

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Tony L. Hammond, Vice Chairman;
Mark Acton;
Dan G. Blair; and
Nanci E. Langley

East Elko Station
Elko, Nevada

Docket No. A2010-3

ORDER DISMISSING APPEAL

(Issued June 22, 2010)

I. INTRODUCTION AND SUMMARY

On February 22, 2010, Simon Sanchez, Jr. (Petitioner) petitioned the Commission seeking review of the Postal Service's actions regarding the East Elko Station, Elko, Nevada.¹ The Commission established Docket No. A2010-3 and a procedural schedule for consideration of the Petitions.² The Postal Service subsequently filed a responsive pleading indicating that no final administrative record would be forthcoming and that the matter should be dismissed.³ The Postal Service

¹ Request for Appeal to Post Office Closure of the East Elko Station, Elko Nevada filed February 22, 2010 (Sanchez Petition). A second petition, dated February 22, 2010, was submitted by the Elko County Board of Commissioners. This Order which addresses both petitions is collectively referred to as the appeal.

² Notice and Order Accepting Appeal and Establishing Procedural Schedule, March 3, 2010, (Order No. 417).

³ Notice of United States Postal Service, March 9, 2010 (Notice).

maintains that the Commission lacks subject matter jurisdiction under 39 U.S.C. § 404(d) to review the discontinuance of stations and branches. Notice at 2. For the reasons discussed below, the appeal is dismissed.

II. BACKGROUND

On July 2, 2009, the Postal Service filed its Station and Branch Optimization and Consolidation Initiative (Initiative) in Docket No. N2009-1.⁴ During the proceeding, the issue regarding whether or not the same discontinuance procedures for closing a post office are required for closing a branch or a station surfaced. The Commission determined that Docket No. N2009-1 was not the appropriate venue to consider the matter but referenced the instant docket as a possible alternative.⁵

In Order No. 417, the Commission invited interested persons to comment on its interpretation of 39 U.S.C. § 404(d)(1). The Commission's interpretation accords customers of stations and branches the same treatment of post offices for purposes of appeal. In response, Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and the Association of Priority Mail Users, Inc. each filed a Notice of Intervention as full participants⁶ and jointly filed comments.⁷ The Postal Service also filed comments regarding the applicability of 404(d).⁸ Neither Petitioner filed a participant statement or brief in support of their petition.

⁴ Docket No. N2009-1, Request of the United State Postal Service for an Advisory Opinion on Changes in Postal Services, July 2, 2009.

⁵ Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, March 10, 2010 (Advisory Opinion).

⁶ Valpak Direct Marketing Systems, Inc. Notice of Intervention and Valpak Dealers' Association, Inc. Notice of Intervention, both filed March 29, 2010. On April 19, 2010, Association of Priority Mail Users, Inc. filed a Notice of Intervention accompanied by Association of Priority Mail Users, Inc. Motion for Late Acceptance of Notice of Intervention, April 16, 2010. The motion is granted.

⁷ Answering Brief of Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and Association of Priority Mail Users, Inc., April 19, 2010 (Valpak Brief).

⁸ Comments of United States Postal Service Regarding Jurisdiction Under (Current) Section 404(d), April 19, 2010 (Postal Service Comments).

III. PARTICIPANT PLEADINGS

Most customers of the East Elko Station are P.O. Box holders and live in the rural areas of Elko, Nevada. Sanchez Petition at 2. Walk-in customers tend to be employees of surrounding businesses, including stores in the mall, hotels and the casino. *Id.* The Petitioner similarly contends that the Postal Service never effectively sought customer opinions regarding closing the East Elko Station, and never considered the effect on the community. *Id.* at 1. He acknowledges that surveys were available to the public, however customers had to stand in line and request them. *Id.* at 2.

