

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

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Delaware Station Post Office, )  
Albany, New York 12209 )  
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Docket No. A2011-1

PUBLIC REPRESENTATIVE RESPONSE IN SUPPORT OF  
DELAWARE AREA NEIGHBORHOOD ASSOCIATION'S APPLICATION  
FOR SUSPENSION OF DETERMINATION TO CLOSE

(November 3, 2010)

On October 19, 2010,<sup>1</sup> the Delaware Area Neighborhood Association (DANA) filed an application, pursuant to 39 U.S.C. 404(d)(5) and Commission Rule 114,<sup>2</sup> asking the Commission to issue an order to suspend the closing of the Delaware Station Post Office and preserve the status quo until such time as the Commission completes its review of this pending appeal.<sup>3</sup> In support of its Suspension Application, DANA filed a sworn statement of Susan J. DuBois.<sup>4</sup> The USPS has failed to file a timely response to the suspension application.<sup>5</sup>

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<sup>1</sup> Pursuant to 39 U.S.C. 404(d)(6)(A), the filing date of this application is October 19, 2010 because it was filed concurrently with the post office closing appeal.

<sup>2</sup> In relevant part, section 404(d)(5) states: "The Commission may suspend the effectiveness of the determination of the Postal Service until final disposition of the appeal."; *see also* 39 CFR 3001.114(a).

<sup>3</sup> See Letter from DANA to Shoshana Grove dated October 19, 2010 entitled, "Application for Suspension of Closure of Delaware Station, Albany, New York" (Suspension Application).

<sup>4</sup> See Statement of Susan J. DuBois dated October 18, 2010 (DuBois Statement).

<sup>5</sup> Pursuant to 39 CFR 3001.114, the Postal Service has ten days to file an answer to the suspension application. Even assuming that the filing date of the application was October 21, 2010, more than ten days have passed since the application was filed implying that the Postal Service has no issue with the Commission granting DANA's suspension application.

The Public Representative files this response in support of DANA's application for suspension. DANA and Ms. DuBois have put forth a strong case for the Commission to issue an order to stay the closing of the Delaware Station Post Office and preserve the status quo pending the outcome of this appeal. For the reasons set forth below, the Commission should grant the Suspension Application.

## I. APPLICABLE LEGAL PRINCIPLES

The Commission has jurisdiction to issue an order to stay the closing of the Delaware Station Post Office and preserve the status quo pending the outcome of this appeal pursuant to 39 U.S.C. 404(d)(5).<sup>6</sup> In essence, in seeking a temporary stay of the closing, DANA is asking the Commission to issue a preliminary injunction to preserve the status quo pending the outcome of this appeal.<sup>7</sup> The standards for issuing a preliminary injunction are well settled. To prevail, DANA must demonstrate "a substantial likelihood of success on the merits, 2) that [they] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Canales v. Paulson*, 2006 WL 2520611, \*3 (D.D.C. 2006). The Commission must balance the relative strength of the arguments in each of the four categories in determining whether to grant a preliminary injunction. See *id.* Further, if the Commission finds that the arguments for one factor are particularly strong, it may issue an injunction even if the arguments in the other areas are particularly weak. See *id.*; *CityFed Fin. Corp. v. Office*

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<sup>6</sup> 39 U.S.C. 404(d)(5) ("The Commission may suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal.").

<sup>7</sup> The Commission has appeared to acknowledge that this is the appropriate standard to apply. Cf Docket No. A82-11, Postal Rate Commission Order No. 441 (August 9, 1982). However, it does not appear that the Commission has had the occasion to review a suspension application on the merits as the Postal Service typically voluntarily keeps post offices open pending appeals to the Commission. See e.g., *id.*; Docket No. A79-9, Postal Rate Commission Order No. 267 (April 19, 1979). Assurance from the Postal Service that it would keep the facility open pending the outcome of this appeal would also be adequate to preserve the status quo.

of *Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). For example, if the Commission finds that there is a particularly strong likelihood of success on the merits, a preliminary injunction would be justified even if the arguments in other areas are not very strong. *Id.*; *Mills*, 571 F.3d at 1308. As discussed below, each of these four factors heavily weighs in favor of granting DANA's Suspension Application.

