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ORDER NO. 1254

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Before Commissioners: Edward J. Gleiman, Chairman;  
W.H. "Trey" LeBlanc III, Vice Chairman;  
Dana B. Covington, Sr.; Ruth Y. Goldway; and  
George A. Omas

Complaint of Joseph B. Hurwitz, et al.

Docket No. C99-3

### ORDER DISMISSING COMPLAINT

(June 15, 1999)

*Procedural History.* On April 9, 1999, Joseph B. Hurwitz and Steven G. Kimbell ("Hurwitz, et al.") filed a formal complaint pursuant to Title 39, Section 3662 of the United States Code. Hurwitz and Kimbell are residents of, and owners of home-based businesses in, an area known as Montgomery Village in Montgomery County, Maryland. The Complaint<sup>1</sup> alleges that the United States Postal Service's institution of a new ZIP Code specifically for the Montgomery Village area is based on illegally promulgated and implemented survey guidelines. According to Complainants, the Service's action constitutes an illegal taking of property — a Fifth Amendment takings claim — in the form of home-based business expenses incurred for replacement of stationery, business cards, brochures and checks due to the postal address change. Complaint at 11, Appendix A. Complainants also allege violations of 39 U.S.C. § 3661(b) and (c) (*id.* at 2),<sup>2</sup> 5 U.S.C. §§ 603, 604, 605 and 610 (*id.* at 2-3),<sup>3</sup> 39 U.S.C. § 403(c) (*id.* at 6),<sup>4</sup>

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<sup>1</sup> The Complaint is entitled "Joseph B. Hurwitz, et al., Class-Action Complaint of Wrongful Change of Postal Address and Motion to Rescind the 'ZIP Code Boundary Review Process' Survey Guidelines" (Complaint).

<sup>2</sup> Sections 3661 (b) and (c) of Title 39 of the United States Code provide in relevant part that:

(b) 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.

the Tenth Amendment of the U.S. Constitution, "the due process clause of the Fifth Amendment to the United States Constitution" (*id.* at 8), the "unjust enrichment doctrine" (*id.* at 9) and the First Amendment (*id.* at 14). Finally, certain criminal charges are alleged, such as "actionable fraud" (*id.* at 14), mail fraud under 18 U.S.C. § 1341 (*id.* at 15), and Racketeer Influenced and Corrupt Organization Act (RICO) violations under 18 U.S.C. §§ 1961 and 1962 (*id.* at 15-17). As redress for all these alleged violations, Complainants seek that: (1) the address changes and ZIP Code boundary changes complained about be reversed and restored to their prior configurations; (2) postal customers be duly notified in writing of the reversal; and (3) the Postal Service Survey Guidelines be rescinded. *Id.* at 17-18.

Complainants first sought redress for their claims in the federal district court system. The district court suit named the Postal Service as a defendant, as well as the Montgomery Village Foundation (Complainants' homeowners association), the Foundation executive vice-president, and Kettler Brothers, Inc., a Maryland corporation that develops homes in Montgomery Village. Motion of United States Postal Service to Dismiss Complaint (Postal Service Motion to Dismiss) (May 10, 1999), Exhibit 1 (Memorandum of the U.S. District Court for the District of Maryland) at 1. Defendants allegedly conspired with each other to change Complainants' neighborhood from Gaithersburg, Maryland 20879 to Montgomery Village, Maryland, 20886, with home-based businesses incurring substantial expenses as a result of the address change. *Id.*, Exhibit 1 at 2. The district court construed Complainants' allegations against the

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- (c) The Commission shall not issue its opinion on any proposal until an opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing ...

<sup>3</sup> Sections 603, 604, 605 and 610 of Title 5 of the United States Code discuss rulemaking criteria and periodic rule review for federal agencies, and include requirements for appropriate notice to all interested parties and opportunity for public comment.

<sup>4</sup> Section 403(c) of Title 39 of the United States Code states that:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mail, nor shall it grant any undue or unreasonable preferences to any such user.