An answering brief was jointly filed by Valpak Direct Marketing Systems, Inc., Valpak Dealers' Association, Inc., and the Association of Priority Mail Users, Inc. (Valpak). The brief addresses the disagreement between the Commission and the Postal Service regarding the applicability of section 404(d) to stations and branches. Valpak maintains that section 404(d) should be interpreted narrowly and only applies to closing post offices, not to closing stations and branches. Valpak Brief at 5. Valpak argues that the Commission in interpreting section 404(d) does not examine the text of 404(d), its legislative history, or the use by Congress of the same terminology in other contexts. *Id.* at 7. Valpak states that the first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. *Id.* at 8. Valpak contends that the language of section 404(d) is unambiguous and that the statutory scheme to limit appeals to post offices is a coherent and consistent policy. *Id.* at 9. Arguing for protection of managerial discretion, Valpak adds that the Postal Accountability and Enhancement Act vests broad managerial discretion in the Postal Service. Valpak maintains that the Postal Service must be allowed to exercise such discretion if it is to operate in a businesslike manner. *Id.* at 10.

In its comments, the Postal Service maintains that section 404(d) was enacted for the purpose of protecting small rural post offices from formal discontinuance. Postal Service Comments at 1-2. The Postal Service reiterates its position that the term "post office" should be interpreted in its technical sense as a facility supervised by a

postmaster. *Id.* at 9. The Postal Service argues that Congress was well aware of the longstanding distinction between post offices and other types of postal facilities when it enacted section 404(d). The Postal Service cites statements made by Senator Randolph expressing his opposition to the “‘indiscriminate closing of our rural and small town post offices’ as well as the decision ‘to create branches out of many post offices close to large cities.’” *Id.* The Postal Service reviews various Commission decisions under section 404(d) and the evolving definition of the term “post office.” In addition, citing case law, the Postal Service argues that the decisions suggest that the Postal Service’s technical or specialized interpretation of “post office” is eminently reasonable. *Id.* at 16. The Postal Service contends that appeal rights exist only for the consolidation or closing of an independent Post Office. *Id.* at 22.

The Public Representative argues that the appeal should be dismissed on the grounds that the discontinuance does not constitute a “closing” or “consolidation”, but rather a rearrangement of retail facilities within a community.⁹ The Public Representative maintains that the facts in the instant proceeding are similar to those in Docket No. A2010-2 (*Sundance*). In each instance, the post office slated for closure is near another postal retail facility. *Id.* at 3. The Public Representative states that customers who would otherwise be served by the East Elko Station would be served by the Elko Main Post Office. *Id.* at 3-4. The Public Representative adds that the facilities affected in the present case are approximately 1.5 miles apart, while in *Sundance*, the distance between the facilities was 1.3 miles. *Id.* at 4. The Public Representative acknowledges the distinction between the present case and *Sundance*. He states that the Commission’s decision in *Sundance* was partly based on the Postal Service’s representations that a new postal facility was being constructed for customers in contrast to this case where there is no reference to the construction of a new post office. *Id.* at 4. The Public Representative also maintains that this proceeding may not be the

⁹ Reply Brief of the Public Representative, May 4, 2010 (Public Representative Reply).

appropriate venue for resolving the question of whether stations and branches are post offices within section 404(d). *Id.* at 5.

IV. CONTROLLING STATUTORY PROVISIONS

The Postal Service is required to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.” 39 U.S.C. 101(b). Congress specified that no post office may be closed solely for operating at a deficit, *id.*, and established a statutory procedure that the Postal Service must follow prior to closing or consolidating a post office.

Under the terms of 39 U.S.C. 404(d)(1), prior to any decision as to the necessity for closing or consolidating any post office, the Postal Service must provide adequate notice so that persons served by the post office will have an opportunity to present their views. The law further requires the Postal Service to consider five enumerated factors in making a decision on whether to close a post office, the first of which is “the effect of such closing or consolidation on the community served by such post office”. 39 U.S.C. 404(d)(2)(A)(i).

These statutory provisions establish a national policy that citizens should have the opportunity to convey their concerns to the Postal Service before their local post office is closed, and most important, that the Postal Service will consider fairly those concerns prior to making a decision to close that facility.

V. COMMISSION ANALYSIS

According to the Postal Service, the Commission lacks subject matter jurisdiction under 39 U.S.C. § 404(d) to review its decision regarding the discontinuance of the East Elko Station. Notice at 1. The Postal Service suggests that since this docket pertains to a station and not an independent post office the Commission may simply dismiss this case. *Id.* at 2. The Commission is not persuaded by this argument. Nonetheless, it concludes that the appeal should be dismissed.

