

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Public Inquiry Concerning the
Terms of 39 U.S.C. 404(d)

Docket No. PI2016-2

PUBLIC REPRESENTATIVE'S REPLY COMMENTS ON
THE COMMISSION'S ABILITY TO REVIEW POSTAL SERVICE
DETERMINATIONS TO CLOSE OR CONSOLIDATE ANY POST OFFICE

(March 29, 2016)

The Public Representative replies to the Postal Service's comments on the role of *Chevron*¹ deference and non-traditional access to postal retail services in resolving the questions posed in this docket.² The Public Representative then addresses comments related to the Commission's interpretation of 39 U.S.C. § 404(d) specific to Contract Postal Units (CPUs), rearrangements, and relocations.

I. The Commission Should Evaluate the Merits of the Suggested Interpretations of 39 U.S.C. § 404(d) Rather Than Defer to the Postal Service's Regulations.

The Postal Service argues that its interpretation of section 404(d)'s terms is entitled to *Chevron* deference from the Commission. Postal Service Comments at 4. However, deference does not help to resolve the issues presented in this docket and lacks legal support. The statutory framework, Commission precedent, and the Postal Service's rulemakings confirm that the Postal Service lacks authority to alter the Commission's statutory jurisdiction.

¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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

Deferring to the Postal Service’s regulations does not help to interpret section 404(d) because the statute already resolves the Commission’s jurisdiction. Section 404(d) balances the Postal Service’s need for operational flexibility with the public’s need for participation in the Postal Service’s decision-making process. Sections 404(d)(1)-(4) provide for public access to process through notice and the opportunity to offer input before the Postal Service determines to close or consolidate any post office. Section 404(d)(5) provides the public with an opportunity to seek Commission review of the adequacy of that process. The Commission’s review and remedial power focuses upon ensuring that the Postal Service’s decision-making process complies with the statute. Commission jurisdiction is the sole independent oversight of the public’s opportunity to participate in these proceedings.

Constraining Commission jurisdiction through Postal Service regulation is inconsistent with this statutory framework. Indeed, the Commission has recognized that Postal Service regulations do not alter the Commission’s section 404(d) review authority.³ Moreover, the Postal Service’s rulemakings stated that the Postal Service and its rulemakings could not alter the scope of the Commission’s statutory jurisdiction.⁴ Courts must defer to the Commission’s interpretation of any section 404(d) ambiguity concerning the scope of the Commission’s jurisdiction under section 404(d).⁵

Deferring to the Postal Service’s regulations does not help to address the questions presented for comment by the Commission in this docket. The regulations do

³ “This is not to say that the Commission’s review authority may be altered by Postal Service regulations” Docket No. A2013-7, *Downtown Fernandina Beach Station, Fernandina Beach, FL*, Order Remanding Determination, November 19, 2013, at 6 (Order No. 1880).

⁴ Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 76 Fed. Reg. 17,794, 17,796 (Mar. 31, 2011) (proposed rule) (“[T]he Postal Service does not have the power to alter the scope of the Commission’s statutory jurisdiction.”); Post Office Organization and Administration: Establishment, Classification, and Discontinuance, 76 Fed. Reg. 41,413, 41,414 (July 14, 2011) (first final rule) (“This rulemaking does not and can not alter the scope of the Commission’s jurisdiction”).

⁵ See *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863,1868 (2013) (holding that a court must defer under *Chevron* to an agency’s interpretation of a statutory ambiguity that concerns the scope of that agency’s statutory authority (that is, its jurisdiction)).

not address “the sole source standard used to determine whether section 404(d) applies to the closure or consolidation of a CPU.”⁶ The regulations also do not address what constitutes rearrangement or how to distinguish it from relocation.⁷ The regulations do not address the limitations Commission precedent imposes upon relocations. *See infra* Part III.C. Instead, the regulations address issues outside the scope of this docket.⁸

Further, the Postal Service’s argument that its interpretation of section 404(d)’s terms is entitled to *Chevron* deference from the Commission lacks legal support. The rationale for *Chevron* deference does not apply. Generalist courts use *Chevron* deference to justify judges deferring to the expertise of agencies, which are accountable to the executive branch.⁹ As an independent agency specializing in overseeing the Postal Service and accountable to the President, the Commission has both expertise and political accountability. Additionally, Commission deference, under *Chevron*, to Postal Service regulations when interpreting section 404(d) fails to meet two legal thresholds: whether Congress delegated authority to the particular agency claiming deference (in this case, the Postal Service) and whether the Postal Service’s rulemaking claiming deference was promulgated in the exercise of that authority.

