idaho Street, Elko, NV 89801. The Elko Main Office is located at 275 Third Street, Elko, NV 89801. The driving distance between these two addresses can be obtained using MapQuest. See www.mapquest.com.

¹² The record in this proceeding lacks detail because of the actions, or inactions, of both the appellant and the Postal Service. The appellant failed to file either a Participant Statement or an initial brief as suggested in the February 25, 2010 Secretary’s Letter. The Postal Service failed to file an administrative record or further statement of the facts surrounding the decision to close the East Elko Station.

¹³ At the time of the *Oceana* decision, the predecessor to today’s section 404(d) was denominated section 404(b).

Oceana at 7. While the known facts in the instant case are sketchy, there is at least some evidence that the Postal Service has made an attempt to assess the needs of the community, the potential economy in operations, and the convenience of customers. See *Oceana* at 8.¹⁴ As such, the Postal Service’s actions can be fairly characterized as “a moving of facilities within a community rather than an elimination of facilities or a change in management within the scope of the statutory provisions.” *Id.* at 7-8.

II. THE INSTANT CASE IS NOT THE APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION OF WHETHER STATIONS AND BRANCHES ARE POST OFFICES WITHIN THE MEANING OF 39 U.S.C. 404(d)

Both Order 417 and the Commissions Advisory Opinion envisioned the use of the instant proceeding as the potential forum for resolving the question of whether stations and branches are post offices with the meaning of section 404(d). There are essentially two reasons why this case is not the appropriate vehicle for resolving a question of such far reaching importance.

First, the mere fact that the Postal Service has raised the statutory interpretation issue in this proceeding does not necessarily require the Commission to resolve the issue here. Indeed, the Postal Service also raised the statutory interpretation issue in *Oceana*. See *Oceana* at 4. The Commission nevertheless determined that before reaching the statutory interpretation issue it was compelled to determine first whether or not the Postal Service actions at issue constituted a “closing” for purposes of section 404(d).¹⁵

The threshold question, whether the Postal Service’s action with regard to the *Oceana* station constitutes a closing or consolidation of a post office, must be answered before the Commission could proceed to the merits of this case.

Oceana at 6. Having found that a relocation of facilities within the community, as opposed to a closing, the Commission never reached the issue of statutory

¹⁴ See also note 10, *supra*; and Sanchez Appeal at 2.

¹⁵ See note 13, *supra*.

interpretation. The same result should be reached here. As a threshold matter, the closing of the East Elko Station fails to qualify as a closing under section 404(d) and should therefore be dismissed without reaching the statutory interpretation issue.

Second, as it did in its Advisory Opinion, the Commission should recognize that the instant proceeding is an inappropriate forum for resolving the statutory interpretation issue. Both the appellant and the Postal Service have failed or refused to provide the Commission with an adequate factual basis for considering whether the East Elko Station is in fact properly considered to be a post office as that term is used in section 404(d). The appellant has failed to file a Participant Statement or an initial brief. The Postal Service has not filed an administrative record or any factual information regarding the nature or scope of the operations of the East Elko Station prior to its closure. The mere "station" label does nothing to inform the Commission regarding the actual operation of the East Elko Station.

Without the need to reach the statutory interpretation issue and without more information regarding the nature and scope of the East Elko Station's operations prior to closure, this proceeding is an inappropriate vehicle for resolving the statutory interpretation issue.

CONCLUSION

For the reasons given above, the Commission should dismiss the appeals in this proceeding because they are not subject 39 U.S.C. 404(d).

Respectfully submitted,

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