### A. Substantial Likelihood of Success on the Merits

DANA has shown a strong and substantial likelihood of success on the merits. According to its Suspension Application, the DuBois Statement, and the appeal,<sup>8</sup> the Postal Service did not follow the statutory requirements of 39 U.S.C. 404(d) in making its determination to close the Delaware Station Post Office.<sup>9</sup> In particular, its written findings communicated to postal patrons did not take into account the effects of closing the facility on employees of the Postal Service, the economic savings to the Postal Service that would result from the closure, or the effects of closure on the community. This is in clear violation of the statutory requirements of sections 404(d)(2) and (3). The Postal Service also failed to provide notice of appeal rights as required by 39 CFR 3001.110. While the failure to do any one of these statutory and regulatory

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<sup>8</sup> See Letter from DANA to Shoshana Grove dated October 19, 2010 entitled, "Appeal of closure of Delaware Station, Albany, New York."

<sup>9</sup> While the Postal Service may continue to adhere to its argument that a "post office station" is not a "post office," that argument has been repeatedly rejected on appeal. See e.g., *In re Gresham, SC*, Docket No. A78-1, Order No. 208 (August 16, 1978); *In re Mt. Eden, Ca.*, Docket No. A80-4, Commission Op. Affirming Determining – 39 U.S.C. § 404(b)(5) (May 28, 1980); *In re Oceana Station Virginia Beach, VA*, Docket No. A82-10, Order No. 436 (June 25, 1982); *In re Knob Fork, WV*, Docket No. A83-30, Commission Opinion Remanding Determination for Further Consideration – 39 U.S.C. § 404(b)(5) (January 18, 1984) (holding that a community post office is a post office for purposes of 404(d)); Docket No. A94-1, Commission Opinion Affirming Decision Under 39 U.S.C. § 404(b) (February 4, 1994) at 5-6; Docket No. A94-3, Commission Opinion Affirming Decision Under 39 U.S.C. § 404(b) (March 15, 1994) (Schley, C. and LeBlanc, C. dissenting) (stating that "[t]he Postal Rate Commission has consistently interpreted § 404(b) to apply to community post offices when they are the sole source of postal services to a community); Docket No. A94-8, Commission Opinion Remanding Decision Under 39 U.S.C. § 404(b) (August 3, 1994) at 7-8; *In re San Francisco Main Post Office, CA*, Docket No. A91-4, Order No. 891 (July 8, 1991); *In re Observatory Finance Station*, Docket No. A2006-1, Order No. 1480 - Order Denying Postal Service Motion to Dismiss and Remanding for Further Consideration, September 29, 2006; *In re Elko Station, NV*, A2010-3, Order No. 477, June 22, 2010.

requirements would be grounds for remanding a closure decision, the fact that the Postal Service failed to follow all of these statutory and regulatory requirements shows that DANA has a very strong and substantial likelihood of success on the merits in this appeal.<sup>10</sup>

### **B. DANA's Irreparable Injury**

DANA and the other petitioners will suffer irreparable injury and harm if the Commission does not grant their application to preserve the status quo pending the outcome of this appeal. First, as the Suspension Application and DuBois Statement explain, the facility is currently scheduled to remain open only until December 31, 2010. However, the Commission's decision on this appeal is not due until February 16, 2010. Thus, without an order requiring the Postal Service to keep the facility open pending the outcome of this appeal, the facility will be closed before the Commission issues its decision on the merits. This would effectively deprive DANA of any remedy if it prevails on the appeal, since the Postal Service does not typically reopen facilities once they are closed, even with a valid Commission remand order.<sup>11</sup>

Second, without an order requiring the Postal Service to preserve the status quo, it could be already gearing up to remove equipment and post office boxes from the facility or in negotiations to terminate its lease of the facility. This could all be occurring prior to the December 31, 2010 date and place the Delaware Station Post Office on an irreversible track to closure notwithstanding a subsequent appeal decision in favor of DANA.

