

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

COMPLAINT OF THE NATIONAL
ASSOCIATION OF POSTMASTERS OF
THE UNITED STATES, THE LEAGUE OF
POSTMASTERS, MARK STRONG,
ROBERT RAPOZA, MARILYN SHAW,
AND MARILYN HILL

Docket No. _____

May 23, 2011

**COMPLAINT
REGARDING POSTAL SERVICE PROPOSED RULE "POST OFFICE
ORGANIZATION AND ADMINISTRATION: ESTABLISHMENT, CLASSIFICATION
AND DISCONTINUANCE," 39 CFR PART 241**

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Table of Contents

I.	Introduction	4
II.	Procedural Considerations (39 C.F.R. §3030.2 and §3030.10)	5
A.	Jurisdiction	5
B.	Standing and Ripeness	5
C.	Matter of First Impression for the Commission	7
D.	Statement on Persons Similarly Situated	8
E.	Certification that Complainants attempted to meet or confer with the Postal Service’s General Counsel	8
F.	Consultation Under Section 1004	9
III.	Legal Claims	10
A.	Claim 1: The erasure of “consolidation” would violate 39 U.S.C. §404(d)	10
1.	“Consolidation” is a defined term and carries significant weight in legislative history and case law	12
2.	The Postal Service lacks the statutory authority to erase “consolidation” from the statute	16
3.	Impact of proposed erasure of “consolidation” upon Complainants	19
B.	Claim 2: The removal of “postmaster” from the definition of “post office” would violate 39 U.S.C. §1004(i)(3)	23
1.	A “postmaster” is an indispensable and defining characteristic of a “post office” in legislative history and case law	24
2.	The Postal Service lacks the authority to disregard the statutory definition of a “postmaster”	27
3.	Impact of proposed removal of postmasters upon Complainants	29
C.	Claim 3: The Postal Service is required by §3661(b) to obtain an advisory opinion from the Commission to close thousands of post offices, effecting a “nationwide change in service”	30
IV.	Relief Requested	32
A.	Temporary Stay	32
B.	Declaratory Judgment	33

1. Claim 1: The Postal Service Lacks the Authority to erase “consolidation” and eliminate one of the rights of appeal Congress provided.	33
2. Claim 2: The Postal Service Lacks the Authority to Remove “Postmaster” from the definition of “Post Office”	33
3. Claim 3: The Large-Scale Proposed Closings is a Nationwide Change in Service which Requires an Advisory Opinion.....	33
4. Other Relief	34
V. Conclusion	34

I. Introduction

The Postal Service released the Proposed Rules, “Post Office Organization and Administration: Establishment, Classification and Discontinuance,” 39 CFR Part 241 on March 31, 2011, and provided notice of the Proposed Rules in the Federal Register, 76 Fed. Reg.17794.

The Complainants believe that the Proposed Rules are in conflict with applicable law. First, the rules effectively remove one of the grounds available to communities and the public to seek review of consolidation actions at the Postal Regulatory Commission. Second, they remove an essential element from the core definition of “post office.” Third, the rules counter the congressional intent in creating an appeal process and in mandating service “to all communities” and a “maximum degree” of service “to rural areas, communities, and small towns where post offices are not self sustaining.” 39 U.S.C. § 101(a), (b). In addition, it appears that the drive for extensive nationwide closings of small post offices—that this proposal is designed to facilitate— is beginning and requires an application under § 3661 (which the Postal Service has not made) to the Commission for an advisory opinion on whether such change is in the public interest.

In sum, Complainants believe the Postal Service lacks the authority to entertain the regulatory elimination of a statutory provision, to alter the jurisdiction of the Postal

Regulatory Commission, or to begin a nationwide change in service without seeking an advisory opinion from the Commission.

II. Procedural Considerations (39 C.F.R. §3030.2 and §3030.10)

A. Jurisdiction

The Commission has jurisdiction over the issues in the above-captioned Complaint pursuant to 39 U.S.C. §3662 which provides that an interested party can file a complaint if the Postal Service is not operating in conformance with the provisions of 39 U.S.C. §401(2), which in this case the Complaints believe it is not. The Commission also has jurisdiction to consider nationwide service changes pursuant to 39 U.S.C. §3661.

B. Standing and Ripeness

The Complainants are interested persons in the following respects:

i. The National Association of Postmasters of the United States is one of two management associations legally-empowered to represent the postmasters of the United States, and is recognized by the Postal Service as such under § 1004 of Title 39 of the U.S. Code. NAPUS has served the nation and its customers for over a century.

ii. The League of Postmasters is one of two management associations legally-empowered to represent the postmasters of the United States, and is recognized

by the Postal Service as such under § 1004 of Title 39 of the U.S. Code. The League of Postmasters has served the nation and its customers for over a century.

iii. Robert Rapoza is the President of NAPUS and represents the postmasters that are members of NAPUS. Mr. Rapoza is also a postmaster and a postal customer.

iv. Mark Strong is the President of the League of Postmasters and represents the postmasters that are members of League of Postmasters. Mr. Strong is also a postmaster and a postal customer.

v. Marilyn Shaw is the former Postmaster of the Post Office in Patterson, Iowa. The Patterson, IA, Post Office is one of thousands of post offices on the Postal Service's list of facilities to be closed in the near future. Ms. Shaw is a retired postmaster and a postal customer.

vi. Marilyn Hill is the former Postmaster of the Post Office in McCallsburg, Iowa. The McCallsburg, IA, Post Office is one of thousands of post offices on the Postal Service's list of facilities to be closed in the near future. Ms. Hill is a retired postmaster and a postal customer.