Congress did not delegate authority to the Postal Service to interpret the scope of the Commission’s jurisdiction under section 404(d). Courts do not consider deferring under *Chevron* without first looking to the statute to determine if Congress delegated

⁶ Notice and Order Seeking Comments on Commission Jurisdiction Over Postal Service Determinations to Close or Consolidate Post Offices, December 10, 2015, at 9 (Order No. 2862).

⁷ *Compare* Order No. 2862 at 2 (seeking comment on rearrangements) *with* Initial Comments of the Association of United States Postal Lessors Regarding the Jurisdiction of the Postal Regulatory Commission With Respect to Post Office Closings, February 5, 2016, at 3 (AUSPL Comments) (noting that Postal Service regulations do not reference rearrangements).

⁸ *See* Postal Service Comments at 7-8 (summarizing regulations that revisit the Postal Service’s disagreement with the Commission on stations and branches).

⁹ “Judges are not experts in the field, and are not part of either political branch of the Government.” *Chevron*, 467 U.S. at 865.

authority to an agency to make rules carrying the force of law.¹⁰ The Postal Service argues that the Commission should defer to the Postal Service because section 404(d) splits enforcement between the Postal Service (the policymaking body) and the Commission (the adjudicatory body). Postal Service Comments 2-4. The Postal Service cites to three examples of split enforcement cases involving the Secretary of Labor (Secretary). *See id.* All three examples are inapplicable to these proceedings.

The first example involves the Occupational Safety and Health Act (OSH Act), which authorizes the Secretary to enforce workplace health and safety upon employers (setting standards for employers, investigating non-compliance, issuing citations, and assessing monetary penalties against non-compliant employers) and the Occupational Safety and Health Review Commission (OSHRC) to adjudicate an employer's contested citation.¹¹ The United States Supreme Court deferred to the Secretary's reasonable interpretation of the Secretary's own ambiguous regulations. *See Martin*, 499 U.S. at 158. *Martin* does not involve *Chevron* deference (by either the Supreme Court or the OSHRC) to the Secretary's interpretation of statutory terms.¹² Moreover, the Supreme Court emphasized the narrowness of its holding, "tak[ing] no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure." *Martin*, 499 U.S. at 157-58. Thus, *Martin* does not support that the Commission must defer to the Postal Service's interpretation of statutory terms.

The second example involves the unique legislative history of the Mine Safety and Health Act (Mine Act). "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally

¹⁰ *See Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

¹¹ *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 147 (1991).

¹² *See id.* The other OSH Act case cited by the Postal Service also does not involve *Chevron* deference to the Secretary's reasonable interpretation of a statute. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7-8 (1985) (per curiam) (holding the Secretary has unreviewable prosecutorial discretion to withdraw a citation against an employer).

accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the [Federal Mine Safety and Health Review] Commission [FMSHRC] and the courts.”¹³ In light of this clear legislative statement, courts have deferred to the Secretary's reasonable interpretations of the Mine Act.¹⁴ The courts' deference to the Secretary concerning the Mine Act does not support the Commission's deference to the Postal Service's interpretation of section 404(d).

The third example involves the Second Circuit's determination as to which component of the Department of Labor (DOL) should interpret the employer liability limitation of the Longshore and Harbor Workers' Compensation Act (LHWCA).¹⁵ Congress authorized the Secretary to prescribe rules and regulations to administer the LHWCA, which fixes the compensation paid to maritime workers injured on the job. *Gen. Dynamics Corp.*, 982 F.2d at 792, 795. The Secretary delegated this authority to the Director of the DOL Office of Workers' Compensation Programs (Director). *Id.* The Secretary appointed the Benefits Review Board (Board) to adjudicate employers' and claimants' appeals of the decisions of DOL's Administrative Law Judges. 33 U.S.C. § 921. Because the Secretary delegated its enforcement authority to the Director, the Second Circuit held that the Board should defer to the Director's reasonable interpretation of the LHWCA's liability limitation, although the Board need not defer to the Director's application of the LHWCA to particular facts. *Gen. Dynamics Corp.*, 982 F.2d at 797. The Second Circuit's selection of which DOL component should issue the Secretary's interpretation of a statutory term limiting payments from employers to claimants does not support the Commission deferring to the Postal Service's

¹³ S. Rep. 95-181, 49, 1977 U.S.C.C.A.N. 3401, 3448; *accord Sec'y of Labor, Mine Safety & Health Admin. v. Nat'l Cement Co. of California*, 494 F.3d 1066, 1073 (D.C. Cir. 2007).

