

**ELAINE J. MITTLEMAN
ATTORNEY AT LAW
2040 Arch Drive
Falls Church, VA 22043
Telephone (703) 734-0482
E-mail elainemittleman@msn.com
Admitted in the District of Columbia; Not Admitted in Virginia**

**Comments on
Postal Regulatory Commission
39 CFR Parts 3001 and 3025
Docket No. RM2011-13; Order No. 814
Docket No. RM2011-13; Order No. 823
Appeals of Post Office Closings
Proposed Rulemaking and Supplement**

October 3, 2011

These comments are being submitted about the proposed rules on Appeals of Post Office Closings. In preparing these comments, I have studied recent appeals before the Postal Regulatory Commission on post office closings. A summary of these appeals, described below, shows serious flaws in the Final Determinations made by the Postal Service and in the review of those Determinations by the Postal Regulatory Commission.

An important omission in the proposed rules is the notice of the right to petition for review of the final orders of the Postal Regulatory Commission in the United States Court of Appeals for the District of Columbia Circuit. *See* 39 U.S.C. § 3663. In light of the shortcomings in the Final Determination record created by the Postal Service and reviewed by the Postal Regulatory Commission, it is imperative that persons appealing to the Postal Regulatory Commission be advised of their right to seek review of Postal Regulatory Commission orders in the District of Columbia Circuit.

I. Recent appeals before the Postal Regulatory Commission.

1. Rogers Avenue Station, Fort Smith, Arkansas, Docket No. A2011-13. In Order No. 766, affirming the determination to close, dated July 20, 2011, the Commission explained that “[i]n announcing its newly adopted rules governing closing of postal retail facilities, the Postal Service indicates it will implement a more robust measurement of financial impact. *See* 76 FR 41418, July 14, 2011. The Commission looks forward to the improved analysis.”

The Concurring Opinion of Commissioners Hammond and Langley noted that, with the new rules, “we expect the Postal Service to fully respond to issues raised by participants so that the Commission will have before it complete records on which to base its decisions, a responsibility Congress has entrusted to us.”

Chairman Goldway dissented, stating that the “Final Determination contains material flaws which justify remanding it to the Postal Service for further consideration. Participants identify factual issues which call into question the basis of the Postal Service’s decision to close the Rogers Avenue Station. í A fair reading of the Final Determination demonstrates that it is based on questionable facts and analysis.”

2. East Camden Branch Post Office, East Camden, Arkansas, Docket No. A2011-30. The petitioner was Gene Hill, President of Highland Industrial Park, Inc. In a letter dated July 19, 2011, to the Postal Regulatory Commission, Mr. Hill explained that there were factual errors in the Final Determination. Contrary to the statements in the Final Determination, East Camden is a separate community from Camden. The incorrect information remained in the Final Determination, in spite of a conference call and a face-to-face meeting with U.S. Postal Service personnel in which the correct information was given. Mr. Hill further discussed the cost of replacement service. He stated, “Currently there is no carrier service in this area that services Highland Industrial Park and all of the industrial tenants contained within the complex. Highland encompasses over 18,000 acres and is home to many large businesses, including the major U.S. DOD Contractors on the

attached listing. The idea that rural carrier service can be provided in that size of an area to large volume customers at no cost is not realistic.ö

On August 26, 2011, the U.S. Postal Service filed a Notice with the Postal Regulatory Commission. The Notice stated that the U.S. Postal Service had determined to withdraw its Final Determination to close the East Camden, Arkansas Branch.

In Order No. 834, dated August 31, 2011, the Postal Regulatory Commission dismissed the appeal in light of the decision of the Postal Service to withdraw the Final Determination to close the East Camden, Arkansas, Branch.

3. Lafayette Postal Facility, Freehold, New Jersey, Docket No. A2011-19. On June 22, 2011, a petitioner filed an application to suspend the Postal Service's determination to close the Lafayette Postal Facility in Freehold, New Jersey. The Postal Service intended to close the facility on July 29, 2011. In a response filed on July 5, 2011, the Postal Service opposed the application for suspension.

In Order No. 762, dated July 19, 2011, the Postal Regulatory Commission denied the application for suspension. Chairman Goldway dissented from denying the application for suspension, explaining that the public and the Postal Service will be better served if affected offices are not closed until completion of the ongoing review process. The dissent also explained that "maintaining operations at a retail facility pending disposition of an appeal will not materially increase Postal Service costs and, in the long run, will avoid unnecessary expenses and public confusion about the process.ö

4. Gwynedd Post Office, Gwynedd, Pennsylvania, Docket No. A2011-15. In Order No. 832, the Commission affirmed the determination to close the Gwynedd, Pennsylvania, station. The Public Representative criticized the sequence of events surrounding the closing and concluded that the public participation could be seen as mere "window dressing" on a decision already made by the Post Office. The Public Representative also

criticized the cost savings, because most of the cost savings were attributed to the salary and benefits of the postal clerk, who was merely being reassigned to another post office.