Postal Service to include tort violations and constitutional claims based on the Fifth, Tenth, Fourteenth and Twenty-Sixth Amendments of the United States Constitution, with common law fraud and civil conspiracy claims asserted against the non-governmental defendants. *Ibid.*

On January 20, 1999, the U.S. District Court for the District of Maryland dismissed Complainants' action. Complainants' subsequent Motion for Reconsideration was denied on February 4, 1999. Complaint at 13. In its dismissal, the court held that Complainants' incurred business expenses due to the address change did not constitute a "taking" under the Fifth Amendment.<sup>5</sup> Postal Service Motion to Dismiss, Exhibit 1 at 3. Complainants' other constitutional claims against the Postal Service likewise were disposed of summarily. *See id.*, Exhibit 1 at 3-4. The court dismissed Complainants' tort claims against the Postal Service due to lack of jurisdiction according to the Federal Tort Claims Act (FTCA). *Id.*, Exhibit 1 at 4. Under the FTCA, a plaintiff must exhaust his administrative remedies prior to filing an action in a district court when the action is for monetary damages and is based on a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Ibid.* (quoting 28 U.S.C. § 2675(a)). While the court did not specify Complainants' administrative remedies in this instance, it did find the FTCA applicable to the situation because the Postal Service was acting within the scope of its statutory authority when it changed Complainants' postal address.<sup>6</sup> *Id.*, Exhibit 1 at 4.

In the present case, the Postal Service filed two motions on May 10, 1999:  
(1) Motion of United States Postal Service for Extension of Time in which to File an

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<sup>5</sup> According to the court, "it is only regulatory actions that compel a physical invasion of an owner's real property or deny 'all economically beneficial or productive use of land' that are compensable takings under the Fifth Amendment." Postal Service Motion to Dismiss, Exhibit 1 at 3 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). Compensation is required only where "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.*, Exhibit at 3 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992)).

<sup>6</sup> With regard to charges leveled against the non-governmental defendants named in Complainants' federal district court case, the district court dismissed all charges. Postal Service Motion to Dismiss, Exhibit 1 at 4. The court found that the Complainants had failed to state a claim for fraud, and that the conspiracy allegations failed as well, where no tort on which to base the allegations was alleged, as required. *Ibid.*

Answer (Postal Service Motion for Extension); and (2) Motion of United States Postal Service to Dismiss Complaint. In the Postal Service Motion for Extension, the Service notes its contemporaneous filing of the motion to dismiss the Complaint, and therefore moves that the 30-day time limit for the filing of an answer be tolled pending final resolution of that motion in the interest of judicial economy. Postal Service Motion for Extension at 1. In support of this request, the Postal Service refers to the Federal Rules of Civil Procedure, which provide for deferral of the filing of a responsive pleading in similar circumstances, and further maintains that Complainants' interests will not be substantially prejudiced by this deferral. *Ibid.*

In its Motion to Dismiss the Complaint, the Postal Service argues that: (1) Complainants have failed to state a claim under 39 U.S.C. § 3662 because they have not alleged either that the Service is charging rates that do not conform to the policies set forth in Title 39, or that they are not receiving postal service in accordance with that Title's policies; (2) Complainants' allegations concern operational matters which are within the exclusive discretion of the Postal Service and therefore removed from the Commission's jurisdiction; and (3) lack of jurisdiction notwithstanding, the Commission has no authority under 39 U.S.C. § 3662 to grant the relief requested by Complainants. Postal Service Motion to Dismiss at 3.

*Facts of the Controversy.* The limited facts of this case are gleaned from the pleadings as follows:<sup>7</sup> Effective January 1, 1998, the ZIP Code of an area in Gaithersburg, Maryland known as Montgomery Village was changed by the Postal Service. Complaint at 13. As a result of this action, residents and businesses in that area experienced a change in the last line of their postal address from "Gaithersburg, Maryland 20879" to "Montgomery Village, Maryland 20886." *Id.* at 8.