Despite the fact that the Postal Service has not implemented the Proposed Rule, the Complainants note that this issue is ripe for consideration for the following reasons: 1) although the Postal Service may elect not to implement the Proposed Rule at this time, the circumstances are readily capable of repetition without a ruling from the PRC that the Postal Service lacks the necessary authority to propose or

adopt rules that contradict the controlling statutes and their congressional intent; and 2) if the Postal Service elects to implement the Proposed Rule, the subsequent damage caused by the widespread removal of postmasters and consolidation of post offices—without community access to notice and comment procedures or appellate review by the PRC—will be irreversible, particularly to the small towns and rural communities that were the focal point and rallying cry of the Senators advocating the passage of the Public Law 94-421 in 1976.

C. Matter of First Impression for the Commission

None of the issues raised in this Complaint are pending in or have been resolved by an existing Commission proceeding, or a proceeding in any other forum in which Complainants are parties. Additionally, the Complainants note that the Commission has never heard a complaint or issued a decision on the matter of whether a Rule proposed by the Postal Service is in conformity with its authorizing statute.

Under § 3662(c), the Commission has the authority, should it find that the Complaint is justified, to order the Postal Service *to take such actions as the Commission considers appropriate* in order to achieve compliance with the applicable requirements and *to remedy the effects of any noncompliance*. This could include ordering the Postal Service to re-open any post office that it had closed or consolidated if that action were necessary to remedy the effects of any noncompliance. The Commission's authority in this instance does not stem from the post office closing

provisions of § 404(d) but rather from the very broad remedial authority that § 3622(c) gives the Commission to act, should it find that the Postal Service is not acting in conformance with § 401(2). Should the Postal Service ignore any remedial order of the Commission, § 3662(d) gives substantial authority to the Commission to levy fines until it is obeyed.

D. Statement on Persons Similarly Situated

Persons similarly situated to Complainants may include other postmasters and other postal customers. Whether those postmasters and/or postal customers are in fact similarly situated depends on whether their current postal facilities are classified as post offices, stations or branches, and whether their postal facilities are being considered (or will be considered in the future) for consolidation, closing, discontinuance, conversion or replacement

E. Certification that Complainants attempted to meet or confer with the Postal Service's General Counsel

The Complainants provided a letter to the General Counsel for the Postal Service on May 11, 2011, setting forth their position that the proposal is not consistent with the underlying statutory authority granted the Postal Service by Title 39. That letter invited the General Counsel to meet to discuss this matter. The Complainants note that the legal questions relating to the statutory authority of the Postal Service to propose or adopt the Proposed Rule are matters of law and do not lend themselves well to

discussion or negotiation. If the Postal Service is acting *ultra vires*, no discussion can correct that.

F. Consultation Under Section 1004.

The Postal Service provided public notice of its Proposed Rule on March 31, 2011, and requested comments. Subsequently, the Postal Service forwarded this change to the Postmasters on April 6, 2011. The Complainants note that the language of 39 U.S.C. §1004 suggests that the Postal Service must provide a description of the proposed rule to NAPUS and The League of Postmasters so that the organizations have an opportunity to participate in the planning and development of the proposed rule. The purpose of §1004 is to allow the postmaster organization to participate in the *planning and development* of a rule, which would suggest that notice should be given before the proposed rule is actually provided to the public so that discussions as to planning and development issues, including the wisdom and legality of the matter, could occur. Instead, the Postal Service provided notice of the rule with language suggesting that the decision had already been made, and that participation or consultation from NAPUS and The League of Postmasters was entirely optional but that the Complainants were welcome to submit questions.

The Complainants filed comments with the Postal Service on Monday, May 2, 2011. Those Comments included a formal opinion letter from Harold Hughes, former

General Counsel of the Postal Service, which concluded that the proposed regulations were inconsistent with the underlying statute.

III. Legal Claims

A. Claim 1: The erasure of “consolidation” would violate 39 U.S.C. §404(d)

Congress provided in §404(d) for two distinct discontinuance circumstances: 1) closing a post office and 2) consolidating post offices. The discontinuance procedure created by §404(d) provided an opportunity for communities to present their first-hand knowledge of the impact of those decisions upon their local “commercial, cultural, and social life,”¹ and if necessary, appeal the Postal Service’s decision to the Postal Regulatory Commission. The language of 39 U.S.C. §404(d) states in relevant part:

(1) The Postal Service, prior to making a determination under subsection (a)(3) of this section [to determine the need for post offices] as to the necessity for the closing **or consolidation** of any post office, shall provide **adequate notice of its intention** to close **or consolidate** such post office at least 60 days prior to the proposed date of such closing **or consolidation** to persons served by such post office to ensure that such persons will have an opportunity to present their views.