¹⁴ See *Nat'l Cement Co. of California*, 494 F.3d at 1069 (concluding that Mine Act terms were ambiguous and remanding to the Secretary for interpretation). In the absence of a conflicting interpretation from the Secretary, the Tenth Circuit deferred to the FMSHRC's interpretation of the Mine Act. See *Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007, 1011 (10th Cir. 2004).

¹⁵ See *Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992).

interpretation of the Commission's ability to review the Postal Service's decision-making process under section 404(d).

Further, the statutory relationship between the Postal Service and the Commission is not analogous to any of these three examples. The relationship between the Postal Service and the Commission is not between an agency with the power to regulate and enforce rules over an industry and another agency with the power to adjudicate those enforcement decisions. Instead, the Postal Service is a participant in the mailing industry (rather than its regulator).¹⁶ The Postal Service is a unique participant because, as an executive agency, it has particular statutory duties and privileges that do not apply to other mailing industry participants.¹⁷ Also, because the Postal Service is an executive agency, it sets out how other participants can do business with the Postal Service via both generally-applicable regulations and privately-applicable contracts. The Commission regulates the business decision-making of the Postal Service to ensure compliance with Title 39. The relationship between the Commission and the Postal Service is that of an independent oversight agency and a regulated agency.

Section 404(d) permits the Postal Service to make business decisions to close or consolidate any post office, subject to providing the public with opportunities to participate in the decision-making process and to seek Commission review of the adequacy of that process. Although section 404(d) affects two executive agencies, section 404(d) is not a split enforcement regime that warrants the Commission's review jurisdiction deferring to the Postal Service. Section 404(d) does not delegate authority to the Postal Service to limit the scope of the Commission's review jurisdiction.

¹⁶ On the market-dominant side, the Postal Service is the only participant. On the competitive side, the Postal Service is one of many participants. Closing and consolidating post offices affects both lines of business.

¹⁷ See, e.g., 39 U.S.C. §§ 101, 403, and 404 (universal service obligation); 18 U.S.C. §§ 1693-1698 and 39 U.S.C. §§ 601-606 (private express statutes).

The Postal Service’s argument that the Commission should defer to Postal Service regulations fails to meet a second legal threshold. Courts do not apply *Chevron* deference unless the agency rulemaking claiming deference was promulgated in the exercise of that agency’s authority delegated by Congress to make rules carrying the force of law.¹⁸ The Postal Service’s rulemaking states that the Postal Service and its rulemaking lacked authority to interpret the scope of the Commission’s jurisdiction under section 404(d). *See supra* note 4. “Nothing in this section shall add to, reduce, or otherwise modify the Postal Service’s legal obligations or policies for compliance with . . . 39 U.S.C. 404(d)” 39 C.F.R. § 241.4(d). Because the Postal Service’s rulemakings were not promulgated in exercise of its authority to interpret the scope of the Commission’s jurisdiction under section 404(d), the rulemakings do not pass this second threshold necessary to apply *Chevron* deference.

The Commission should not defer to the Postal Service regulations to interpret Commission jurisdiction under section 404(d). Deference does not help to resolve the issues raised in this docket and lacks legal support. The Commission has authority and expertise to evaluate the merits of the suggested interpretations of section 404(d).