The Commission found that the record suggested the possibility that the Postal Service made the decision to close the facility before customers were involved in the process and, at a minimum, that the Postal Service rushed to judgment without fully considering views expressed at the public meeting. The Commission noted the new rules of the Postal Service and that the Postal Service has indicated that it will implement a more robust measurement of financial impact. The Commission further explained that it has serious concerns about the development of the public record in the proceeding below. The Commission noted its expectation that, in future proceedings, the Postal Service will develop a more robust public record.

5. Akron-East Station, Akron, Ohio, Docket No. A2011-16. On May 17, 2011, two persons filed appeals seeking review of the Postal Service's determination to close the East Akron station. In Order No. 843, dated September 8, 2011, the Postal Regulatory Commission affirmed the Final Determination to close the East Akron station.

The City of Akron (an intervenor) and the Public Representative argued that the Postal Service failed to inform the customers of their right to appeal. The Commission found that two persons filed timely appeals, so the failure to provide notice caused the participants no injury.

Akron also argued that the Postal Service failed to meaningfully address how closure would affect seniors and persons with disabilities. The Commission indicated that the Postal Service responded to concerns raised by customers. However, in the Order at page 10, the Commission urged the Postal Service to more closely view its responses to facts under review.

The Postal Service had estimated that the net annual savings of closing the East Akron station was \$93,475. Akron and the Public Representative argued that the estimated savings were inflated. The Public Representative questioned whether there would be cost savings from employee salaries and

benefits. The Commission stated that the "Public Representative raises a valid point concerning the computation of savings based on compensation costs that are not eliminated by the closure of the station." Order at page 12. In the Order, the Commission noted that it had "urged the Postal Service to develop a more holistic approach for estimating the impact of decisions to close retail facilities." In addition, the record does not show how the cost of replacement service of \$220,572 was derived. The Commission explained that, when developing replacement costs, the "Postal Service must take greater care to ensure that the underlying record supports its figures." Order at page 13.

Finally, the Postal Service incurred a one-time expense of \$199,800 to buy out the lease. The Public Representative indicated that the Postal Service did not explain why it would buy out the lease when it would have been less expensive to let the lease run its course. The Commission stated that the "additional one-time costs should be factored into the savings estimate to present a more accurate picture of the financial implications of the decision to close a facility." Order at page 14.

The Commission affirmed the determination to close the East Akron station, but stated that the "Postal Service needs to devote greater care to the development of the record, including calculating estimated savings." Order at page 14.

Chairman Goldway dissented and explained that the "administrative record before the Postal Service, as provided to the Commission during this appeal, clearly demonstrates that the Postal Service is going to be worse off financially than if it had determined to keep the facility open." Dissenting Opinion at page 1.

Chairman Goldway stated that the final determination does not explain why the Postal Service would close this facility despite the closing's negative impact on the Postal Service's finances. The record also shows "lapses in the Postal Service's provision of adequate notice and meaningful community input to the citizens of East Akron." Chairman Goldway found the decision to be arbitrary and capricious and unsupported by substantial evidence in the

record. Chairman Goldway concluded by stating that the Commission's legal responsibility requires it to make the Postal Service accountable for its actions.ö Dissenting Opinion at page 2.

6. Valley Falls Station, Cumberland, Rhode Island, Docket No. A2011-18. In Order No. 865, dated September 20, 2011, the determination to close the Valley Falls station in Cumberland, Rhode Island, was affirmed. The Public Representative argued that the procedures followed by the Postal Service were deficient and that the cost savings were overstated.

The Commission noted the recent adoption by the Postal Service of uniform closing procedures for all retail facilities. The Commission expressed hope that these procedures will greatly reduce these types of concerns going forward, ensure that both interested persons have a meaningful opportunity to participate in the process, and that the Postal Service has a meaningful opportunity to consider and address customers' concerns.ö Order at page 8.

In addressing the issue of cost savings, the Commission noted that the Public Representative raised a valid point concerning the computation of savings based on compensation costs that are not eliminated by the closure of the Valley Falls station. The Commission cited the new rules adopted by the Postal Service and stated that it anticipates that the improved analysis will ensure a more accurate measurement of actual cost savings than is possible now.ö Order at page 12.

The Postal Service indicated that it would incur a one-time expense of \$93,103 to close the station, including \$90,603 to buy out the existing lease and \$2,500 for building modifications. The Public Representative noted that, if the Postal Service paid \$90,603 to buy out the lease, it would have paid approximately \$40,000 more than had it simply let the lease run its course.