(2) The Postal Service, in making a determination whether or not to close **or consolidate** a post office--

(A) shall consider--

(i) the effect of such closing **or consolidation on the community** served by such post office;

(ii) the effect of such closing **or consolidation on employees** of the Postal Service employed at such office;

(iii) whether such closing **or consolidation is consistent with the policy of the Government, as stated in section 101(b)** of this title, that the Postal Service **shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices**

¹ See, e.g., H.R. Rep. No. 94-391, 94th Cong., 1st Sess. 3 (1975).

are not self-sustaining;

(iv) the economic savings to the Postal Service resulting from such closing **or consolidation...**

(3) Any determination of the Postal Service to close **or consolidate** a post office shall be in writing and shall include the findings of the Postal Service with respect to the considerations required to be made under paragraph (2) of this subsection. Such determination and finding shall be made available to persons served by such post office.

(4) The Postal Service shall take no action to close **or consolidate** a post office until 60 days after its written determination is made available to persons served by such post office.

(5) A determination of the Postal Service to close **or consolidate** any post office **may be appealed** by any person served by such office **to the Postal Regulatory Commission** within 30 days after such determination is made available to such person under paragraph (3). The Commission shall review such determination on the basis of the record before the Postal Service in the making of such determination. The Commission shall make a determination based upon such review no later than 120 days after receiving any appeal under this paragraph. The Commission shall set aside any determination, findings, and conclusions found to be--

(A) **arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;**

(B) **without observance of procedure required by law;** or

(C) **unsupported by substantial evidence on the record...**

(emphasis added).

In its March 31, 2011, Federal Register notice, the Postal Service states: “The governing statute does not define ‘close’ and ‘consolidate’ nor does it offer any guidance as to the distinction between two terms.” 79 Fed. Reg. at 17795. What the Postal Service doesn’t mention is that there is a long set of statutory and regulatory interpretations that quite distinctly define what “closing” and “consolidating” mean, and that the Postal Service has crafted a rule that redefines “consolidating” in a way that

effectively side steps those definitions and seeks to nullify the statutory definition of a Post Office consolidation as a “discontinuance” action.

For this reason, the proposed regulation would violate the referenced statute. The Proposed Rules would give the Postal Service the unilateral authority to consolidate Post Offices, without initiating the legally required process. As the Postal Service has said:

... conversion of a post office into, or the replacement of a post office with, another type of USPS-operated retail facility [would] not [be] a discontinuance action subject to this section. A change in the management of a post office such that is staffed only part-time by a postmaster, or not staffed at all by a postmaster, but rather another type of USPS employee, [would] not [be] a discontinuance action subject to this section.

76 Fed. Reg 17794.

1. “Consolidation” is a defined term and carries significant weight in legislative history and case law

Congress, the courts, and the Postal Service have all evinced a clear understanding of the meaning and distinction between the “closing” and the “consolidation” of a post office. A closure occurs when a post office is “closed,” postal service is no longer provided out of that specific facility, and a new post office is not established elsewhere to replace the closed facility. The current regulation, §241.3(c)(2), defines “consolidation” as a situation where “a community post office or classified or contraction station or branch [is substituted] for the discontinued post office.” This definition is consistent with established congressional intent.

The term “consolidation” has a long and fairly consistent statutory history. Prior to the Postal Reorganization Act of 1970, 39 USC §701, 705 referenced Post Office “consolidations” as making them into station or branches of another Post Office. In 1976 Congress added a subsection to 39 U.S.C. § 404 creating a procedure for notice, community input, and a right of appeal to the Postal Regulatory Commission whenever the Postal Service determined “to close or consolidate a post office.” That procedure, originally codified as § 404(b), subsequently became §404(d) with the passage of the Postal Accountability and Enhancement Act. That single subsection refers to “closing or consolidation” of any post office eleven times.

In Knapp v. United States Postal Service, 449 F. Supp. 158 (E.D. Mich., 1978), the Court pointed to the legislative history in defining “consolidation”:

Senator Randolph, when he proposed the legislation destined to become 39 U.S.C. § 404(b) [now (d)] on the floor of the Senate, made it clear that his interest was to deal with the problem of the physical closure of a post office or the physical consolidation of post offices, particularly as this relates to postal services in rural areas.... The Senator specifically objected to the ‘indiscriminate closing of our rural and small town post offices’ as well as the decision by the Postal Service to ‘create branches out of many post offices close to large cities’ and thus ‘transfer a community oriented post office into one administered through the instructions and directives of large city postmasters with little or no community involvement.’ Hearings [on S. 2844 Before the Senate Comm. on Post Office and Civil Service, Part 4, 94th Cong., 2d Sess. 142-143 (1976)], *supra*, at 142.

Knapp at 161-162. Sen. Randolph explained that, “Under this legislation the U.S. Postal Service must substantiate any proposal to change or eliminate independent post offices.” 122 Cong Rec. 6314 (Mar. 11, 1976) (Emphasis added). Clearly, consolidation constitutes such a “change” and the Postal Service cannot claim the unfettered ability to implement a consolidation, absent the initiation of the prescribed statutory discontinuance process. As the above quotation makes quite clear, Congress meant to distinguish a post office closing from the consolidation of a community-oriented and locally-managed post office into another office.