This redesignation apparently was prompted by a request from the Montgomery Village Foundation, the homeowners association for that area, and Kettler Brothers,

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<sup>7</sup> As previously noted, the Postal Service has asked to defer submission of an answer to the Complaint pending resolution of its Motion to Dismiss. The Service's Motion to Dismiss presents a comprehensive legal analysis, but essentially does not challenge Complainants' recitation of the facts of the case, although the district court orders are attached. For purposes of evaluating the Postal Service Motion to Dismiss, the Commission assumes the facts to be as alleged in the Complaint.

Inc., a Maryland corporation that develops homes in Montgomery Village. Postal Service Motion to Dismiss, Exhibit 1 at 1. The Postal Service approved the ZIP Code change based to some extent upon the results of the Service's ZIP Code Boundary Review Process, a 1991 set of regulations which provides guidelines for the conduct of a survey of an area to assess the appropriateness of a ZIP Code modification. Complaint at 2, 5. Complainants Hurwitz, et al. are residents of, and owners of home-based businesses in, Montgomery Village who participated in the survey and objected to the ZIP Code change.

*Legal Arguments of the Parties.* Complainants' principle objections relate to the fairness and legality of the ZIP Code Boundary Review Process (specifically, the survey guidelines), the business material expenses incurred due to the address change, and the change of the area's postal identity from "an incorporated city with international standing in the scientific world, to that of an unincorporated development whose name does not even appear on many regional or national maps ... ." *Id.* at 2-3, 12, 15; Opposition to United States Postal Service's May 10, 1999 Motion to Dismiss Complaint (May 18, 1999) (Opposition) at 5.

Complainants offer a number of legal arguments in support of their Complaint brought under 39 U.S.C. § 3622. In the first instance, Complainants allege that the Postal Service's ZIP Code Boundary Review Process (Boundary Review Process), through which the Montgomery Village area was ultimately accorded its new postal identity and ZIP Code, was issued and implemented in 1991 in violation of 39 U.S.C. §§ 3661(b) and (c), 403 (c) and 5 U.S.C. §§ 603, 604 and 610. Complaint at 2-3, 6. Specifically, the Complaint charges that the Boundary Review Process constitutes a nationwide or substantially nationwide change in the nature of postal services<sup>B</sup> with an impact on delivery, and as such, the Postal Service was obligated under federal law to submit the Boundary Review Process for consideration before the Commission, with an opportunity for a hearing on the record. *Id.* at 2; Opposition at 1-2. Notice of the

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<sup>B</sup> Complainants highlight that the phrase "postal services" broadly encompasses "the full range of services USPS provides the people, without any limitation whatsoever." Opposition at 6. As such, the Service's obligations incurred under Title 39 in the provision of postal services is not restricted to the delivery of mail. *Ibid.*

Boundary Review Process as a proposed or final rule also should have been provided in the Federal Register for public comment (accompanied by Service certification that the rule would not have a significant economic impact on a substantial number of small entities). Complaint at 2-3.

Complainants maintain that the concept of a postal identity, emphasized in the Boundary Review Process, is not defined in any Postal Service source, yet confers a status on the numerous "town-like entities" on a parity with incorporated town names in the National 5-Digit ZIP Code and Post Office Directory. *Id.* at 4-5. Despite this level of equality, the determination of a postal identity apparently is subject to less rigorous standards than are applicable to a community seeking official state recognition. *Id.* at 6. It is Complainants' position that the Postal Service's establishment of postal identities violates the Tenth Amendment of the U.S. Constitution, which accords the state or the people those powers not delegated to the federal government, as the Service "regulates and sets policy for something (postal identity) which is not legally defined, over which it can show no basis of legal authority ...." *Ibid.*