The Commission stated that the record is not complete with regard to the economic impact to the Postal Service. The Commission noted in its conclusion that the Postal Service needs to greatly improve its notice and community involvement procedures and develop more reliable cost savings

estimates. Overall, the Commission recommends that the Postal Service devote greater care to the development of the record.ö Order at page 13. In spite of the Commission's findings about the failures of the Postal Service in its notice procedures and estimates of cost savings, the Commission affirmed the Postal Service's determination to close the Valley Falls station.

7. La Mesa Annex, La Mesa, California, Docket No. A2011-20. In a letter dated July 7, 2011, a person sought review of the determination to close the La Mesa Annex in La Mesa, California. The letter stated that the "Postal Service has totally misled their customers and the PRC into closing this station and has based this closure on blatantly erroneous facts." The letter explained that the savings estimate of \$98,000 for the lease was erroneous. The office will still be a carrier annex, so the facility will not be closed and there would be no savings on the lease.

On July 28, 2011, the Postal Service filed a response indicating its intent to withdraw the Final Determination to close the La Mesa Annex. In Order No. 795, dated August 10, 2011, the Postal Regulatory Commission dismissed the appeal in light of the Postal Service's withdrawal of its Final Determination to close the La Mesa Annex.

II. Proper review of Postal Service determinations is required.

As discussed above, the recent Postal Service determinations have had serious failings. These include the lack of proper and adequate notice and opportunity to comment on closing decisions, consideration of the economic savings to the Postal Service and evaluation of alternative service available.

The appeals show that there has been a lack of proper notice. The Postal Service apparently has operated on the assumption that the notice and comment requirements are less rigorous when the closing pertains to a branch. The notice and comment requirements should be the same for all closing determinations. Moreover, the Postal Service has left the impression in several cases that it had already made a decision before it sought comments. The persons submitting comments felt that their thoughts were not properly considered and that the process was essentially a waste of their

time.

If the Postal Service wants to garner the support of the public for the closing determinations, it must ensure that the process is open and that patrons feel they had a proper opportunity to comment and have their views considered. The closing determinations affect seniors, in particular, in a very personal manner. The post office should be a friendly, neighborhood place and its patrons have relied upon its convenience and accessibility. The sudden and thoughtless closing of these neighborhood institutions is a shock and should not be undertaken without the greatest care to meet the needs and concerns of the patrons.

In its new rules governing the closing of postal retail facilities, the Postal Service indicated that it will implement a more robust measurement of financial impact. *See* 76 FR 41413, 41418 (July 14, 2011). A substantive and factually-accurate cost savings must be included in all determinations about closings. Even if the rules are considered to be prospective only, the statutory requirement that requires consideration of the economic savings to the Postal Service must be followed. *See* 39 U.S.C. § 404(d)(2)(A). The failure to comply with these statutory requirements cannot be ignored or simply excused by the Commission's hope that the Postal Service will have a "more accurate measurement of actual cost savings." Order No. 865, p. 12, dated September 20, 2011, Docket No. A2011-18.

The determination of economic savings is also fundamentally flawed because of the failure of the Postal Service to determine the effect on revenues of closing a facility. The Postal Service apparently simply assumes that the revenue will remain unchanged and that patrons will take the same amount of business to other facilities. This assumption cannot be supported. The use of facilities is greatly determined by convenience. If patrons are forced to spend a considerable amount of time to arrive at a facility, they will seek alternate methods of shipment, such as Federal Express and UPS, or simply withdraw from reliance upon the Postal Service.

In its new rules, the Postal Services stated that "situation-dependent and speculative factors like revenue leakage are difficult to quantify." 76 FR

41418 (July 14, 2011). The Postal Service cannot perform a substantive determination of economic savings if it does not quantify the revenues of a post office and at least estimate the revenues lost from a closing.

The methodology used now by the Postal Service is meaningless. Based on its present method, closing any facility will produce some type of "cost savings," in the form of savings on lease payments and employee compensation. In the absence of also quantifying revenues, these cost savings provide no guidance concerning which facilities should be closed. The larger and busier post offices would probably show the greatest "cost savings" if they were closed. Thus, the calculation of cost savings, without any reference to revenue or net profit, provides no substantive fiscal measure to make a determination about closing.

If the Postal Service continues to calculate "cost savings," without regard to revenues or profits, it can actually further exacerbate its budgetary crisis. The closing of any post office could presumably be justified by looking only at savings from eliminating a lease payment or employees (who may just be moved to other facilities). Thus, stations which are profitable and in great demand could also be closed based on "cost savings." A proper profit-and-loss statement is needed to make any economic determination on closing stations.