Based on the intention of Congress, as illuminated in the legislative history, the Knapp Court explained the distinction between a “closing” and a “consolidation,” either of which creates a right of appeal to the Postal Regulatory Commission:

“‘Consolidation’ . . . has the characteristic of subordinating the day to day overall management of one office having a postmaster to the administrative personnel of another office.” Knapp at 162.

This definition of consolidation has been followed by other courts. In Citizens for the Hopkins Post Office v. United States Postal Service, 830 F. Supp. 296 (Dist. SC, 1993), the Court, relying on Knapp and on the Postal Service’s own definition of “consolidation” stated:

This court finds the definition of “consolidation” advanced by the Postal Service to be the one which is reasonable and in keeping with the intent of Congress in this statute. It clearly defines ‘consolidation’ as an action in which a post office would lose its independence and individual identity. It is the opinion of this court that such an action, as defined by the Postal

Service, is clearly the type of action Congress intended to trigger the operation of § 404(b) [now (d)].

Hopkins, at 299.

The Postal Service itself clearly understands the meaning and import “of the word ‘consolidate’ in section 404(d).” As recently as February 25, 2011, the Postal Service has supported an “accurate” understanding of §404(d) regarding “consolidation”. In response to a lawsuit, just the month before it published its Proposed Rules, the Postal Service explained to a federal district court:

A Post Office is an organizational unit headed by a postmaster that provides retail and delivery services, and mail processing to residents and businesses in the ZIP Code areas that comprise the office's exclusive service area. Use of the word “consolidate” in section 404(d) illustrates this nuance, because it involves consolidation of what was once an independent Post Office into a subordinate station or branch reporting to another Post Office.

Defendant Postal Service's Response in Opposition to Plaintiffs' Second Amended Motion and Application for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, in City of Tuscaloosa, Alabama v. United States Postal Service, Case No. 7:11-CV-0585-SLB (served February 25, 2011), at 16 (“Postal Service Memorandum”).

The Postal Service also notes in that same Memorandum that “[p]ostal regulations reflect the statutory distinction between an independent Post Office and its subordinate stations and branches, which Congress has followed for well over a century,” and then cites twelve statutes and ten Acts of Congress recognizing this statutory distinction. *Id.* at 18.

The Postal Service's apparent revision to its interpretation of §404(d) now seems to state that the word "close" has significant meaning but the word "consolidate" does not. Such a position violates the principle that statutes are to be construed in such a way that all terms of the statute have meaning. "[E]ffect must be given, if possible, to every word, clause and sentence of a statute' so that no part will be inoperative or superfluous, void or insignificant." American Federation of Government Employees, Local 2513 v. Federal Labor Relations Authority, 834 F.2d 174, 177 (D.C. Cir. 1987) (quoting In re Surface Min. Regulation Litig. 627 F.2d 1346, 1362 (D.C. Cir. 1980). The Postal Service cannot create ambiguity by ignoring a well-established definition of consolidation and reading §404(d) as though the term carries no significance and is therefore inoperative or superfluous.

By implementing the Proposed Rule, the Postal Service would erase community involvement in consolidation decisions, with potentially far-reaching consequences. The Proposed Rule would also erase statutory and procedural protections Congress intended to provide to the public.

2. The Postal Service lacks the statutory authority to erase "consolidation" from the statute.

The general powers of the Postal Service include the authority to "adopt, amend, and repeal such rules and regulations, **not inconsistent with this title**, as may be necessary in the execution of its functions under this title and such other functions as

may be assigned to the Postal Service under any provisions of law outside of this title[.]”
39 U.S.C. 401(2), emphasis added.

When Congress authorized the Postal Service to “adopt, amend and repeal...rules and regulations” necessary to carry out its statutory functions under Title 39, Congress did not delegate the authority to change the words of the statute itself, or read an entire concept out of a statute. Effectively erasing the word “consolidate” out of a statute which was previously unambiguous is inconsistent with the congressional meaning and intent of Title 39 and represents a change to the statute that exceeds the Postal Service’s statutory authority. “A cardinal principle of interpretation requires [an agency] to construe a statute ‘so that no provision is rendered inoperative or superfluous, void or insignificant.’” Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 472 (D.C. Cir. 2009) (quoting Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998)). The Postal Service’s new position that the word “consolidate” is ambiguous and indistinct from the word “close” violates this principle of interpretation, ignoring congressional intent, consistent court interpretation, and its own well-established regulations, and constitutes an arbitrary and capricious change. Although the Postal Service asserts that this change will merely “erase the effect of administrative designations on applicable discontinuance procedures,” 79 Fed. Reg. at 17795, the change will in fact also erase the effect of an entire concept that Congress discussed at length when it enacted the statute.

Although the Postal Service expressly recognizes that § 404(d) allows a “determination to...consolidate any Post Office” to be appealed to the Postal Regulatory Commission, and that “the Postal Service does not have the power to alter the scope of the Commission's statutory jurisdiction,” in its explanation it nonetheless declares—in contravention of the foregoing two points—that the “conversion of an independent Post Office to a subordinate Postal Service-operated retail facility would no longer constitute a ‘consolidation’ that triggers discontinuance proceedings, as it does today.” 76 Fed. Reg. at 17794, 17796, and 17795.