Moreover, according to Complainants, the Boundary Review Process by which the Postal Service designates these postal identities violates section 403(c) of the Postal Reorganization Act by unjustly granting an undue and unreasonable preference to developers and community groups. *Ibid.* Those parties, versus other users of the mails, have the exclusive right to request that the Service implement the Boundary Review Process by initiating a survey. In this case, Complainants allege that those parties provided a biased list of names of affected postal customers to the Postal Service for participation in the survey process. This list ostensibly did not reflect all postal customers, but rather omitted renters, which Complainants maintain resulted in exclusion of "a disproportionate number of blacks, Hispanics, and newly nationalized citizens from an election issue affecting the public interest." *Id.* at 12. The Postal Service did not check the list for accuracy or completeness, nor apparently is it obligated to do so under the guidelines. Ultimately, 12,000 ballots on the proposed boundary/ZIP Code change were sent (to a community which Complainants number at 34,000, with about 26,000 postal customers affected by the proposed change), eliciting

3,315 responses. Of those responding, 1,663 community members voted for the ZIP Code change to 20886, while 1,652 members opposed the change. *Ibid.* Complainants suggest that the net 11 responses voicing in favor of the ZIP Code change were too small a number on which to base such an action, although they acknowledge that the Postal Service's Survey Guidelines do not gauge community approval as a suitable basis for denial of the requested change, but merely a consideration. *Id.* at 11-12.

As a result of the ZIP Code/address alteration, Complainants argue that they have suffered unjust economic loss by the unnecessary deprivation of their right to utilize business materials which bear the former last line of their address: Gaithersburg, Maryland 20879. According to Complainants, the Postal Service action thus constitutes an unjust taking in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 8. In contrast to Complainants' financial losses, the Service and the requesting real estate developers and community group are unjustly enriched by the address change, reaping monetary benefits from the new postal identity, which is recognized as a valuable commodity. *Id.* at 8-9.

Complainants' remaining allegations against the Postal Service include actionable fraud and mail fraud (committed "whenever changes to 'postal identities' are made [with consideration of mailed surveys] based solely on external requests for same pursuant to the Survey Guidelines"), as well as a claim for treble damages under the RICO Act. *Id.* at 14-17. Finally, it is Complainants' contention that the Survey Guidelines at issue deliberately pervert and corrupt the well-established USPS regulation MI PO-410-92-1, a Postal Service Management Instruction issued in January 1992 addressing in detail ZIP Code authorization and assignment. Opposition at 2; Complaint, Appendix B.

According to Hurwitz, et al., the scope of this Complaint falls within the Commission's jurisdiction under 39 U.S.C. § 3662, as the "legal implementation and administration of USPS' ZIP Code system impacts delivery service nationally." Opposition at 2. The Complainants seek the following relief from the Commission: (1) the reversal of the address changes and ZIP Code boundary changes at issue, with restoration to their prior configurations; (2) written notification of the reversal to postal

customers; and (3) rescinding of the Postal Service Survey Guidelines. Complaint at 17-18. In their Opposition, Complainants emphasize that the relief sought is in fact provided for in 39 U.S.C. § 3625, with Commission consideration of the Complaint culminating in recommendations sent, if appropriate, to the Board of Governors who could then grant the actual requested relief. Opposition at 7.

In its Motion to Dismiss the Complaint, the Postal Service argues that the Complaint fails to raise rate, classification or service issues appropriate for Commission consideration under 39 U.S.C. § 3662, and further requests relief which the Commission lacks authority to provide. Postal Service Motion to Dismiss at 6. Specifically, the Complaint does not allege a rate problem, nor does it effectively demonstrate that Complainants' current postal services are not in conformity with Title 39 policies. *Id.* at 4. According to the Postal Service, Complainants have continued to receive mail delivery service to their homes as before the ZIP Code change. *Ibid.*

In fact, the Postal Service maintains that no service issues are involved in this case; rather, Complainants' problem is that the mail they now receive must bear a different ZIP Code and post office designation than previously. As such, the issue directly concerns operational details of the Postal Service's administration of the nation's mail delivery system, which is within the exclusive jurisdiction of the Service. *Id.* at 4-5.

Finally, the Postal Service contends that even if the Complaint were construed to be within the purview of 39 U.S.C. § 3662, the Commission lacks authority to grant the relief requested by Complainants, which includes restoration of their former ZIP Code boundary and the rescinding of the Postal Service Survey Guidelines. *Id.* at 5-6.