II. Non-traditional Access to Postal Services Supplements, Rather Than Replaces Post Offices.

The Postal Service states that “[t]he Commission should continue taking broader access to postal services into account in proceedings under section 404(d).” Postal Service Comments at 14. Referencing “the increasing availability of non-traditional access to postal retail services,” the Postal Service supports “the Commission’s mindfulness of such options . . . in exercising restraint in interpreting applicable

¹⁸ *See Gonzales*, 546 U.S. at 258 (“*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.”) (citing *Mead Corp.*, 533 U.S. at 226-27 (holding “that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”)).

provisions of section 404(d).” *Id.* at 15. The Commission’s mindfulness of this emerging non-traditional access, however, is nuanced. The Postal Service has acknowledged that other forms of access may help mitigate the effects of closings, but “[t]he Postal Service has not asserted that alternate access points *alone* provide a sufficient range of services to postal customers.”¹⁹ Broader and non-traditional access supplements rather than replaces access to post offices by providing more business hours and physical locations to access some, but not all, postal retail services.²⁰

The Commission’s mindfulness of non-traditional access differs depending on the services provided by the affected retail facility and the Postal Service’s planned action. For instance, relocations, which move retail operations from a Postal Service-operated retail facility to a different Postal Service-operated retail facility within in the same community, do not implicate non-traditional access at all. See *infra* Part III.C. Non-traditional access also does not affect the baselines for rearrangements, which transfer retail services from a Postal Service-operated retail facility to another Postal Service-operated retail facility in the community as part of a plan designed to enhance service. See *infra* Part III.B. Commission precedent confirms that rearrangements and relocations do not rely non-traditional access, let alone a single non-traditional access point, to replace a Postal Service-operated retail facility.

In CPU closing proceedings,²¹ the Commission’s approach to determine if the CPU is the community’s sole source of regular and effective postal services first considers the availability of retail facilities and then factors in multiple non-traditional access points. For instance, in *Alplaus*, the Commission based its decision on the

¹⁹ Docket No. ACR2012, Responses of the United States Postal Service to Chairman’s Information Request No. 2, January 17, 2013, question 6 (emphasis added).

²⁰ See U.S. Gov’t Accountability Office (GAO), GAO-12-100, U.S. Postal Service: Action Needed to Maximize Cost-Saving Potential of Alternatives to Post Offices, November 2011, at 5-9 (comparing the services accessible through retail facilities and non-traditional access).

²¹ CPUs functioning as a community’s sole source of regular and effective postal services (those at issue in this docket) represent a minority of CPUs. Most CPUs absorb excess demand and reduce customers’ wait time at nearby Postal Service-operated retail facilities. See GAO, GAO-13-41, Contract Postal Units: Analysis of Location, Service, and Financial Characteristics, November 2012, at 11-12.

availability of two Postal Service-operated retail facilities within a 5-minute drive (one less than a mile away), 20 other access points within 5 miles (including non-traditional access points), and usps.com.²² In *Careywood*, the Commission based its decision on the availability of a Postal Service-operated retail facility within a 7-minute drive (7 miles away), rural carriers, and usps.com, and the internet.²³

Although the Commission appeared to attach particular significance to the distance and driving time between the affected CPU and the nearest Postal Service-operated retail facility in these cases, the Public Representative does not support the inclusion of a specific distance or driving time criteria in any generalized Commission jurisdictional interpretations. Such criteria are highly fact-specific.²⁴ Further, a generalized jurisdictional interpretation that includes potential sources of postal services outside the affected community poses difficulties in setting appropriate boundaries in future proceedings as to how far outside the community the public would be expected to travel to get regular and effective postal service.²⁵ The Public Representative instead suggests that the Commission focus its analysis and any generalized jurisdictional interpretation upon the affected community when determining if a CPU is the sole source of regular and effective postal services to the community.

²² Docket No. 2012-88, Order No. 1293, *Alplaus Post Office, Alplaus, New York*, Order Dismissing Appeal, March 21, 2012, at 6. The alternative access points mentioned by the Postal Service in *Alplaus* were uncontested. *Id.*

²³ Docket No. A2015-2, *Careywood Post Office, Careywood, Idaho*, Order Dismissing Appeal, May 27, 2015, at 11-12 (Order No. 2505). The petitioner argued that this retail facility did not provide postal services to Careywood because it was located outside the community. *See id.* at 6-7. The Commission characterized the petitioner's objections to usps.com and rural carriers as issues of convenience and desirability rather than availability. *Id.* at 12-13.

²⁴ "One mile in Manhattan is not one mile in rural Nebraska." Initial Comments of Steve Hutkins on the Commission's Jurisdiction Over Post Office Closings, February 4, 2016, at 20 (Hutkins Comments).

