

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;  
Nancy E. Langley, Vice Chairman;  
Mark Acton; and  
Tony Hammond

Public Inquiry Concerning the  
Section 701 Report

Docket No. PI2016-3

COMMENTS OF ELAINE MITTLEMAN ON THE  
REPORT TO THE PRESIDENT AND CONGRESS  
PURSUANT TO SECTION 701 OF THE  
POSTAL ACCOUNTABILITY AND ENHANCEMENT ACT

(June 14, 2016)

I appreciate the opportunity to provide comments on Docket No. PI2016-3. The Order Seeking Comments includes several topics identified by the Commission as potential areas of interest. The topics were identified to further the Commission's mission of enhancing transparency and accountability of the Postal Service. Following are my comments on several of those topics. I would also like to have considered in this Docket the comments that I submitted in Docket No. PI2016-2.

## I. Postal Service Financial Situation

The Postal Service should undertake a fundamental analysis and revision of its planning for post office retail facilities. The recent emphasis has been on closing, relocating or reducing the hours of post offices. This is a very short-sighted and inadequate strategy for retail facilities.

There has been little showing that closing facilities has resulted in significant cost savings or provided benefit to postal customers. There seemed to be a general belief that closing post offices was needed as a cost-cutting measure. However, the actual cost savings from closing post offices apparently has not been calculated or does not include a determination of lost revenue. After pursuing a strategy of closing post offices, the Postal Service changed its strategy to the POSTPlan, which reduced hours at post offices. The determination of actual cost savings achieved by the POSTPlan has been reviewed by the General Accounting Office.

A recent GAO report discussed whether the Postal Service's POSTPlan cost-savings estimates are reliable. GAO, *U.S. Postal Service: Post Office Changes Suggest Cost Savings, but Improved Guidance, Data, and Analysis Can Inform Future Savings Efforts*. GAO-16-385 (Washington, D.C.: April 2016).

<http://www.gao.gov/products/GAO-16-385>

The GAO report at page 26 discussed the assumptions about revenue for the POSTPlan, as follows:

In July 2012, USPS testified to PRC that it did not anticipate losing revenue due to POSTPlan, though it had not conducted a financial analysis to support this statement. Specifically, as described below, USPS expected any revenue lost at POSTPlan post offices to be absorbed elsewhere. ... In September 2015, we asked USPS what, if any, steps it had taken to address PRC's recommendation. At that time, USPS had not yet taken steps to analyze changes in revenue at POSTPlan post offices ...

The GAO report in the Conclusions section at page 32 stated:

Finally, in its estimates of expected savings, USPS did not initially consider the effect that reduced retail hours may have on revenue and thus did not calculate an estimate of *net* cost savings. This means USPS had an incomplete picture of the effects of POSTPlan. ... Improving the quality of future POSTPlan revenue analyses, especially as the program potentially expands to additional offices, could help USPS better understand the implications of POSTPlan and inform future decision-making as USPS conducts workload re-evaluations of post offices.

The GAO discussion about shortcomings in the Postal Service's estimate of cost savings while assuming no loss is revenue applies to the Postal Service's estimate of cost savings in post office closings. There has been inadequate consideration or analysis of the financial impact of closings. The Postal Service has typically failed to include estimates of lost revenue, so there cannot be a correct calculation of cost savings. In other words, there was not an estimate of *net* cost savings.

In the opinions considering closings, some of the Commissioners have commented on the failure to determine economic savings. For example, in Docket No. A2012-90, Order No. 1291, Order Affirming Determination (Alexander,

Kansas), March 20, 2012, Chairman Goldway and Vice Chairman Langley dissented. Chairman Goldway wrote that “[t]he Administrative Record is inaccurate with regard to economic savings. As such, the Postal Service has not adequately considered economic savings as required by 39 U.S.C. § 404(d)(2)(A)(iv).” Vice Chairman Langley wrote that “[t]he Postal Service did not adequately consider the economic savings as required by 39 U.S.C. § 404(d)(2)(A)(iv). ... As a government entity, the Postal Service should ensure that its cost/benefit analysis accurately identifies capturable cost savings and does not overstate savings.”

