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POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:	Robert G. Taub, Acting Chairman; Mark Acton; Tony Hammond; and Nanci E. Langley
Public Inquiry Concerning the Terms of 39 U.S.C. 404(d)	Docket No. PI2016-2

REPLY COMMENTS OF STEVE HUTKINS ON THE COMMISSION'S JURISDICTION OVER POST OFFICE CLOSINGS

(March 29, 2016)

Aside from the Postal Service, the commenters on this public inquiry docket are in agreement that the Commission should not interpret 39 U.S.C. § 404(d) in ways that would narrow the Commission's jurisdiction over post office appeals. As the Public Representative observes in her Initial Comments:

> Because the Commission's jurisdiction is the sole oversight of the opportunity for public participation concerning these matters, the statute and the public interest demand that the Commission avoid unnecessarily constraining its ability to consider [a] determination of the Postal Service to close or consolidate any post office."[1]

Any reinterpretation of 404(d)(5) should therefore "reconfirm the statutory framework."

[1] Public Representative's Comments on the Commission's Ability to Review Postal Service Determinations to Close or Consolidate Any Post Office (February 5, 2016), p. 4.

The commenters stress that it is crucial for the Commission to hear appeals on all post offices — whether they be stations, branches, contract post offices, community post offices, or independent post offices. The commenters are also critical of statutory interpretations that would narrow the Commission's jurisdiction by treating some post office closures as "rearrangements of postal services" or by imposing a so-called "sole source" test on appeals. As the Public Representative states, "The Commission must take care not to limit its jurisdiction so as to permit elimination of a community's access to effective or regular postal services without the statutory safeguards for process." (p. 7)

While the commenters are agreed on these issues, the Postal Service takes a different view. The following comments address the main points in the Postal Service's Initial Comments.

1. The Postal Service's interpretation of 39 USC 404(d) should not be accorded deference.

In its Initial Comments (Section II-A), the Postal Service argues that it should be accorded deference in interpreting 39 USC 404(d).[2] This argument is problematic for a number of reasons.

The Postal Service begins by citing *Chevron* and saying that this precedent shows it "should be accorded deference when reasonably interpreting the statutes that it administers." While I am not an attorney, this

[2] United States Postal Service Comments on the Interpretation of Terms Related To 39 U.S.C. § 404(d) (February 5, 2016).

strikes me as a misinterpretation of *Chevron. As* Time Warner observed in its comments to the Commission on the exigent rate increase, *Chevron* is about judicial review of an agency's interpretations of statute. It is *not* a tool for statutory interpretation by an agency.[3] The premise of *Chevron* is that when the statute is ambiguous, the courts should defer to the agency charged with implementing the statute to make interpretations. *Chevron* might come into play if the Postal Service were to petition the courts in opposition to the Commission's interpretation of 404(d), but it is not relevant to the issue at hand, namely how the Commission should interpret the statute.

Even if the issue were to be petitioned to the courts, deference would not necessarily be due to the Postal Service. Section 404(d)(5) charges the Commission, not the Postal Service, with responsibility for reviewing appeals. It is therefore up to the Commission, not the Postal Service, to interpret this section of the statute. Moreover, it is not up to the Postal Service to determine whether or not its interpretation of the statute is "reasonable." That too would be up to a court to decide. In any case, simply because the Postal Service's interpretation of the statute may appear reasonable is no reason for the Commission to accept that interpretation. The Commission is charged by the

[3] Initial Comments of Time Warner Inc. in Response to Commission Order No. 757**,** Docket No. R2010-4R, July 25, 2011:

> *Chevron* is not very useful to an agency as a tool for statutory interpretation. The point may seem almost too obvious to need stating, but we will state it anyway. The *Chevron* framework was developed for use by appellate courts in reviewing agency interpretations of law. Any attempt to use that framework for the initial task of interpretation will show that it is far from adequate for the purpose."

statute with reviewing appeals, and the Commission must make its own interpretation.