²⁵ In *Careywood*, the Postal Service asserted that customers may access retail services through Village Post Offices, Self-Service Kiosks (automated postal centers), and Approved Shippers. Order No. 2505 at 5-6. The petitioner objected that none were in the area and the Commission found these methods "may not be currently available to many postal customers." *Id.* at 6-7, 12. The Commission also did not rely on the Postal Service's argument concerning consignment stamp retailers and acknowledged the petitioner's response that consignment stamp retailers were in towns 20 to 30 miles away. *Id.* at 7, 12.

In response to Mr. Hutkins' Comments regarding the role of usps.com and the internet in the Commission's interpretation of 39 U.S.C. § 404(d),²⁶ the Public Representative recommends that the Commission and the Postal Service continue to treat usps.com and the internet as tools to supplement, rather than replace post offices. The Postal Service recognizes that "[e]ven with the continued availability of mail-related products and services through alternative modes (such as Internet orders), in-person visits to postal facilities remain strong."²⁷ "Despite our cultural migration to digital communication, we still need the 'brick-and-mortar' experience."²⁸ Also, the Commission should remain mindful of certain necessary electronic access barriers, such as internet connectivity and an electronic form of payment.²⁹

The Public Representative recommends that the Commission's review of whether a CPU is the community's sole source of regular and effective postal services first evaluate the community's retail facilities to determine if any adequately replace the affected CPU and then consider the availability of multiple non-traditional access points for supplemental purposes only. This approach would comply with section 404(d)'s requirements to provide the public with access to process and the opportunity to seek Commission review of that process. While attentive to the process and review required by section 404(d), this approach takes a realistic view of progress.

²⁶ Hutkins Comments at 5, 32.

²⁷ United States Postal Service, *The Household Diary Study: Mail Use & Attitudes in FY 2014*, May 2015, at 19. The Postal Service reports that the majority of U.S. households patronize a post office at least once a month and over 24 percent of U.S. households visit at least three times a month. *Id.*

²⁸ United States Postal Service Office of the Inspector General, *Retail Opportunities for the U.S. Postal Service*, Report No. MS-WP-15-004, September 4, 2015, at 10 (recommending that the Postal Service leverage its retail facilities in conjunction with electronic access).

²⁹ See 39 U.S.C. § 403(b)(2) (requiring the Postal Service "to provide types of mail service to meet the needs of different categories of mail and mail users"); *Id.* § 403(c) (prohibiting the Postal Service from unduly or unreasonably discriminating against or preferring any user); *Id.* § 101(a) (requiring the Postal Service to "provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.").

III. The Commission Should Reconfirm the Statutory Framework to Address the Issues Presented in This Docket.

The Commission sought comments on its interpretation of section 404(d) related to the sole source test for CPUs as well as rearrangements and relocations. See *generally* Order No. 2862. In reply to the comments, the Public Representative reiterates the importance of the statutory framework. Section 404(d) balances the Postal Service's operational flexibility with giving the public notice and a meaningful opportunity to participate in the Postal Service's decision-making process concerning retail facility closings and consolidations. Section 404(d) also provides the public with the opportunity for Commission review of that process. If the Commission finds that it lacks jurisdiction over a challenged Postal Service determination, the Commission dismisses the proceeding. That dismissal means that the public lacks the statutory protections of process and Commission review of that Postal Service determination. For this reason, the Commission should avoid unnecessarily constraining its ability to consider "[a] determination of the Postal Service to close or consolidate any post office." 39 U.S.C. § 404(d)(5).

A. The Commission Should Retain Its Ability to Review the Postal Service's Process for Closing Sole Source CPUs.

The Postal Service argues that "[i]n asserting jurisdiction over [the closing of a sole source CPU], the Commission has created additional complications for effective management of the Postal Service and its charge under the Postal Reorganization Act to function like a business." Postal Service Comments at 11. The Postal Service explains that the operator of a sole source CPU "holds unreasonable leverage over" the Postal Service and "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." *Id.* at 12. However, this argument directly contradicts the Postal Service's characterization of the Commission's remedial power:

The Commission does not even have the power to supersede the Postal Service's discretion over the outcome of a closing or consolidation,

beyond its limited authority to ‘suspend the effectiveness’ of a Postal Service determination if the Commission finds that the Postal Service needs to pursue a more thorough decision-making process. *Id.* at 3.