This was one of many decisions by the Commission that was decided by a tie vote. The issue of tie votes will be discussed below. In this case, even though two Commissioners questioned the economic savings, the Commission decision affirmed the determination to close the Alexander, Kansas, post office.

The emphasis of the Postal Service concerning retail operations has been on closing and relocating retail facilities. In emphasizing the need to improve its financial condition, the Postal Service should make considerable efforts to ensure that post offices serve the needs of the retail customers. The GAO Report states at page 5 that “[p]ost offices are a key part of USPS’s revenue stream – accounting for about 56 percent of USPS’s total retail revenue of about \$19 billion in fiscal year 2015.” The emphasis by the Postal Service on closing post offices, rather

than providing improved, upgraded and convenient retail facilities, is counter-productive to the needs of the Postal Service to increase revenue at retail facilities.

While the Postal Service has spent considerable effort on closing, relocating and reducing the hours of post offices, it appears that the Postal Service has not emphasized or been a leader in looking to the future by planning for and improving new and existing facilities. In the fairly-distant past, the Postal Service served as a leader in communities and worked to ensure that the post office had a place of honor and importance in those communities. The Postal Service seems to have abandoned that important role in communities.

The growth of Tysons Corner community in Northern Virginia is a stark example of the failure of the Postal Service to serve a community. The development of Tysons Corner, with apparently no participation by the Postal Service, shows the absence of the Postal Service in urban planning and looking to the future. According to Wikipedia, Tysons Corner is Fairfax County's central business district and a regional commercial center. It is home to two super-regional shopping malls and numerous corporate headquarters, including Gannett, Hilton Worldwide, Freddie Mac, CapitalOne and Booz Allen Hamilton. [https://en.wikipedia.org/wiki/Tysons\\_Corner,\\_Virginia](https://en.wikipedia.org/wiki/Tysons_Corner,_Virginia). There was just a ceremonial event for a new development at Tysons called The Boro. The first phase will include a large Whole Foods Market, a 15-screen Showplace Icon

Theatre, 80,000 additional square feet of retail, 835 apartments, 400,000 square feet of office space and a 1-acre park. This is an example of the development going on at Tysons Corner.

[http://www.bizjournals.com/washington/breaking\\_ground/2016/06/kettler-on-the-boro-first-truly-urban-authentic.html?ana=e\\_du\\_pap&s=article\\_du&ed=2016-06-13&u=qyyEjcT7fISM3tIwQsdjXnDudqq&t=1465845841&j=73990282](http://www.bizjournals.com/washington/breaking_ground/2016/06/kettler-on-the-boro-first-truly-urban-authentic.html?ana=e_du_pap&s=article_du&ed=2016-06-13&u=qyyEjcT7fISM3tIwQsdjXnDudqq&t=1465845841&j=73990282)

Incredibly, in spite of the enormous growth and economic importance of Tysons Corner, the community does not have a post office or apparently a zip code. The analysis by the Postal Service conducted for post office closings, such as the Pimmit post office, did not even acknowledge that Tysons Corner exists.

In 2011, the Postal Service did approve the use of Tysons Corner or Tysons as an official address. A Washington Post article stated, “[w]ith no zip code of its own, Tysons Corner has long struggled to define its sense of place, despite success as a major shopping and employment hub. It isn’t an official city and residents and businesses there have traditionally had mailing addressed in McLean, Falls Church or Vienna.” [https://www.washingtonpost.com/tysons-corner-gets-its-own-postal-address/2010/07/28/AFH9gSJC\\_story.html](https://www.washingtonpost.com/tysons-corner-gets-its-own-postal-address/2010/07/28/AFH9gSJC_story.html) It is baffling and dismaying that the Postal Service apparently has not taken additional actions to plan for providing retail postal service in the Tysons Corner area.