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<sup>10</sup> The Public Representative reserves the right to argue that other statutory and regulatory violations exist upon receipt of the Administrative Record and other relevant facts in this case when the merits of this appeal are actually adjudicated.

<sup>11</sup> See e.g., *In re Observatory Finance Station*, Docket No. A2006-1, Order No. 1480 - Order Denying Postal Service Motion to Dismiss and Remanding for Further Consideration, September 29, 2006.

Finally, post office box customers at the Delaware Station Post Office, such as DANA, will have to spend money, time, and resources to relocate their post office boxes to other post office stations and branches if they do not intend to use boxes at the Hudson Avenue post office. Such customers will need to change addresses of their official documents, stationary, business cards, and other business and personal documents that list the post office box as their official addresses. If DANA and others have to change their addresses for business purposes and then change them back, it will result in confusion and chaos due to multiple address changes within a short period of time. For post office box customers that are businesses, this confusion will likely cause the irreversible loss of business customers.

Thus, as outlined above and in more detail in DANA's Suspension Application and accompanying DuBois Statement, absent an order preserving the status quo and keeping the Delaware Station Post Office open pending the outcome of this appeal, DANA and the other petitioners will suffer irreparable injury and harm.

### **C. Lack of Substantial Injury to Other Parties**

The harm to the Postal Service from keeping this facility open pending the Commission's determination on this appeal is minimal. The Postal Service routinely keeps post offices open pending appeal,<sup>12</sup> which demonstrates that it does not perceive any substantial harm or loss from maintaining the status quo for a short period of time. Additionally, informal discussions with various affected parties have confirmed that the Postal Service has a lease for these premises that does not expire until at least August/September 2011 with lease terms favorable to the Postal Service. Accordingly, there is no immediate need for the Postal Service to vacate the premises.

Moreover, the Postal Service did not file a timely response to DANA's Suspension Application. This is particularly telling given the gravity and emergency

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<sup>12</sup> See e.g., Docket No. A82-11, Postal Rate Commission Order No. 441 (August 9, 1982); Docket No. A79-9, Postal Rate Commission Order No. 267 (April 19, 1979).

nature of this type of request. A suspension application is not a run-of-the-mill request where the Postal Service may file a late response without consequence.

The lack of a timely response from the Postal Service on DANA's Suspension Application shows that the Postal Service does not consider the matter to rise to the level of causing it any substantial injury. Thus, the injury to the Postal Service from granting the Suspension Application to preserve the status quo appears to be nominal.

**D. Issuance of an Order to Preserve the Status Quo Furthers the Public Interest**

The public interest would be well served by granting DANA's suspension application. If the Postal Service were allowed to irreversibly close post offices while appeals were pending to overturn those closures, the statute providing appeal rights to users of those post offices would be rendered meaningless. The public interest is well served by a statutory scheme and post office closing procedures that allow appellants to receive due process and an adequate remedy if they prevail on appeal. Not issuing an order preserving the status quo in this and similar cases would be equivalent to taking away mail users appeal rights. An orderly and effective appeal process is a keystone provision for the United States judicial system. Promoting the effectiveness of the appeals process furthers the public interest.

**II. CONCLUSION**

As demonstrated above, on balance, all four elements of the preliminary injunction test heavily weigh in favor of granting DANA's application for suspension. Accordingly, because DANA has made a strong showing that the Commission should preserve the status quo pending the outcome of this appeal, the Commission should grant its Suspension Application. The Commission should also require the Postal Service to notify postal patrons of the Delaware Station Post Office of the issuance of such stay.

Respectfully Submitted,

/s/ Robert Sidman

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