The actual language of the Proposed Rule reflects this view: “The conversion of a post office into, or the replacement of a post office with, another type of USPS-operated retail facility is not a discontinuance action subject to this section.” Proposed 39 C.F.R. § 241.3(a)(1)(iii), 76 Fed. Reg. 17797. Even the Supplementary Information provided by the Postal Service emphasizes that this provision is intended to “clarify that the reclassification of a Post Office as a Postal Service-operated station or branch, or the replacement of the former with the latter, is not a closing or consolidation subject to 39 C.F.R. 241.3.” 76 Fed. Reg. 17795.

Complainants wish to make it clear that they do not object to the application of enhanced discontinuance procedures to “Other Retail Facilities” in §241.3. Postmasters recognize that community notification and input provide a modicum of credibility to the closing and consolidation process, even for stations and branches. Existing regulations do not clearly prescribe a process for the closing or consolidation of postal facilities

subordinate to post offices; the proposed regulations lay out a process for notification and input for such units. Nevertheless, Complainants believe that the distinction between post offices and subordinate facilities must be maintained in §241.3, as was Senator Randolph's intent when he introduced his post office provisions.

3. Impact of proposed erasure of “consolidation” upon Complainants

The proposed regulation promotes a discriminatory level of postal services, particularly to rural areas and small towns, and directly conflicts with, §101(b), which provides for a “maximum degree of effective and regular postal services.” (Emphasis added.)

The Proposed Rule conflicts with the clear congressional intent in enacting 39 U.S.C. § 404(d), impacting Complainants in several ways: the Proposed Rules would remove the Complainants' 1) statutory right under 404(d)(1) and (5) to the notice of appeal rights given to the public when a Post Office is consolidated; 2) the statutory right under 404(d)(1) and (2)(A) to submit comments or to have the effect of a Post Office consolidation upon employees and communities evaluated prior to the Postal Service making the decision to consolidate; and 3) the statutory right under 404(d)(5) to appeal the Postal Service's decision to consolidate a Post Office to the PRC.

First, under the Proposed Rules, since the “consolidation” of a Post Office into a station, or branch, or other type of “USPS-operated retail facility,” “would no longer constitute a ‘consolidation’ that triggers discontinuance proceedings,” no notice of

appeal rights would need to be provided to the public, including the Complainants. 76 Fed. Reg. at 17795 and 96.

Next, the public, including the Complainants, would have no right under the Proposed Rules to submit comments. Nor would the Postal Service consider itself obliged to consider “the effect on employees of the USPS-operated retail facility; [or] compliance with government policy established by law that the Postal Service must provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining....” Proposed 39 C.F.R. § 241.3(a)(2), 76 Fed. Reg. at 17797.

Third, Complainants object to proposed §241.3(a)(1)(iii) as it seeks to deny communities whose Post Offices are converted into stations and branches, and subsequently closed, their statutory right to Postal Regulatory Commission (PRC) appellate review. The Postal Service has already determined that its customers and the public have no right to “a judicial remedy whenever the Postal Service [makes] a business decision to relocate postal operations.” Postal Service Memorandum at 27.² See also, *Id.* at 27-28.³

² The Postal Service has also determined that the closing of stations or branches are not subject to appeals to the Postal Regulatory Commission under 39 U.S.C. section 404(d), although “the interpretation of section 404(d) remains a matter of open contention before the Commission. E.g., PRC Order No. 673 at 2, 4-6.” Postal Service Memorandum at 18.

³ “Congress further demonstrated its intent that the Postal Service be able to operate without judicial interference by exempting the Postal Service from the Administrative Procedure Act. 39 U.S.C. § 410(a).” Postal Service Memorandum at 27.

The fact that the Postal Service might decide—at least temporarily—to grant privileges on a limited basis does not change the fact that it is trying to bypass the *statutory* rights to these procedures. Under 39 USC 404(d)(5) postal customers may appeal closings to the PRC if the Postal Service fails to comply with the statutory procedures and the substantive provisions of the section, as described in the section. Moreover, the Commission may set aside any Postal Service determination, findings, or conclusions if the agency fails to follow the specified procedures, if the decision is arbitrary or capricious, or if the decision is unsupported by evidence, including a determination that the balancing of the local interests versus the Postal Service interests was done in an arbitrary or capricious manner.

Under its Proposed Rule, the Postal Service is creating a process to avoid the statutory right of appeal for a post office consolidation to the Postal Regulatory Commission which Congress created under §404(d)(5), by simply “converting” a post office into “another type of USPS-operated retail facility.” Proposed 39 C.F.R. § 241.3(a)(1)(iii), 76 Fed. Reg. 17797. Since this “is not a discontinuance,” and “would no longer constitute a ‘consolidation’,” the public, including the Complainants, would have no right to appeal what the Postal Service no longer deems to be an event of regulatory, statutory, or community significance. This “death by definition” is not consistent with Congress’ express intent in establishing a right of review for the consolidation of post offices.

The Postal Service's interpretation of §404(d)(5) reserves PRC review solely for Post Offices closures. Even assuming that the Postal Service's reading is correct, the unrestricted conversion of Post Offices into stations and branches would unlawfully shield Post Office closings from Commission review. Once the Postal Service converts a Post Office into a station or branch, the facility, according to the Postal Service, is beyond PRC review. Consequently, the statutory due process entitlements of impacted communities are nullified by the unilateral consolidation of post offices into stations or branches. Complainants believe that this is the reason why the discontinuance process applies to the consolidation of post offices into subordinate types of postal facilities.