Even though Tysons got an address, it did not get any post office. A recent search on the USPS website for post offices at Tysons Corner, Virginia, showed that there are no post offices. The search result states, "Sorry, there aren't any locations within 1 mile. So we listed the closest ones we could find." The nearest locations are in McLean, Dunn Loring, and Vienna, Virginia. The post office in Pimmit Hills that was closed in 2011 was also near Tysons Corner. <https://tools.usps.com/go/POLocatorAction.action> The result of closing the Pimmit post office is that now the Tysons Corner area has fewer post offices than it did in 2011 (before the Pimmit post office was closed in November 2011).

In light of my concern about the lack of postal facilities in the Tysons Corner and Pimmit communities and zip code 22043, I contacted the Postal Service Inspector General in April 2015. I received a message from Janet Sorensen that my inquiry had been referred to the Postal Service's Vice President of Retail and Customer Service Operations. Since that time, I have had several telephone conversations with the office of Retail and Customer Service Operations. I have also sent emails as a follow-up to my inquiry. I have not received any substantive response to my inquiry. Further, it is not clear what efforts the Postal Service has made to provide retail postal facilities in the Tysons Corner and Pimmit communities and in zip code 22043. It seems that the Postal Service

continues to ignore planning for retail postal facilities in Tysons Corner and Pimmit communities and zip code 22043.

Further, the decision of the Postal Service to close the Pimmit post office, which was one of the closest post offices to Tysons Corner, shows a complete failure to consider the needs of postal customers in the Tysons Corner area. Not only did the Postal Service fail to plan for Tysons Corner, it closed the Pimmit post office, which was near Tysons. An article in The Washington Post discussed the closing of the Pimmit post office. The article described my efforts in “trying to find out how the closest post office to Tysons – soon to explode in population with three new Metro stations and vast development planned – could be shuttered with seemingly no public notice.” [https://www.washingtonpost.com/blogs/the-state-of-nova/post/nova-residents-battle-to-save-local-post-offices/2012/03/28/gIQA1RXSgS\\_blog.html](https://www.washingtonpost.com/blogs/the-state-of-nova/post/nova-residents-battle-to-save-local-post-offices/2012/03/28/gIQA1RXSgS_blog.html)

The lack of planning by the Postal Service is illustrated by the fact that, in 2011, the Postal Service approved the use of Tysons Corner or Tysons as an official address and also closed the Pimmit post office. If Tysons Corner is growing, why did the Postal Service close the Pimmit post office, which was near Tysons?

The Postal Service should have a vigorous effort to plan for and improve retail facilities. It appears that the focus of the Postal Service has been primarily

on closing and limiting access to retail facilities. The Postal Service should plan for growth in urban areas with the emphasis on mixed-use developments and walkability. It is important that the Postal Service be a participant, if not a leader, in planning and contributing to developing and evolving communities.

I am requesting that the Postal Service provide new and convenient retail postal facilities in the Tysons Corner and Pimmit communities and zip code 22043. I am further requesting that the Postal Service determine whether the Tysons community should have a zip code. The Postal Service cannot continue to ignore – and fail to provide retail service to - the Tysons and Pimmit communities.

In addition, I am requesting that the Postal Service establish a policy and office to participate in urban planning and providing convenient retail postal facilities. The failure of the Postal Service to participate in the growth of communities, such as Tysons Corner, shows an utter lack of forward-thinking management and business planning.

## II. Post Office Closing/Consolidation Procedures

I request that the comments submitted in Docket No. PI2016-2 be considered in this Docket.

First, it should be understood that the number of post office closing appeals has been dramatically reduced. This is likely a result of the change in strategy of the Postal Service from closing post offices to reducing hours in the POSTPlan.