Moreover, the Postal Service should consider the overall impact of closing many stations. If the number of stations closed is so large that service options are seriously affected, the Postal Service as a whole may suffer. The lack of a cohesive, functioning system of postal service facilities may cause the entire system to lose its fundamental capacity to serve the public. The long-standing tradition of convenient and local postal facilities may wither and persons will seek other options in greater numbers. It does not appear that the budgetary problems of the Postal Service are materially caused by operating retail facilities. The risks of impairing the network of post offices should be considered in any decision to undertake a systematic closing of those facilities.

The Postal Service is harming one of its major assets in planning to close

many retail facilities. The calculation of "cost savings" ignores the profits earned by the stations. Patrons go to the facilities because of the friendly and helpful employees who provide assistance in answering questions and mailing packages. The options to purchase stamps at other locations or through the internet do not substitute for the basic function of the retail facilities, which is to provide hands-on and skilled service. By failing to take credit for its substantial asset of a trained and knowledgeable workforce at post offices, the Postal Service is greatly increasing its budget problems and even its reason to have retail facilities.

The cost savings methodology is further flawed by the Postal Service's apparent failure to calculate or explain one-time costs, such as lease terminations. It seems that the Postal Service is incurring large costs to break leases when it would be financially prudent to let the leases run until the end of the term. The fundamental lack of understanding of financial analysis by the Postal Service is revealed in its decisions to terminate leases in an apparent effort to expedite closings, rather than to improve the budget of the Postal Service.

Another flaw in the cost savings analysis concerns employee compensation. If the postal employees will simply be moved to another facility, there would be no cost savings to the Postal Service in the category of employee compensation. The employee compensation costs would remain, but would be incurred at another facility. Thus, analyzing cost savings only by facility and not on a regional basis is misleading.

The Postal Service's determination concerning whether other facilities are convenient is based on miles without regard for traffic and method of transportation. If patrons travel by foot or public transportation, then a distance of two miles to the postal facility can present a substantial investment of time. Patrons will seek other options, rather than spending an hour or more to make the trip to the post office. It should be noted that requiring patrons to travel miles further to use a postal facility goes against the present concerns about the environment, fuel economy and livability. Proper urban planning seeks to encourage walking, bicycling and the use of public transportation. The Postal Service is violating important urban

planning precepts in forcing patrons to travel by vehicle several miles or more to use a postal facility.

A review of the recent determinations by the Postal Service shows many failings in the process and factual support for decisions to close post offices. At a time when the number of proposed closings and appeals is increasingly dramatically, the determination process and record must be greatly improved. At a minimum, the determination to close must not violate the requirements set out in 39 U.S.C. § 404(d)(5)(A), (B) and (C).

III. The orders of the Postal Regulatory Commission can be reviewed by the United States Court of Appeals for the District of Columbia Circuit.

There is a right to petition for review of the orders of the Postal Regulatory Commission in the United States Court of Appeals for the District of Columbia Circuit. *See* 39 U.S.C. § 3663, which provides that a person adversely affected by a final order of the Postal Regulatory Commission may petition for review in the United States Court of Appeals for the District of Columbia Circuit.

The Postal Regulatory Commission apparently has taken the position, relying upon 39 U.S.C. § 404(d)(5), that its orders are not subject to review or appeal in federal court. That statutory provision refers to “any review carried out by the Commission under this paragraph.” It does not address the question of whether the orders of the Commission are subject to review in federal court.

The Postal Regulatory Commission should make it clear that its orders are subject to review in federal court. Further, it should formulate its orders to ensure that there is a proper record for the District of Columbia Circuit to review. *See LePage’s 2000, Inc. v. Postal Regulatory Commission*, 642 F.3d 225, 234 (D.C. Cir. 2011) (petitions to review order are granted; the order is vacated; the Commission has much work to do on remand remedying the abundant inconsistencies in its order).

In reviewing the determinations of the Postal Service to close facilities, the Postal Regulatory Commission apparently has relied upon what it views as its limited authority in 39 U.S.C. § 404(d)(5). Pursuant to that section, the Postal Regulatory Commission “may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration.” Even if the Postal Regulatory Commission may only either affirm or return the determination, it still is required to perform a substantive review. It fails to perform this review if it simply notes flaws in the determination process and record, while expressing hope that the Postal Service will provide a better record in the future.

The Postal Regulatory Commission must perform its statutory duties to review determinations to close and set aside those determinations which are arbitrary and capricious, which failed to follow procedural requirements, or which are unsupported by substantial evidence on the record. *See* 39 U.S.C. § 404(d)(5)(A), (B) and (C). In the absence of a thorough review of the final determinations of the Postal Service to close post offices, the Postal Regulatory Commission is not complying with its statutory mandate.