The Postal Service proceeds to argue that "in instances where an independent agency acts as a limited adjudicatory body, reviewing decisions of the agency with policymaking authority, courts have deferred to the interpretations of the policymaking body over those of the adjudicatory body, even if those interpretations implicate the adjudicatory body's jurisdiction" (p. 2). In support of this argument, the Postal Service cites *Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp*. According to the Postal Service, "this precedent indicates that '[w]hen the responsibility for administering an act has been split,' a court is 'to defer to the office that has the policy-making authority.'"[4] The Postal Service states that it is "the policy-making authority," and it therefore should be granted deference in the interpretation of the statute.

As with *Chevron*, however, the *General Dynamics* case was about judicial review of an agency's interpretation of a statute. The case involved what the court should do when two agencies disagree over the interpretation of

[4] *Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992). The full passage from which the quotation was taken reads as follows:

> When the responsibility for administering an act has been split, the Supreme Court has directed us to defer to the office that has the policy-making authority. Congress delegated to the Secretary of Labor the power to prescribe rules and regulations under the Act. 33 U.S.C. § 939(a) (1988). In turn, the Secretary set up the Office of Workers' Compensation Programs, the head of which is the Director. 20 C.F.R. § 701.201 (1992). The Secretary delegated to this Office "all functions of the Department of Labor with respect to the administration of benefits programs" under the Act, 20 C.F.R. § 701.202 (1992), and designated the Director to represent her in all review proceedings, 20 C.F.R. § 802.410(b) (1992). Thus, the Director, as the policy-making authority, is to be accorded deference.

a statute. But the Commission's public inquiry docket about 404(d) does not involve judicial review. The Commission has simply asked for comments about how the statute should be interpreted. As with *Chevron*, *General Dynamics* might become relevant if this case were to be reviewed by the court, but it is premature to invoke such precedents.

In citing *Chevron* and *General Dynamics,* the Postal Service argues that it should have the last word on how to interpret 404(d). If that were true, there would be no need for this docket to begin with. The Commission would only need to ask the Postal Service how to interpret the statute. Public comment on the matter would not be necessary.

If the Postal Service were correct in its view that deference must be accorded to the "policy-making body" rather than the "adjudicatory body," the Commission would need to defer to the Postal Service in other matters besides those being considered in this docket. The Commission is charged with adjudicatory responsibilities in many contexts, such as complaints and rate cases. If the Postal Service were always due deference when there was a difference of opinion with the Commission in these matters, the Postal Service would not need to go to court to contest the Commission's orders, as has happened on many occasions — e.g., the exigent rate increase, the *Gamefly* case, the order on price adjustments regarding mail preparation requirements, and so on.[5]

[5] United States Postal Service v. Postal Regulatory Commission, U.S. Court of Appeals, Case No. 14-1009; United States Postal Service v. Postal Regulatory Commission, U.S. Court of

When the Commission and the Postal Service have gone to court over disagreements about interpreting a statute, the courts have not automatically concluded deference is due to the Postal Service. In fact, the courts have often determined that it is the Commission, not the Postal Service, which should be given deference. In May 2015, for example, the US Court of Appeals for the District of Columbia ruled on the Postal Service's appeal of the Commission's ruling on Price Adjustments for Market Dominant Products and Related Mail Classification Changes.[6] The court ruled that the statute and regulations were ambiguous, and it was up to the Commission, not the Postal Service, to interpret them. The Postal Service did not argue, as it is doing now, that its interpretation of the statute should be given deference because it is the policy-making authority.

I have not been able to locate any instance in which the Postal Service has introduced this line of argument and cited the *General Dynamics* case. Nor has the Postal Service made this argument in previous post office appeals cases before the Commission. The Postal Service has often expressed disagreement with the Commission about the meaning of 404(d) (e.g., the definition of "post office" with respect to stations and branches), but it has never asserted its right to deference as the "policy-making authority." One wonders why the Postal Service decided that this argument was suddenly relevant to this docket.

Appeals, Case No. 15-1338; United States Postal Service v. Postal Regulatory Commission, U.S. Court of Appeals, Case No. 13–1308.