The Commission maintains its position that section 404(d) is applicable to the discontinuance of post offices, branches and stations. The Commission believes that section 404(d) was enacted to give persons served by postal retail facilities being considered for closure an opportunity to comment on the closing and to appeal the decision. The general public is largely unaware of the technical differences between a station, branch, community post office or main post office.¹⁰ The discontinuance of a Postal Service operated retail facility has similar effects on patrons regardless of how the Postal Service might classify the facility. *Id.* at 66.

The Postal Service and Valpak argue that the Commission's interpretation of section 404(d) has ventured far from what Congress envisioned, thus broadening the Commission's jurisdiction. The Postal Service maintains that the first time in which the Commission signaled its claimed jurisdiction to consider all station and branch discontinuance decisions was in the 2009 testimony provided in an oversight hearing by a member of the Commission's staff. The Postal Service's statement is incorrect. In 1982, the Commission accepted an appeal regarding the closing of the Oceana Station, Virginia Beach Virginia.¹¹ The Postal Service's argument that the appeal be dismissed because the facility in question was a classified station was rejected. However, the Postal Service explained that closing the Oceana Station, building a new facility, and shifting services and employees around the Virginia Beach area were all a part of its plan to enhance the postal network in Virginia Beach. *Id.* at 4. The Commission held that the Postal Service's decision to close the Oceana Station be considered within the context of the Postal Service's other actions in the area and therefore was a rearranging of postal facilities in the community and not a closing.

Similarly, in *Ecorse* the Commission considered whether the Postal Service's decision to close one facility, Ecorse Classified Branch, located in close proximity to

¹⁰ Advisory Opinion, *supra*, at 61.

¹¹ Docket No. A82-10, Order Dismissing Docket No. A82-10, June 25, 1982 (Oceana).

another facility, was covered by section 404(d).¹² In *Ecorse*, the Postal Service built a new facility located 1.7 miles away from the Ecorse Branch. *Id.* at 4. The Postal Service decided to close the Ecorse Branch since customers could obtain the same services 1.7 miles away at the new facility. The Petitioner argued that the Postal Service had failed to follow the appropriate closing procedures. *Id.* at 2. In light of opening the new facility in close proximity to the Ecorse Station, the Commission reasoned that the community was not losing service, and therefore the Postal Service's actions did not amount to the type of closing envisioned by section 404(d). The Commission held that the actions regarding the Ecorse Branch were a part of a larger retail facility realignment plan servicing the community and the Postal Service was not obligated to follow the formal post office closing requirements. *Id.* at 6.

In Elko, Nevada, there were two postal facilities, the East Elko Station and the Elko Main Post Office. The two facilities were just off the same street, approximately 1.5 miles apart. The Postal Service decided to discontinue services at the East Elko Station requiring customers to utilize the Elko Main Post Office. Petitioner Sanchez contends that the Postal Service did not consider the effect that closing the East Elko Station would have on the community and therefore failed to meet the requirements of section 404(d). The Public Representative contends that section 404(d) is not applicable to the circumstances before the Commission because a closing as envisioned by section 404(d) has not occurred. Public Representative Reply at 2-4.

Here, the Postal Service has decided to close a station located 1.5 miles away from the main post office which offers the same services. In *Ecorse*, the Postal Service decided to close the Ecorse Branch which was located 1.7 miles away from a newly constructed post office offering customers the same services. In this case, while there is no new facility, the East Elko Station is in close proximity to a post office where P.O. Boxes are available and other services may be obtained. Therefore, the East Elko Station customers are not losing access to the postal services offered in their

¹² Docket No. A2007-1, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007 (Ecorse).

community. The Commission considers the close proximity of the Elko Main Post Office, and the fact that the same services are available there to be a chief justification for closing the East Elko Station. For these reasons, the Commission concludes that the procedural requirements of section 404(d) do not apply.

Notwithstanding differences in interpreting section 404(d), the Commission strongly encourages the Postal Service to provide similar notice to patrons of stations and branches as is required, under the Postal Service's view, to patrons of post offices. Patrons should be given an opportunity to present their views prior to a formal determination to discontinue service. Providing such notice does not prevent the Postal Service from promptly taking whatever action it deems appropriate, including the closing of such facilities.

It is Ordered:

The Petitions filed in this docket are dismissed as discussed in the body of this Order.

By the Commission.

Shoshana M. Grove
Secretary