The proposed regulation would authorize an inferior level of service to small towns and rural America, in violation of §§101(b) and 404(2)(A)(iii). The proposed regulation promotes a facility standard that would lead to second-rate services to countless communities, particularly those situated in rural areas and small towns. Under the proposed regulations, the Postal Service would maintain post offices that are deemed by the agency as:

... necessary to ensure regular and effective postal services are available to all customers within specified geographic borders.

That is far less than the "maximum degree of effective and regular service" standard that is found in §101(b) of Title 39.

Moreover, the proposed regulation is unduly ambiguous, since it fails to define how the "specified geographic borders" are to be determined, including whether the

parameters will be municipal boundaries, census tracts, mileage markers, or even whether the geographic borders will be consistent from one area to the next. In addition, the regulations fail to define “regular and effective postal services,” leaving uncertainty as to whether such services will be limited to selling stamps or will include post office box service, package services, postal money orders, and other services routinely offered by post offices in the affected communities.

Additionally, the proposed §241.3(a)(1)(iii), attempts to dodge the statutory prohibition against closing a post office “solely for operating at a deficit”, 39 U.S.C. 101(b). The legal prohibition applies only to Post Offices, not to subordinate facilities. Consequently, the proposed regulation would enable the Postal Service to skirt the ban against closing small post offices that operate at a deficit by converting those post offices into stations and branches. The existing statutory discontinuance process applies to the consolidation of post offices into subordinate types of postal facilities to preclude unilateral administrative conversions of Post Offices into subordinate units.

B. Claim 2: The removal of “postmaster” from the definition of “post office” would violate 39 U.S.C. §1004(i)(3)

The second sentence of proposed §241.1(a) regarding changes to the management of post offices conflicts with 39 USC 1004(i)(3). The proposed regulation seeks to authorize post office management by “a postmaster or by another type of postal employee” (Emphasis added). In essence, under the proposed regulation, the

manager of a post office need not be a postmaster. However, this proposed regulation violates §1004(i)(3), which states that:

‘Postmaster’ means an individual who is the manager in charge of a post office, with or without the assistance of subordinate managers or supervisors.

Consequently, a post office can only be managed by a postmaster. The Postal Service may not legally implement the second sentence of §241.1(a).

1. A “postmaster” is an indispensable and defining characteristic of a “post office” in legislative history and case law

Congress plainly considered, and enacted into law, provisions making clear that a “postmaster” is a defining characteristic of a “post office.” In the Postmasters Equity Act of 2003, Congress added §1004(i)(3) to the law. Senate Report 108-112, which accompanied S. 678 (PL 108-86), calls attention to the congressional intent of the law in defining “postmaster”.

The bill would also define the term “postmaster” for the first time by noting that a postmaster is an individual who is the manager-in-charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors.

S. Rep. No.108-112, at 2 (2003).

When the present 39 USC § 404(d) was added, the amendment was introduced by Senator Randolph with a recognition of the vital importance of postmasters: “These postmasters—men and women—are, in a sense, counselors to so many people. They help, in many ways with the filling out of forms and reports, and they represent what I

believe is the human side of the Government.... They strive daily to help citizens generally across a broad front.” 122 Cong. Rec. S14268 (August 23, 1976).

In implementing present § 404(d) the federal courts have considered the presence or absence of a postmaster as the defining factor in determining whether a “closing” or a “consolidation” has taken place.⁴ “Thus, plaintiffs contend that the existence of a postmaster distinguishes a post office from a postal station or branch. Part 244.131 of the United States Post Office Manual seemingly supports this position....” Wilson v. United States Postal Service, 441 F Supp 803, 806 (C.D. CA, 1977). The Wilson Court concluded: “The Court is impressed and indeed finds a substantial degree of merit with plaintiffs’ argument. It appears beyond dispute that Inglewood is lacking a full-time postmaster. Arguably, therefore, Inglewood has been reduced to the status of a postal station or branch. Although plaintiffs request more relief than this violation would afford, I am disposed to order the Inglewood Postmaster to return to his full-time duties at Inglewood and to order compliance with the requisites section 404(b) [now 404(d)] before the Inglewood Post Office is consolidated with the Marina Facility.” Wilson, at 807. ⁵ Similarly, in the Hopkins case, *supra*, the Court concluded “that there has been no consolidation because the Hopkins postmaster continues to operate the post office and to be responsible for the day-to-day management of this office....” Hopkins, at 299.

⁴ The Postal Service itself cites the Wilson case for this proposition in its Tuscaloosa litigation. Post Service Memorandum at 21.

⁵ The Wilson Court ultimately concluded that Inglewood had lost its postmaster before the effective date of present Section 404(d).

The Postal Regulatory Commission (then the Postal Rate Commission) has repeatedly recognized the essential nature of postmasters in its review of proposed post office closings. For example, in the very first decision the Commission rendered on the merits in a post office closing appeal, the Commission observed: “It is likewise clear from the legislative history cited above that the social existence of the community is to be considered. The Senate debate referred to the services provided by the postmaster or officer-in-charge outside the realm of postal business: assistance with correspondence and with Federal government business such as tax returns, social security, and other concerns of ordinary individual life.” In the matter of Lone Grove, Texas, PRC Docket No. A79-1, at 22 (May 7, 1979).