[6] United States Postal Service v. Postal Regulatory Commission, No. 13–1308 (May 12, 2015)

The PRA and the PAEA do not give the Postal Service carte blanche to interpret and administer postal laws. If that were the case, there would no need for a regulatory commission at all. The Postal Service obviously has a large role to play in administering the PRA and PAEA, but its role is not exclusive. The Commission also plays a significant role, and in both acts Congress expressly delegated to the Commission responsibility for reviewing appeals on post office closings. In so doing, Congress also delegated authority for interpreting what types of facilities are encompassed by the term "post office" and what it means to "close or consolidate" a post office. The Commission has its own statutory obligations, and just as it up to the Postal Service to interpret the statutes that govern its responsibilities, it is up to the Commission to interpret the statutes that govern the Commission's responsibilities.

The Postal Service's regulations and handbooks define "post office" in ways that exclude stations, branches, Contract Postal Units (CPUs) and Community Post Offices (CPOs). The Commission has long held that the term "post office" does encompass all of these retail facilities and that 404(d) applies to all of them. There is absolutely no reason for the Commission to defer to the Postal Service on this issue.

2. The Postal Service's previous rulemakings that involved discontinuances (241.3) and relocations (241.4) did not address the questions being examined in this docket.

In its Initial Comments (Section II-B), the Postal Service argues that it "has already developed definitions for section 404(d) terms and related terms," as if that should put an end to the issues being examined in this docket. But the Postal Service's claim is not accurate. The previous rulemakings dealt with issues other than those being addressed here.

The 2011- 2012 rulemaking regarding post office closures and consolidations was about preparing the way for POStPlan.[7] This rulemaking created three new categories of post office — Remotely Managed Post Offices (RMPOs), Part-Time Post Offices (PTPOs), and Administrative Post Offices (APOs) — and redefined the term "consolidation" so that the Postal Service could downgrade thousands of independent post offices to be RMPOs without going through a discontinuance procedure on each one (as would have been required under the then-current definition). This rulemaking did not address the issues associated with the "relocation," "rearrangement" and "realignment" of postal services in a community, or the "sole source" test that has been invoked in the Commission's orders on CPUs and CPOs.

The second rulemaking conducted by the Postal Service took place in 2014-2015.[8] It revised the federal regulations on "relocations" (39 C.F.R. § 241.4). As the Postal Service observes in its Initial Comments, "In the course of that rulemaking, the Postal Service identified the context in which relocations

[7] Final Rule, Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 77 Fed. Reg. 46,950 (Aug. 7, 2012).

[8] Final Rule, Relocating Retail Services; Adding New Retail Service Facilities, 80 Fed. Reg. 9,190 (Feb. 20, 2015).

arise, and made clear that the procedures related to relocations and similar actions were independent of section 404(d) and 39 C.F.R. § 241.3."

As I emphasized in my Initial Comments, the relocations covered by 241.4 are completely different from the actions that have been identified as "rearrangements," "realignments," and "relocations" by the Commission in *Oceana* and its progeny, up through *Pimmit* and *Glenoaks*. In those instances in which the Postal Service relocated a post office using the procedures outlined in 241.4 (such as *Venice* and *Santa Monica*), there was always a replacement facility at least somewhere in the community. These were always *new* retail facilities, albeit sometimes located in a carrier annex that had not previously housed a retail facility. I do not know of any cases in which the Postal Service said it was following the relocation procedures in 241.4 without providing a new replacement facility. The 2014-2015 rulemaking on 241.4 therefore has nothing to do with the "rearrangement" and "sole source" issues being examined in this inquiry.

When it examined "the context in which relocations arise" in that rulemaking, the Postal Service did not give any indication that such "relocations" might also encompass the "rearrangements" at issue in this docket. The Final Rule on the revisions to 241.4 does not even mention this term, and the rulemaking process did not invite comments on the matter. There is nothing in the Final Rule to suggest that the relocations conducted under 241.4 might also encompass other types of facility actions.