In Fiscal Year 2012, the Commission considered 208 post office closing appeals.

In sharp contrast, the Commission reviewed three post office closing appeals in Fiscal Year 2015. The Commission dismissed two of those three appeals. Thus, it appears that the Commission is not presently involved in a significant manner in the issue of post office closing appeals. It is not known whether the Postal Service may change its strategy again in the future, with the result that there will be more post office closing appeals.

In its previous efforts in reviewing appeals, the Commission relied upon the concept of rearrangement of facilities within a community. The Commission should acknowledge that the concept of rearrangement of postal facilities is not part of the regulations about post office closings or relocations. That term is not valid and should not be considered in the analysis. It is a term invented by the Commission in the 1982 *Oceana* decision, Order No. 436 Dismissing Docket No. A82-10, June 25, 1982, which predated the regulations.

## A. Tie votes

The issue of tie votes has become significant in the national discourse after the death of Justice Scalia, which resulted in the Supreme Court having eight Justices. For example, an article in The New York Times discussed the dynamics in an eight-member court. As the article noted, in the case of a tie, “[t]he court issues an unsigned opinion containing a single sentence: ‘The judgment is affirmed by an equally divided court.’”

<http://www.nytimes.com/2016/04/05/us/politics/dynamics-are-shifting-in-an-8-member-supreme-court.html>

The issue of tie votes also has occurred when the Commission reviewed appeals about post office closings. Many of the decisions had a 2-2 tie vote. The Commission is not a court of appeals. Thus, many of the issues discussed about tie votes in the Supreme Court may not apply to tie votes by the Commission. However, the concern about the tie votes in the Supreme Court makes clear that there should be serious analysis and consideration of the impact of a decision reached by a tie vote.

There are substantial questions whether a 2-2 tie vote by the Commission can properly be considered an affirmation of the decision on review. First, the Commission is not a court of appeals reviewing a court decision from a lower court. The determination by the Postal Service to close a post office is not the

equivalent of a court decision, in which two parties were involved and presented arguments. The determination by the Postal Service is a decision by an agency and not part of a litigation process. Thus, the review by the Commission is not a review of a lower court decision.

Second, a decision by the Commission should be decided by a majority of votes and not by tie votes. A tie vote should not be considered an affirmance, because, in fact, a majority of Commissioners did not agree on an outcome. A tie vote should not be assumed to be an affirmance of the determination by the Postal Service.

The many tie votes in the closing cases reflected the pervasive disagreements and perspectives on what issues and facts need to be considered in deciding to close post offices. The Commission essentially did not have a general agreement about the proper outcome of closing determinations. By assuming that a tie vote was an affirmance, the Commission simply avoided its responsibility to make decisions in which a majority agreed on the result and reasoning.

The Commission did not adopt any rule concerning tie votes. Instead, the Commission began putting footnotes in orders after the occurrence of numerous tie votes had revealed that there was an issue about the effect of a tie vote.

The Commission clearly faced a significant problem in light of the quantity

of tie votes. The Commission FY 2012 Annual Report (available at [http://prc.gov/Docs/86/86069/PRC\\_2012\\_Annual\\_Report\\_w-links.pdf](http://prc.gov/Docs/86/86069/PRC_2012_Annual_Report_w-links.pdf)) reported that the Commission considered and concluded 207 post office closing appeals in FY 2012. The Commission affirmed the Postal Service in 162 cases. Further, 133 of those cases were decided by a tie vote, which the Commission treated as an affirmance of the Postal Service. Thus, 133 of the 162 cases that affirmed the Postal Service were decided by a tie vote, but were considered to be an affirmance. *See* 2012 Annual Report at 42 n. 4.

The Commission should adopt a rule concerning voting requirements, including a discussion about the need for a majority and tie votes. The Commission should not simply assume that a tie vote is an affirmance.