In the Supplementary Information for its Proposed Rule, the Postal Service states the longstanding definition of a “post office:” “A Post Office is an organizational unit headed by a postmaster that provides retail and delivery services, and mail processing to residents and businesses in the ZIP Code areas that comprise the office's exclusive delivery service area.” 76 Fed. Reg. 17794. This is the same definition that the Service recently provided the federal court in its Tuscaloosa litigation. Postal Service Memorandum at 15.

From the foregoing, it appears clear that Congress, in its legislative history and in its enactments, and the courts, the Commission, and even the Postal Service itself (at least prior to the release of this proposal), would disagree with the Postal Service's determination that the “designation of a retail facility as a Post Office... would not

depend on whether any responsible personnel is a postmaster.” 76 Fed. Reg. 17795. To preclude a clear violation of law and clear congressional intent, the Postal Service may not implement the second sentence of §241.1(a).

2. The Postal Service lacks the authority to disregard the statutory definition of a “postmaster”

The general powers of the Postal Service include the authority to “adopt, amend, and repeal such rules and regulations, **not inconsistent with this title**, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title[.]” 39 U.S.C. 401(2), (emphasis added).

When Congress authorized the Postal Service to “adopt, amend and repeal...rules and regulations” necessary to carry out its statutory functions under Title 39, Congress did not delegate to it the authority to ignore or rewrite the definitions of the statute.

The Postal Service disregards the plain language of 39 USC 1004(i)(3), which clearly defines the connection between a postmaster and a post office when it proposes that a post office may be managed by another type of postal employee. The statute must be interpreted in such a way that gives “effect, if possible, to every clause and word.” United States v. Menasche, 348 U.S. 528, 538-39 (1955). Moreover, the statute must be read as a whole; the Postal Service is not authorized to eliminate the definition

of a postmaster and its relationship to a post office by reading Title 39 “as a series of unrelated and isolated provisions.” Gustafson v. Alloyd, 513 U.S. 561, 570 (1995).

“Construing a statutory term...requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires [a court] to examine ‘the context in which statutory words are set -- the statute's purpose, structure, and history. . . .’” Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1522 (D.C. Cir. 1984), (quoting Natural Resources Defense Council, Inc. v. EPA, 725 F.2d 761 at 768 (D.C. Cir. 1984)).

The Postal Service states in its discussion of the new Proposed Rule that it intends to “clarify” that a “post office” does not need a postmaster:

Subsection 241.1(a) would also clarify Post Offices may be managed by postmasters as is commonly the case, or by other designated personnel. The designation of a retail facility as a Post Office, classified station, or classified branch would not depend on whether any responsible personnel is a postmaster.

76 Fed. Reg. 177945.

True to its declared intention, the actual language of the Proposed Rule provides: “A change in the management of a post office such that it is staffed only part-time by a postmaster, or not staffed at all by a postmaster, but rather by another type of USPS employee, is not a discontinuance action subject to this section.” Proposed 39 CFR § 241.3(a)(1)(iii); 76 Fed. Reg. 17797.

This result is not consistent with applicable law, court decisions, or congressional intent.

3. Impact of proposed removal of postmasters upon Complainants

As is the case with the Postal Service's proposed erasure of "consolidation" from a discontinuance action, the removal of a "postmaster" from a post office is said to no longer be "a discontinuance action." Therefore, no notice of appeal rights would need to be provided to the public, and the Postal Service would have no statutory duty to consider public policy, or the effect on employees.

Both the second sentence of proposed §241.1(a) and §241.3(a)(1)(iii) would tend to reduce the post office's responsibility, accountability, and service to its community, and would significantly increase the workload for surviving Postmasters. These two provisions, taken together or separately, would lead to a non-manager managing the operations of a retail facility that was formerly an independent Post Office, with a Postmaster as its manager. Senate Report 108-111 outlines Postmaster duties:

[Postmasters] are accountable for postal operations and services, including retail postal operations and community relations.

The individuals who would replace Postmasters do not have the requisite skills, training, or the appropriate experience and directives to manage postal operations or conduct appropriate community relations. Postmasters in adjoining Post Offices would need to try supervise the newly created stations and branches and their relations with their communities, thereby placing extraordinary operational pressures on their own Post Offices. In addition, such management and supervision could jeopardize compliance with the Sarbanes-Oxley Act, since auditing functions and financial checks

could be severely compromised by remote supervision of post offices. The impact of this issue on the Postal Service's Sarbanes-Oxley Act compliance is an issue that the proposal does not adequately address, and one the Commission may wish to explore with the Postal Service.

Proposed Rule §241.3(a)(1)(iii) attempts to insulate the removal of the Postmaster position from the initiation of the discontinuance process. A Postmaster is the manager in charge of a Post Office. The absence of a Postmaster position at the facility results in the creation of a subordinate facility. In Wilson v. U.S. Postal Service (441 F. Supp. 806), the court found that "the existence of a postmaster distinguishes a Post Office from a postal station or branch." Consequently, the act of replacing a Postmaster as the manager of a postal facility with another type of postal employee would constitute a conversion, and a Post Office consolidation within the meaning of §404(d). Hence, replacing the Postmaster with a non-Postmaster would trigger the discontinuance process.