As for the meaning of "relocation," when a commenter on the rule suggested that the Postal Service should define "relocation" more specifically, the Postal Service replied "We expect readers of the new rule will understand 'relocation' to have its ordinary dictionary meaning." The ordinary dictionary definition does not encompass the kind of "rearrangements" at issue in this docket, which do not involve simply moving retail services from one building to another.

3. The fact that these earlier rulemaking processes were transparent and participatory is irrelevant.

In its Initial Comments (Section II-C), the Postal Service argues that both of these previous rulemaking processes were "transparent" and "participatory," as if that were further indication that the Commission's public inquiry is not necessary. But the Commission has not initiated this docket because there were failings in the Postal Service's previous rulemakings. That is not the issue here.

As an example of its "dialogue with the public" on these rulemakings, the Postal Service notes that a commenter on the 2011-2012 rulemaking had suggested that the discontinuance procedures should also apply to Contract Postal Units. The Postal Service says it "addressed this commenter's concerns by explaining that the exigencies of contracting relationships make it impractical to harmonize their discontinuance . . . with the procedures required for discontinuance of Postal Service-operated facilities'" (USPS Initial Comments

at 9). But the fact that the Postal Service "addressed" this concern in a "transparent" manner did not put an end to the issues surrounding CPUs, and it is not relevant to the present docket.

4. The Postal Service's argument concerning the Commission's jurisdiction over stations and branches is no more persuasive now that it has ever been, and it is not relevant to this docket.

In its Initial Comments (Section III-A), the Postal Service returns once again to the issue of the Commission's jurisdiction over appeals on stations and branches. As it has done many times in the past, the Postal Service argues that the Commission's view that it has jurisdiction in these cases "is inconsistent with the spirit, intent, and history of section 404(d)."[9] As usual, the Postal Service reviews its interpretation of the legislative intent, legal precedents, previous PRC cases, and so on.

The Commission's order initiating this docket does not invite comments about the stations-and-branches issue. If the Commission intends to expand the scope of its public inquiry in this way, it should restart the process and make that clear from the beginning. There should be no need to do that, however, since the Commission's position has been clearly reiterated for many

[9] See, for example, United States Postal Service Motion to Dismiss Proceeding, July 26, 2006, Observatory Finance Station, Pittsburgh, Pennsylvania (Docket No. A2006-1), and Comments of United States Postal Service Regarding Jurisdiction under (Current) Section 404(d), April 19, 2010, East Elko Station, Elko, Nevada, Docket No. A2010-3.

years in many contexts, and nothing has happened to require the Commission to revisit the issue. If the Postal Service objects to the Commission's position on this matter, it should seek a remedy from the courts. Continuing to argue with the Commission about the matter is beating a dead horse.

It may be noted that in its 2011-2012 rulemaking on 241.3, the Postal Service did indicate that it would extend the discontinuance process to stations and branches, but it stopped short of acknowledging that stations and branches fell within the scope of 404(d).[10] The Postal Service again affirmed its belief that the Commission was not authorized to hear appeals on stations and branches, and consequently it would continue not to notify patrons of these facilities that they had a right to an appeal a discontinuance decision to the Commission.

While it is probably outside the scope of this docket, it would be helpful if the Commission resolved this dispute once and for all. If the Commission believes that individuals have a right to appeal the closing of a station or branch, the Postal Service should inform the community of this right when it issues a Final Determination. According to the Commission's position on these matters, the Postal Service has not been in compliance with the statute, and the matter should be addressed in the annual compliance review.

[10] Final Rule, Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 77 Fed. Reg. 46,950 (Aug. 7, 2012).

5. The Commission's jurisdiction over contract post offices does not interfere with the Postal Service's management.

In its Initial Comments (Section III-B), the Postal Service argues that "the Commission's jurisdiction over contractor-operated retail units creates "additional complications for effective management of the Postal Service and its charge under the Postal Reorganization Act to function like a business." For example, says the Postal Service, a "contractor would be able to hold the Postal Service hostage in renewal negotiations by making unreasonable demands, since it knows the Postal Service has no choice but to do business with it."