The Commission’s remedial authority focuses upon ensuring that the public has adequate notice and opportunity to participate in the Postal Service’s decision-making. With this focused grant of remedial power, section 404(d) balances the Postal Service’s operational flexibility with the public’s need for process. If the Commission finds that it has jurisdiction to review the process for closing a particular CPU, that finding does not necessarily trigger remedial action. And, if in fulfillment of its statutory duty to review the proceeding, the Commission suspends the closing for up to 120 days or returns that proceeding to the Postal Service for further consideration, neither ruling forces the Postal Service to do business with a particular contractor. The Postal Service’s process to close sole source CPUs must adhere to basic notice and procedural requirements imposed by section 404(d). The Commission’s interpretation that “any post office” means a community’s retail facility for postal services is long-standing.³⁰ The Commission should retain its ability to review if the Postal Service’s closing of a sole source CPU complies with the statutory process.

B. Rearrangements Inside the Community Are Designed to Improve the Community’s Access to Retail Services.

The Commission interpreted section 404(d) closings and consolidations to exclude rearrangements, which occur inside the affected community and are designed to improve the community’s access to postal retail services.³¹ Commenters caution that

³⁰ See Public Representative’s Comments on the Commission’s Ability to Review Postal Service Determinations to Close or Consolidate Any Post Office, February 5, 2016, at 4-5 (PR Comments).

³¹ See Docket No. A2011-90, *Pimmit Branch, Falls Church, Virginia*, Order Dismissing Appeal, January 20, 2012, at 11-12 (Order No. 1159) (refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement to enhance the Postal Service’s network by opening a new main post office inside the community two miles from the prior branch); Docket No. A2010-3, *East Elko Station, Elko, Nevada*, Order Dismissing Appeal, June 22, 2010, at 7 (Order No. 477) (refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement to enhance the Postal Service’s network by rearranging retail services inside the community from a station to a main post office 1.5 miles away); Docket No. A2010-2, *Sundance Post Office, Steamboat Springs, Colorado*, Order Dismissing Appeal, April 27, 2010, at 6 (Order No. 448)

without limit, rearrangements could be construed broadly to apply to virtually any action and circumvent section 404(d).³² The Public Representative replies that Commission precedent confirms that rearrangements transfer the services of the affected Postal Service-operated retail facility to another Postal Service-operated retail facility in the community as part of a plan designed to enhance service.³³ Specifically, rearrangements create a new Postal Service-operated retail facility in the community,³⁴ transfer retail services to a superior Postal Service-operated retail facility,³⁵ or both.³⁶ Some rearrangements exceed this baseline by including additional network enhancements.³⁷

(refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement that would not eliminate any postal facilities in the community and would create a new post office); Docket No. A2007-1, *Ecorse Classified Branch, Ecorse, MI*, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007, at 6 (Order No. 37) (refusing to apply 39 U.S.C. § 404(d) to a planned rearrangement to create a new larger post office within the same community “to take over and replace the workload and retail services offered at the [prior branch.]”); *In the Matter of Birmingham Green, AL*, 35237, Order Dismissing Appeal on Jurisdictional Grounds, December 3, 2003, at 6 (Order No. 1387) (holding the Commission lacked jurisdiction to review a planned rearrangement of retail services from a station to a main post office less than one-half mile away inside the community, which would provide equal or superior service, and establish a CPU near the prior station); Docket No. A82-10, *Oceana Station, Virginia Beach, Virginia*, Order Dismissing Docket No. A82-10, June 25, 1982, at 4-6 (Order No. 436) (holding the Commission lacked jurisdiction to review a planned rearrangement to enhance the Postal Service’s network by opening a new main post office four miles from the prior station, improving services at nearby retail facilities, and opening a CPU in the area).

³² See AUSPL Comments at 3 (“Nor is [rearrangement] subject to any logical limiting principle. Any action might be labeled a ‘rearrangement.’”); Initial Comments of the National Association of Postmasters of the United States on the Commission’s Ability to Review Postal Service Determinations to Close or Consolidate Post Offices, February 5, 2016, at 3-4 (NAPUS Comments) (expressing concern that rearrangement may be used to avoid Commission review of closings and consolidations); Hutkins Comments at 5 (“What criteria would *exclude* a post office closing from the ‘rearrangement’ category?” Would any post office whatsoever be outside the scope of such formulations?”).

³³ See *supra* note 31; see also Order No. 1880 at 5 (rejecting the Postal Service’s argument that its plan to replace the Downtown Fernandina Beach Station post office with a CPU was a rearrangement).

