

UNITED STATES OF AMERICA  
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  
Section 701 Report

Docket No. PI2016-3

INITIAL COMMENTS BY STEVEN HUTKINS  
REGARDING THE COMMISSION'S SECTION 701 REPORT

(June 14, 2016)

The following comments pertain to the procedures for appeals of Postal Service determinations to close or consolidate post offices, which is one of the areas of consideration for the 701 Report for 2016. I would like to offer four recommendations.

1. The Commission should, as it did in the 701 Report for 2011, recommend that the scope of appellate review from Postal Service determinations to close retail facilities be clarified. Congress should make it clear that in the context of 39 U.S.C. 404(d), the plain meaning of "post office" includes all retail offices operated by the Postal Service, including stations and branches, as well as independent post offices. The Commission itself has already commented about the rationale for this recommendation in its 2011 701 Report, as well as numerous dockets on appeals, so I will not comment further on this.

2. The Commission should go one step further and recommend that Congress clarify the plain meaning of “post office” in such a way that it includes contract post offices, regardless of whether or not they are the “sole source” of postal services in a community. I have filed comments on this issue for the Commission’s Public Inquiry Concerning the Terms of 39 U.S.C. 404(d), so I will not comment further here.<sup>1</sup> I would ask that the Commission consider these earlier comments as part of the docket on the 701 Report.

3. The Commission should recommend that Congress clarify the meaning of 39 U.S.C. 404(d) with regard to the Commission’s use of the terms “relocations,” “realignments,” and “rearrangements” of postal services in a community as a rationale for dismissing appeals. My previous comments for PI 2016-2 also address this issue in detail, so again I would ask that the Commission consider these earlier comments as part of the docket on the 701 Report.

As I argued in my comments for PI 2016-2, the term “relocation” should be restricted to cases where retail services are moved from one building to another in a community, as defined by 39 CFR 241.4 (“Expansion, relocation, and construction of post offices”). The Commission should not use the terms “relocations,” “realignments,” and “rearrangements” to describe other sorts of situations that involve post offices closings, which are covered by 39 CFR 241.3

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<sup>1</sup> Initial Comments Of Steve Hutkins on the Commission’s Jurisdiction Over Post Office Closings (February 4, 2016), Reply Comments Of Steve Hutkins on the Commission’s Jurisdiction Over Post Office Closings (March 29, 2016), Docket No. PI2016-2: Public Inquiry Concerning the Terms of 39 U.S.C. 404(d)

("Discontinuance of USPS-operated retail facilities"). It would be beneficial if Congress addressed the issues raised in PI2016-2 and clarified the scope of the Commission's jurisdiction in these so-called "rearrangement" cases.

4. Finally, the Commission should recommend that Congress address the question of whether or not the Commission's orders concerning appeals on closings are subject to judicial review. This was the issue in *Mittleman v Postal Regulatory Commission*, and I do not believe the Court rendered a correct decision in dismissing Mittleman's appeal.<sup>2</sup>

39 U.S.C. § 3663 of the Postal Accountability and Enhancement Act clearly gives individuals the right to appeal the Commission's orders to the courts:

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia. The court shall review the order or decision in accordance with section 706 of title 5.

Despite the clarity of this passage, the Court, in its decision on *Mittleman*, determined that § 3663 did not apply to Commission order's regarding appeals on closings because of a sentence in 39 U.S.C. 404(d)(5), which reads as follows:

The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration, but the Commission may not modify the determination of the Postal Service. The Commission may suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal. The provisions of section 556, section 557, and [chapter 7 of title 5](#) shall not apply to any review carried out by the Commission under this paragraph.

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<sup>2</sup> *Mittleman v. Postal Regulatory Commission*, United States Court of Appeals, District of Columbia Circuit, Nos. 12–1095, 12–1110, 12–1157, Decided: July 8, 2014.

The Court interpreted the last sentence in this passage to mean that judicial review of a Commission decision on a post office closing is prohibited.

I do not believe that this is what Congress meant when it included this passage in 404(d). In my view, the passage is not about whether or not judicial review is permitted; rather, it is about *the manner* in which the Commission should conduct its review of appeals. Congress was simply saying that the Commission did not need to follow the *procedures* described in section 556, section 557, and chapter 7 of title 5. If Congress wanted to preclude judicial review of the Commission's orders on closings, I believe it would have done so much more explicitly —as explicitly as it said in § 3663 that the Commission's final orders *could* be reviewed by the United States Court of Appeals.

In any case, given what the Court saw as an inconsistency between 404(d)(5) and § 3663, it would be beneficial if Congress clarified the meaning of the two passages. Did Congress really intend to prohibit judicial review of the Commission's orders on post office closings? It is a question clearly worth asking in the 701 Report.

All four of these issues have been the source of uncertainty, confusion, and controversy. I would ask that the Commission's 701 Report address all four of them and encourage Congress to clarify the meaning of the relevant statutes. I believe that the Commission's jurisdiction regarding appeals should include the closings of *all* types of post office — independent post offices, stations, branches, and contract post offices. No closure should be excluded from appellate review

by the Commission simply because a postal facility is not the “sole source” of retail services in the community or because the closing is part of some vaguely defined “rearrangement” of retail services. And finally, Congress should address the core issue in the *Mittleman* decision and make it clear, I hope, that individuals can appeal a Commission ruling on a post office appeal to the courts. It is extremely important for the public to have the right to appeal all post office closings to both the Commission and the courts, without fear that the appeal will be dismissed on what must inevitably be seen as technical grounds.

Respectfully submitted,

By:         /s/ Steve Hutkins

Steve Hutkins  
PO Box 43  
Rhinecliff, NY 12574  
ssh1@nyu.edu