

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules Applicable to Appeals)
of Post Office Closings)

Docket No. RM2011-13

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
COMMENTS REGARDING PROPOSED RULES
APPLICABLE TO APPEALS OF POST OFFICE CLOSINGS
(October 3, 2011)**

BACKGROUND

On August 18, 2011, the Commission issued Order No. 814, "Notice of Proposed Rulemaking regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices," commencing Docket No. RM2011-13. Order No. 814 set October 3, 2011 as the deadline for comments. On August 25, 2011, the Commission issued Order No. 823, "Supplemental Notice regarding Proposed Rules Governing Appeals."

The Commission proposes, *inter alia*, to remove Subpart H of Part 3001 of Chapter III of Title 39 of the Code of Federal Regulations, and to add Part 3025. The Commission makes this proposal believing that the current rules are "unnecessarily complex" and because "the Postal Service has recently revised its rules."¹ Order No. 814, p. 1.

**GENERAL COMMENT ON THE LIMITED ROLE OF THE COMMISSION
IN POSTAL SERVICE CLOSING OR CONSOLIDATING POST OFFICES**

While many of the Commission's proposed rules are helpful, the Commission should avoid the introduction of additional, arbitrary hurdles into the process of necessary right-sizing

¹ See 76 *Fed. Reg.* 41,413 (July 14, 2011).

of the retail operation at a time when the Postal Service is facing severe financial problems. It is essential that the Commission recognize its limited role in this area.²

The statutory scheme vests broad authority in the Postal Service for establishing and closing post offices. 39 U.S.C. section 404(a)(3) provides that the Postal Service has the power “to **determine** the need for post offices ... and to provide for such offices ... **as it determines** are needed.” (*Id.*, emphasis added.) 39 U.S.C. section 404(d)(1) imposes a duty on the Postal Service to provide “adequate notice” in deciding whether to close or consolidate a post office. 39 U.S.C. section 404(d)(2) specifies how the Postal Service makes a determination to close or consolidate a post office. 39 U.S.C. sections 404(d)(3) and 404(d)(4) provide that the Postal Service’s determination is to be in writing and made available to persons served by such post office. The Commission has no role with respect to effecting any of these statutory requirements. (Moreover, other provisions of applicable law reinforce Congress vesting broad managerial prerogatives in the Postal Service. *See, e.g.*, 39 U.S.C. sections 101, 202, 401-404.)

Under 39 U.S.C. section 404, the Commission’s **only** authority in this area is to entertain an **appeal** of a Postal Service determination under 39 U.S.C. section 404(d)(5) and 39 U.S.C. section 404(d)(6). In such cases, the Commission has the power to set aside a Postal Service determination **only** if it finds the Postal Service’s action to be: “(A) arbitrary,

² In view of Docket No. N2011-1, the Commission could be required to resolve appeals from the closings of over 2,800 post offices over the next year. With no clear statutory mandate, it is submitted that it would not seem prudent to assume the responsibility to hear another 500 appeals involving the closing of stations and branches, each within a 120-day deadline.

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.” 39 U.S.C. § 404(d)(5). The Commission’s basic role, therefore, is to hear an appeal under a standard that would accord due deference to the agency (Postal Service) decision, in accordance with Administrative Procedure Act-like standards. Clearly, such review authority does not allow the Commission to substitute its own judgment for that of the Postal Service in closing or consolidating facilities. No Commission rule should purport to govern the Postal Service’s actions under 39 U.S.C. sections 404(a)(3) or 404(d)(1) through (4), where the Postal Service was vested with exclusive jurisdiction to act.

SPECIFIC COMMENTS

These comments focus on three aspects of the Commission’s proposed rules which are seen as highly troublesome and in conflict with the Commission’s statutory authority:

- (i) the Commission’s definition of “post office” (proposed rule 3025.1(d));
- (ii) the Commission’s requirement of “adequate notice” (proposed rule 3025.3);

and

- (iii) the Commission’s decision to suspend all final determinations to close or consolidate a post office pending an appeal (proposed rule 3025.30).

These three proposed rules should be reconsidered and substantially revised in issuing final rules.

I. The Commission Has Incorrectly Defined “Post Offices,” as It Has No Statutory Authority to Hear Appeals from the Closing of Stations and Branches.

The Postal Service and the Commission have long disagreed about the scope of 39 U.S.C. section 404(d) — which states that the Commission’s jurisdiction to hear appeals applies to closing or consolidation of any “post office.” The Commission believes that it has authority to hear an appeal from a Postal Service decision to close or consolidate stations and branches. The Commission would attempt to enshrine its assertion of jurisdiction over stations and branches by redefining “post office” as “a Postal Service operated retail facility.” Proposed section 3025.1. The Commission explained that it “seeks to clarify the scope of its authority and eliminate any public confusion on when persons served by a particular office may appeal a determination to close or consolidate that office.” Order No. 814, p. 10.