The Postal Service brought up this same argument in *Knob Fork*, and the Commission found it unpersuasive. As the Commission observed then:

> That the operators of community post offices may cancel the contracts on notice does not show that Congress intended to exclude communities with only contractor-operated facilities from the procedural protections of section 404(b). The changing of contractors would not be an event requiring the section 404(b) procedure. Additionally, since the Postal Service must continue to provide service to every community in the nation [39 U.S.C.§ 101(a)] and there are provisions to deal with unanticipated inability of post offices to remain functioning (DMM § 113.3), it does not appear that the contractor's ability to cancel has any bearing on the proper interpretation of section 404(b).[11]

Nothing could be clearer: The fact that some post offices operate under a contract with the Postal Service is not relevant to the protections of the discontinuance statute.

The Postal Service's argument here could be equally applied to the

[11] PRC Order Remanding Final Determination, Knob Fork, West Virginia 26579 (No. A83-30), January 18, 1984, p. 9-10.

contract negotiations on post office leases. The lessor, knowing that a post office closure could be appealed to the Commission, could conceivably "hold the Postal Service hostage in renewal negotiations" in order to get a better lease deal. Using the same logic that it uses with respect to contract offices, the Postal Service could argue that 404(d) does not apply to the 23,000 post offices using leased spaces. The Commission would never accept such an argument, and it should not accept the Postal Service's argument about contract post offices.

As with lease issues, if there were a problem with the negotiation of a contract for a CPU or CPO, the Postal Service could simply look for another contractor, just as it can look for another location when a lease can't be renewed. If there's insufficient time to find a new contractor, the Postal Service can temporarily suspend services while it looks for another contractor. If it proves impossible to find someone else to operate the CPO, the Postal Service could begin a discontinuance study (just as it can do when there's staffing problems at a USPS-operated post office). But just because contract issues may arise does not mean that Congress meant to exclude contract facilities from 404(d).

One can imagine a situation where the contractor was asking far too much money — as the Postal Service alleged in the *Careywood* case — but that should be an issue considered during the review of the appeal. Contract issues should not give the Postal Service the freedom to close a CPU or CPO without going through a proper discontinuance procedure, and they should

not preclude the opportunity for an appeal to the Commission.

6. Contrary to the Postal Service's claim, the Commission has not "rightly concluded" that "rearrangements" and "realignments" are different from "closings."

In Initial Comments (Section IV-A), the Postal Service argues that the Commission has "rightly concluded" that "relocations" are not the same as "closings." "In multiple appeal decisions," states the Postal Service, "the Commission has developed precedent to the effect that, as long as the Postal Service provides the same *level of service* to a community, the fact that it rearranges or relocates *where* it provides those services within the community is not tantamount to a 'closing' or 'discontinuance' under section 404(d). The Postal Service cites three PRC precedents: *Oceana, Venice,* and *Santa Monica*.

The Postal Service thus obfuscates the key distinction between "relocations" on the one hand, and "rearrangements" or "realignments" on the other. The *Oceana* case came before 241.4 was added to the federal regulations, so it obviously would not have been possible for the Postal Service to follow these regulations in that case (were they even relevant to the facility actions taking place at the time). In *Venice* and *Santa Monica,* the Postal Service was adamant, both to the public in these communities and the Commission when appeals were filed, that it was following the process described in 241.4.

In its interpretation about what the Commission has "rightly concluded," then, the Postal Service skirts one of the key issues in this docket, namely situations that are not properly characterized as "relocations" under 241.4. These include cases (like *Pimmit* and *Careywood*) in which there was not a *new* replacement facility and the Postal Service did not go through the 241.4 process.

The Postal Service quotes the Commission's statement that its "traditional distinction" between relocations and closings has "worked reasonably well" "for more than 30 years." This is a misleading summary of the history. During these three decades there was only a small handful of cases where the Commission invoked *Oceana* and the "rearrangement" terminology. The distinction is not "traditional," and it has not "worked reasonably well." In fact, it has led to several very controversial decisions by the Commission, it has necessitated this public inquiry docket, and it threatens to make matters worse by severely circumscribing the Commission's jurisdiction to hear appeals.