C. Claim 3: The Postal Service is required by §3661(b) to obtain an advisory opinion from the Commission to close thousands of post offices, effecting a "nationwide change in service"

Concurrent with the Proposed Rules, the Postal Service has issued a list of prospective post offices, primarily in rural communities, that are undergoing the evaluation process prior to a decision to close the post offices. This list includes

thousands of post offices across the nation, which, if closed, would severely undermine the scope and intent of 39 USC §404(d) and 101(b).

The requirements of §3661(b) state in relevant part:

When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Rate Commission requesting an advisory opinion on the change.

Obviously, closing thousands of post offices across the entire United States is, by definition, both “nationwide” and a “change in service” for which the Postal Service has not sought a prior advisory opinion under 39 U.S.C. §3661, as is deciding to ignore the role of the Postal Service as the local face of the federal government and looking at small rural post offices only as ways to “access our products and services.” See National Postal Forum Prepared Remarks of Postmaster General Patrick Donahue, May 2, 2011 available at <http://www.usps.com/communications/newsroom/speeches/speeches.htm>.

The Complainants are currently receiving postal services across the nation. If the current post offices slated for closing are closed as proposed, the Complainants along with similarly situated members of the public will no longer receive postal services in accordance with the policies of the Act.

IV. Relief Requested

A. Temporary Stay

The Complainants express their concern that if the Proposed Rules are implemented, the Postal Service may begin implementing changes that harm Complainants and others similarly situated as well as the residents of those communities which will have their post offices lose their local focus as they are consolidated with other post offices and lose the responsibility, accountability, and transparency provided by local management. This includes but is not limited to: (1) converting post offices to, or replacing post offices with, stations or branches without public notice or evaluating the effect of the change upon local communities as required by 39 U.S.C. §404(d); and (2) changing the management of post offices, removing trained postmasters and managing post offices utilizing other, subordinate USPS employees in violation of 39 U.S.C. §1004(i)(3).

The Complainants believe that the Postal Service's Juggernaut will be difficult to stop once it is set in motion, and the damage to Postmasters and local communities, particularly rural customers, will be significant and irreversible.

The Complainants respectfully request that the Postal Service's Proposed Rule, "Post Office Organization and Administration: Establishment, Classification and Discontinuance," 39 C.F.R. Part 241, be stayed from taking effect as a final rule until such time as the Commission issues a final decision on the above-captioned case. In

the alternative, the Postal service could avoid what it might consider the negative precedent of having the Commission stay one of its proposed rules by voluntarily agreeing to stay any further activity in its Part 241 regulatory proceeding until the Commission's final ruling in this matter.

B. Declaratory Judgment

1. Claim 1: The Postal Service Lacks the Authority to erase “consolidation” and eliminate one of the rights of appeal Congress provided.

For the reasons stated above, the Complainants respectfully request a ruling from the Commission that the Postal Service's proposed rule violates 39 U.S.C. §401(2) and 39 U.S.C. §1004(i)(3).

2. Claim 2: The Postal Service Lacks the Authority to Remove “Postmaster” from the definition of “Post Office”

For the reasons stated above, the Complainants respectfully request a ruling from the Commission that the Postal Service's proposed rule violates 39 U.S.C. §401(2) and 39 U.S.C. §1004(i)(3).

3. Claim 3: The Large-Scale Proposed Closings is a Nationwide Change in Service which Requires an Advisory Opinion

For the reasons stated above, the Complainants respectfully request a ruling that the Postal Service must obtain an advisory opinion before closing thousands of post

offices, affecting nationwide postal service, and before abdicating its responsibility to serve communities through maintaining its nationwide network of rural post offices as local federal government offices.

4. Other Relief

Complainants request any other relief that the Commission deems just and proper.

V. Conclusion

Regulatory efforts by the Postal Service to make it “easier” to discontinue Post Offices and sidestep its statutory responsibility should not be taken lightly. Nor should regulatory proposals by the Postal Service designed to subvert the existing statutory discontinuance process be taken lightly as a specific matter. Moreover, regulatory efforts to stamp out the statutory position of Postmaster should be viewed not only as an alternative tactic to eliminate Post Offices and avoid the discontinuance process, but also as an attempt to sabotage Congress’ intent, which recognizes the unique and critical position that Postmasters hold in their communities and the services they provide in their communities. Top postal officials may feel (as so many have felt over the last four decades) that acting as the face of local government and having their rural post offices and postmasters play a central part in their communities is not a role that they wish to continue. The decisions to discontinue that role, however, is a decision for

Congress to make, not the Postal Service. Efforts by the Postal Service to make that decision by itself, which is what this whole proposal is about, should not be tolerated. Unless and until the law is changed, that remains a fundamental part of their mission.

Respectfully submitted this 23rd day of May, 2011.

/s/ Robert J. Brinkman

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individual Complainants.*

CERTIFICATE OF SERVICE

I hereby certify that, in compliance with Rule 3030.11, a copy of this Complaint has been served on the United States Postal Service at the following address on this 23rd day of May, 2011:

United States Postal Service
PRCCOMPLAINTS@usps.gov

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