³⁴ See Order No. 1159 at 11-12; Order No. 448 at 6; Order No. 37 at 6; Order No. 436 at 4-6.

³⁵ The services of Pimmit Branch, East Elko Station, Birmingham Green Station, and Oceana Station were each rearranged to a main post office. See Order No. 1159 at 11-12; Order No. 477 at 7; Order No. 1387 at 6; Order No. 436 at 4-6. Ecorse Branch’s retail services were rearranged to a larger post office that was open for longer hours. Order No. 37 at 4, 6.

³⁶ See Order No. 1159 at 11-12; Order No. 37 at 6; Order No. 436 at 4-6.

³⁷ The planned Oceana Station rearrangement would open a new main post office, improve retail services at nearby facilities, and create a CPU. Order No. 436 at 4-6. The planned Birmingham Green

C. Relocations Move Retail Operations While Maintaining the Same Level of Access to Retail Services in the Community.

Commenters ask the Commission to distinguish relocation from rearrangement. Hutkins Comments at 11; NAPUS Comments at 3. Relocations move retail operations from a Postal Service-operated retail facility to a different Postal Service-operated retail facility within in the same community without reducing the community's access to postal retail services in a Postal Service-operated retail facility. The Postal Service's relocation regulations do not appear to address the Commission's focus upon maintaining "the same level of access to retail services in the community."³⁸ The Commission should reconfirm this limiting principle to ensure that relocations do not permit merging multiple Postal Service-operated retail facilities inside a community into fewer retail facilities because such an action would not maintain the same level of access for the community.³⁹ Indeed, the Commission has recognized only two methods to relocate a Postal Service-operated retail facility inside a community. Most relocations transfer the affected Postal Service-operated retail facility's services by transforming a Postal Service-operated facility that does not traditionally offer retail services, such as a carrier annex, into a Postal Service-operated retail facility.⁴⁰ Alternatively, relocations may replace the affected Postal Service-operated retail facility with a new Postal Service-operated retail facility inside the same community.⁴¹ Neither relocation method

Station rearrangement would transfer services to a main post office with superior service and create a CPU. Order No. 1387 at 6.

³⁸ Compare Docket No. A2011-21, *Ukiah Main Post Office, Ukiah, California*, Order No. 804, Order Granting Motion to Dismiss, August 15, 2011, at 4 with 39 C.F.R. § 241.4(a)(1).

³⁹ "It is undeniably the case that where two post offices existed before action by the USPS and one exists after, one of the post offices was in fact 'closed.'" AUSPL Comments at 2.

⁴⁰ See PR Comments at 7-8, n.21 (summarizing relocations to carrier annexes).

⁴¹ Docket No. A86-13, Order No. 696, *Wellfleet, Massachusetts 02667*, Order Dismissing Docket No. A86-13, June 10, 1986, at 2 (holding the Commission lacked jurisdiction to review a planned relocation to replace a post office with a newly-built post office because the petitioner did not establish that plan would eliminate a post office from the community).

recognized by the Commission diminishes the total number of Postal Service-operated retail facilities inside a community.⁴²

IV. Conclusion

Section 404(d) balances the public's need to participate in the Postal Service's decision-making with the Postal Service's need for operational flexibility. The statute requires the opportunity for process and Commission review while focusing the Commission's remedial power. Thus, the Commission should reaffirm the statutory framework, which already ensures that process does not impede progress.

Respectfully submitted,

Lauren A. D'Agostino
Public Representative

901 New York Avenue, N.W., Ste. 200
Washington, D.C. 20268-0001
(202) 789-6837; Fax: (202) 789-6861

⁴² See *supra* notes 40-41. The Commission dismissed two petitions as premature without ruling if the planned action was a relocation or a closing. See Docket No. A2013-9, Order No. 1817, *Berkeley Main Post Office, Berkeley, California*, Order Granting Motion to Dismiss, August 27, 2013, at 3 (“Without information on when the [affected post office] will close, and where and when the replacement facility will begin operations as a post office, any appeal is premature. Such information would be relevant in determining whether the Postal Service's actions represent a relocation or closing.”); Docket No. A2013-6, Order No. 1802, *Bronx General Post Office, Bronx, New York*, Order Granting Motion to Dismiss, August 8, 2013, at 4 (same).