#### B. Review of decisions of the Postal Service and the Commission

The decisions of the Postal Service and the Commission must be reviewable to further the Commission's mission of enhancing transparency and accountability of the Postal Service.

As an example, the reliance on the concept of rearrangement to support a claim that the Commission does not have jurisdiction to review closings should not be permitted. In the 1982 *Oceana* case, the Commission made up a category of action, described as rearrangement of retail facilities within a community. This category does not exist in the regulations. The Commission cannot decide on its

own that it does not have jurisdiction to review what it has decided is a “rearrangement.”

The Postal Service has separate procedures for closings and for relocations. These procedures are set out in 39 CFR § 241.3 (closings) and 39 CFR § 241.4 (relocations). The regulations do not include the term, “rearrangement” or discuss rearrangements within a community. That description was created in *Oceana* and is not part of the regulations.

As noted in the comments in Docket No. PI2016-2, the Commission should not refuse to consider cases, such as the Pimmit case [Order No. 1159 Dismissing Appeal, issued January 20, 2012]. The Commission should not assert that it lacks jurisdiction, based on its own creation of a category described as a rearrangement. The Pimmit case concerned the loss of a post office in the Pimmit community. The Commission failed to consider the merits of the appeal and instead asserted that it did not have jurisdiction. The result was that the Pimmit community does not have a post office and did not receive any consideration by the Commission of the merits of the closing of the Pimmit post office.

It appears that the previous issue about whether appeals are permitted for stations and branches has been resolved. If there is still some question, there should be a clear statement that closings of stations and branches by the Postal Service can be appealed to the Commission.

The concept of stations and branches seems antiquated. For example, in Northern Virginia, there no longer is a Falls Church Main Post Office. Thus, the Falls Church Finance Station is not subordinate to a main post office. There may still be a Falls Church Postmaster for administrative purposes. However, the Falls Church Postmaster is apparently located in the Merrifield area and not in Falls Church. The Pimmit post office (which was a branch) was not outside the city limits of Falls Church, but was located in Fairfax County. In urban areas, cities and communities are contiguous, so the concept of stations and branches is meaningless (except perhaps for Postal Service administrative matters).

The Postal Service should consider abolishing the concept of stations and branches. At a minimum, there should be no distinction between main post offices, stations and branches for purposes of closing determinations and appeals to the Commission. All types of retail facilities should have the same procedures, including notice, community meetings and right to appeal to the Commission.

Finally, the Commission should not argue that its final orders about post office closings cannot be reviewed in the D.C. Circuit. That argument is in violation of the statutory provision, 39 U.S.C. § 3663, which provides for review in the District of Columbia Circuit of final orders of the Postal Regulatory Commission. The D.C. Circuit opinion in *Mittleman v. Postal Regulatory*

*Commission*, 757 F.3d 300 (D.C. Cir. 2014), is clearly wrong and in violation of 39 U.S.C. § 3663.

That opinion in the D.C. Circuit is a result of the arguments presented by the attorneys for the Commission that there was not jurisdiction to review Commission orders about post office closings. If the Commission believes in transparency and accountability, it should not be arguing against judicial review of its final orders in the D.C. Circuit. There is a fundamental role in our government for judicial review of agency action. It is very troubling that the Commission has argued against judicial review, particularly when a statute, 39 U.S.C. § 3663, clearly provides for judicial review of final orders of the Commission.

Further, the failure to permit judicial review of Commission orders about post office closings also means that there is no judicial review of the determinations of the Postal Service to close post offices. Thus, there are two agencies – the Postal Service and the Postal Regulatory Commission – that are acting without the availability of judicial review of their actions. Agencies should willingly participate in the process of judicial review of their actions. Judicial review serves an important role in furthering transparency and accountability of agency actions. It is very troubling that review of post office closings can be denied both in the Commission and in the D.C. Circuit.

I appreciate the opportunity to provide comments on this Docket. I would be glad to provide additional information or participate further in this matter.

Respectfully submitted,

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