The disagreement between the Postal Service and the Commission regarding the Commission’s jurisdiction over appeals of closures or consolidations of Postal Service-operated retail stations and branches is longstanding. *See, e.g.*, Order No. 814 (Aug. 18, 2011), pp. 10-11; Docket No. N2009-1, PRC Advisory Opinion (Mar. 10, 2010), p. 65; Docket No. A2010-3, Comments of the United States Postal Service Regarding Jurisdiction Under (Current) Section 404(d) (Apr. 19, 2010). Valpak has been clear in support of the same interpretation of “post office” taken by the Postal Service. *See* Docket No. A2010-3, Answering Brief of Valpak Direct Marketing Systems, Inc., Valpak Dealers’ Association, Inc., and Association of Priority Mail Users, Inc. (Apr. 19, 2010). What has not been settled in a long string of appeal dockets, nature of service dockets, and Postal Service rulemakings, the

Commission now attempts to settle in its own rulemaking by creating its own definition of “post office.”³

The Commission grounds its proposed definition in “the plain meaning” of the term. Order No. 814, p. 10. Accordingly, it does not invoke any authority to interpret an ambiguous term. *See, e.g., U.S. Postal Service v. Postal Regulatory Commission*, 599 F.3d 705, 710 (D.C. Cir. Mar. 30, 2010). In support of Valpak’s belief that “post office” unambiguously means that a “post office” is not a station or branch, and that the Commission’s “plain meaning” argument is not persuasive, Valpak refers to and incorporates by reference its Answering Brief of Valpak Direct Marketing Systems, Inc., Valpak Dealers’ Association, Inc., and Association of Priority Mail Users, Inc. (Apr. 19, 2010) filed in Docket No. A2010-3.

II. The Commission Seeks to Impose Non-statutory Regulatory Requirements on the Postal Service.

Current law has two provisions which relate to dissemination of information to the public about the closing of a post office.

The **first** requirement occurs early in the process: “[t]he Postal Service, **prior** to making a determination ... as to the necessity for the closing or consolidation of any post office, [to] 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.” 39 U.S.C. § 404(d)(1) (emphasis added).

³ It is interesting that the Postal Service already has gone beyond the requirement of the statute, possibly in response to the Commission’s concerns and recommendations expressed in its advisory opinion in Docket No. N2009-1, by modifying its own rules and procedures to apply with respect to closing not just post offices but also to the closing of stations and branches.

The **second** requirement occurs late in the process: “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.” 39 U.S.C. § 404(d)(4) (emphasis added).

Currently, the Commission’s rules are confusing with respect to these statutory provisions:

Pursuant to section [404(d)] of the Act any decision to close or consolidate a post office must be preceded by 60 days **notice** to persons served by such post office, the opportunity for such persons to **present their views**, and a written determination based upon consideration of each of the factors listed in section [404(d)(2)] of the Act. This **notice** must include a provision stating that, pursuant to Pub. L. 94-421, a **final** Postal Service determination to close or consolidate a post office may be appealed to the Postal Regulatory Commission at 901 New York Avenue NW., Suite 200, Washington, DC 20268-0001, within 30 days after the issuance of a written determination by the Postal Service. [39 C.F.R. § 3001.110 (emphasis added).]

Current rule 3001.110 conflates the “adequate notice” and “made available” requirements in section 404(d).

Clearly, the Commission’s current rule should be improved. However, the proposed rule overreaches. The Commission states that “[s]ection 3025.3 contains **new notice** requirements.” *Id.*, p. 14 (emphasis added). This proposed regulation is deeply flawed. First, it purports to regulate the Postal Service both in making, and making available, a determination prior to the filing of an appeal — areas where the Commission has no authority. Second, even if the Commission had authority to mandate that the Postal Service inform the public in a specific manner, such mandate must be consistent with the statute. 39 U.S.C. sections 404(d)(3) and 404(d)(4) do not speak of “notice” at all, and are therefore different from the requirement of “adequate notice” in section 404(d)(1). Subsections (d)(3) and (4)

require that the Postal Service make available to persons served its determination to close or consolidate a post office. A statutory requirement that such determinations be “made available” is substantively different from a requirement that “adequate notice” be given.

III. The Commission Lacks the Authority to Order an Automatic Suspension of all Postal Service Determinations to Close or Consolidate a Post Office until Resolution of an Appeal.

Proposed rule 3025.30 states:

A final determination to close or consolidate a post office is **suspended** until final disposition by the Commission when a person files a timely Petition for Review.

In its explanation, the Commission stated that it “believes that, absent extraordinary circumstances, **no post office** should be closed or consolidated if an appeal is pending, and requiring a petition to apply for a suspension causes **unnecessary paperwork** for both the petitioner and for the Postal Service.” Order No. 814, p. 5 (emphasis added).

The Commission’s statutory power to suspend each final determination pending an appeal is quite different from that presumed by the proposed rule. The statute uses the permissive word “may,” and that power is stated with reference to “the determination” under review:

The Commission **may** suspend the effectiveness **of the determination** of the Postal Service until the final disposition of the appeal. [39 U.S.C. § 404(d)(5) (emphasis added).]

This statutory language vests the Commission with **discretion** in suspending **each** final determination. The use of the phrase “the determination” refers to each Postal Service determination — not all that may thereafter be filed. If Congress wanted all Postal Service determinations to be suspended pending appeal, it could have provided that — but it did not.

Therefore, the statute does not vest the Commission with the authority that it would assume in its proposed regulation — to exercise its discretion before any appeal is even filed, through a blanket rule. Indeed, a blanket rule is the antithesis of discretion. The Commission’s rationale of minimizing “paperwork” provides no justification to avoid the clear meaning of the statutory suspension power.

Respectfully submitted,

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers’ Association, Inc.