*Commission Analysis.* Upon review of the facts of the Complaint and application of relevant law, the Commission grants the Postal Service's Motion to Dismiss. The Hurwitz et al., Complaint about the postal address ZIP Code change is brought pursuant to 39 U.S.C. § 3662, which provides in relevant part:

Interested parties . . . who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form



and in such manner as it may prescribe. The Commission may in its discretion hold hearings on such complaint.

Section 3001.82 of the Commission's regulations, which addresses the scope and nature of complaints, states in relevant part that:

The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the [Postal Reorganization] Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

39 C.F.R. § 3001.82. Past Commission complaint cases have interpreted this provision, in conjunction with 39 U.S.C. § 3662, to further require consideration of whether the Postal Service acted in an arbitrary, discriminatory, capricious or unreasonable manner in a given case, "as for example, if the Postal Service did not afford complainants an opportunity to present their grievances to responsible management." Docket No. C83-1, PRC Order No. 512 at 2 (July 12, 1983). See also Docket No. C84-3, PRC Order No. 580 (Sept. 24, 1984). While this provision specifically allows the Commission to hold hearings on rate and classification complaints, the Commission has no direct authority over operational aspects of postal management. The Commission is limited to rendering a public report on issues not related to rates or classifications, upon which the Postal Service may act in its discretion. See Docket No. C83-2, PRC Order No. 524 at 6-7 (Sept. 2, 1983).

In the Commission's view, the present Complaint does not satisfy the § 3662 requirements for a Commission hearing. It is recognized that the issue of ZIP Code boundaries raised by Complainants is national in nature, as the Boundary Review Process is implemented across the country as deemed necessary by the Postal Service, with ZIP Code changes made accordingly. However, the alteration of ZIP

Code boundaries is clearly an operational matter within the exclusive jurisdiction of Postal Service management, in compliance with the policies set forth in Title 39.

It is important to note that while the Postal Services retains control over operational matters, the Commission nonetheless has authority to consider complaints on such issues if the circumstances indicate that a particular Service operational policy is arbitrarily discriminatory on its face or implemented in an arbitrarily discriminatory manner. Even granting that all facts alleged by Complainants are true, the circumstances of this case do not reach a level of arbitrary discrimination that violates postal policy as provided for in Title 39.

Complainants are understandably concerned that the Survey Review Guidelines may not have given all mail recipients in Montgomery Village the opportunity to express an opinion on the boundary realignment and ZIP Code change.<sup>9</sup> However, the Postal Service clearly indicates that the Survey Review Guidelines are but one factor in the decision to alter a ZIP Code boundary. Use of the Survey Review Guidelines, even if they are somewhat flawed, does not appear to be a discriminatory action by the Postal Service. The Service is under no obligation to design and conduct its survey in the same manner and under the same standards that Maryland sets forth for communities seeking status as incorporated towns or cities.

The Commission is concerned that the problems cited by Complainants indicate that there is substantial room for improvement in the Boundary Review Process. The Postal Service should reexamine this process and implement methods which may ensure more fully the inclusion of all interested parties. Certainly, the Service is able to contact all postal patrons in an affected area with a saturation mailing. However, even if the Commission were to accept as true all the facts alleged by the Complaint, the Postal Service would not have failed to provide service consistent with Title 39 policies.

*Conclusion.* Based upon the above analysis, the Commission concludes that Complainants have failed to present an issue appropriate for Commission action under 39 U.S.C. § 3662, as implemented by Commission regulations. Therefore, the

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<sup>9</sup> As Complainants had no interest in the initiation of the Boundary Review Process, questions with regard to limits on parties accorded standing to start the process are not germane.


Complaint is dismissed, and the Postal Service's Motion for Extension to file an answer is rendered moot.

It is ordered:

1. The Motion of United States Postal Service to Dismiss Complaint [of Hurwitz, et. al], filed May 10, 1999, is granted.
2. The Motion of United States Postal Service for Extension of Time in which to File an Answer, filed May 10, 1999, is deemed moot.

By the Commission.

(S E A L)

  
Margaret P. Crenshaw  
Secretary