7. Expanding customer access to postal services has nothing to do with the Commission's jurisdiction under 404(d).

In its Initial Comments (Section V), the Postal Service argues that the Commission should take into consideration changes in the landscape of customer access to postal services. I have already addressed this argument at length in my Initial Comments, but just to summarize the main points.

First, when Congress passed PAEA in 2006, it re-adopted section 404(b) of the PRA and updated it as section 404(d).[12] The only modification in the language of the statute involved updating the Commission's name (from the Rate Commission) and amending a passage about how to date when an appeal had been submitted. PAEA did not alter the Commission's jurisdiction under 404(d), and it did not in any way modify the scope of the statute. Yet by 2006, when PAEA became law and reaffirmed the safeguards of 404(d), the Postal Service was already well underway in expanding customer access. The Senate Committee's report on the legislation specifically addressed this matter and explicitly stated that the legislation in no way made it easier to close post offices.

Second, in my Initial Comments I argued that one of the main problems with the "sole source" test for contract units is that it could also be applied to USPS-operated post offices as well. I observed that it was only a matter of time before the Postal Service or the Commission would invoke this test in the context of other post office appeals.

As it turns out, it did not take very much time at all. In its Initial Comments, the Postal Service makes exactly that argument. Its comments about expanded access on pages 14 and 15 are clearly meant to apply broadly and not just to contract units, as seen in the conclusion to its Initial Comments:

[12] As section 1006 of PAEA states: "This section and the amendments made by this section shall apply with respect to any determination to close or consolidate a post office which is first made available, in accordance with paragraph (3) of section 404(b) of title 39, United States Code, after the end of the 3-month period beginning on the date of the enactment of this Act."

"Finally, the Postal Service agrees with the Commission's observations that modern changes in alternate access channels are an important consideration when judging whether a community is receiving adequate access to postal services."

The Postal Service does not limit this remark to contract units, and for good reason. If it makes sense to apply the "sole source" test to contract units, it should also be applied to USPS-operated post offices. Using this reasoning, then, virtually any post office appeal could be dismissed because the case does not pass the "sole source" test. This shows why the test is so problematic. The question of whether or not a community is receiving adequate access to postal services may come up during a discontinuance study or an appeal before the Commission, but it has nothing to do with how the Commission should interpret its jurisdiction under 404(d).

In conclusion, I would reiterate the recommendation of the Public Representative:

> The Public Representative recommends against issuing generalized jurisdictional interpretations relying on specific facts. To do so would oversimplify the Commission's analyses that it applies to a particular post office, particular methods to access postal services, and a particular community. Instead, any generalized jurisdictional interpretation issued by the Commission should reconfirm the statutory framework.

There is nothing in the statutory framework to justify narrowing the Commission's jurisdiction to hear appeals simply because of "the increasing availability of non-traditional access to postal retail services" or because there are alternative options within the particular community or via the Internet.

There is nothing in this framework to suggest that Congress intended that some closings are not "discontinuances" under 404(d) because they can be considered "rearrangements." There is nothing in this framework to imply that the statute does not apply when a ruling by the Commission might "impair the Postal Service's effective and efficient management of its retail facility network."

If the Commission interprets 404(d) in ways that end up narrowing its jurisdiction over appeals, the Postal Service's decision to close a post office will essentially be the final word. If the Postal Service makes mistakes during the discontinuance process, or if it issues a final determination that is arbitrary and capricious, there will be nothing anyone can do to challenge the decision. Appeals to the Commission will be dismissed, and then, as a consequence of the DC District Court's decision on *Mittleman,* appeals to the courts challenging the Commission's decision will be dismissed as well.[13] The public's right to appeal post office closings will thus be completely foreclosed. That cannot be what Congress intended when it put the discontinuance statute in the PRA and reaffirmed it in PAEA.

Respectfully submitted,

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[13] Elaine Mittleman v. Postal Regulatory Commission, U.S. Court of Appeals, District of Columbia, Nos. 12–1095, 12–1110, 12–1157. Decided: July 8, 2014