

**POSTAL REGULATORY COMMISSION****[Docket Nos. PI2016–2; Order No. 2862]****Public Inquiry on Commission Jurisdiction Over Postal Service Determinations To Close or Consolidate Post Offices****AGENCY:** Postal Regulatory Commission.**ACTION:** Notice.

**SUMMARY:** The Commission is establishing a public inquiry to receive comments regarding the Commission's jurisdiction over Postal Service determinations to close or consolidate post offices. This notice informs the public of this proceeding, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* January 29, 2016. *Reply Comments are due:* February 23, 2016.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

- I. Introduction
- II. Public Inquiry
- III. Conclusion
- IV. Public Representative
- V. Ordering Paragraphs

**I. Introduction**

The Postal Regulatory Commission (Commission) seeks comments on the interpretation of terms related to 39 U.S.C. 404(d), which governs the jurisdiction of the Commission over Postal Service determinations to close or consolidate post offices. This statute sets forth requirements for the Postal Service to follow when it closes or consolidates a post office, and authorizes the Commission to review these closures and consolidations. Petitions filed before the Commission regarding the closing of various Postal Service retail facilities often indicate a misunderstanding among the general public of the scope of Commission authority to review Postal Service decisions regarding the operation of its retail facilities.

The Commission seeks input as to what, in commenters' views, constitutes a relocation or rearrangement of postal services and is thus exempt from Commission review pursuant to section

404(d); and when or if the Commission should have jurisdiction to review the closing or consolidation of a contract postal unit (CPU). The remainder of this Notice provides background information on the Commission precedent related to its jurisdiction to aid commenters.

In Order Nos. 1866<sup>1</sup> and 2505<sup>2</sup> the Commission signaled its intent to initiate this type of separate proceeding in which it could consider the scope of its appellate authority with regard to relocations and rearrangements of postal retail facilities, as well as the closure of CPUs. Specifically, in *Glenoaks*, the Commission expressed a preference to initiate a proceeding in which it would clarify and distinguish Postal Service characterizations of relocations and rearrangements from closures and consolidations. Order No. 1866 at 12. In *Careywood*, the Commission acknowledged the need to review the sole source standard that it has applied to CPUs. Order No. 2505 at 14. The Commission initiates this public inquiry to discuss the aforementioned matters and provide stakeholders and other interested persons an opportunity to provide written comments.

**II. Public Inquiry**

The Commission establishes Docket No. PI2016–2 to solicit comments regarding its interpretation of terms and concepts related to section 404(d) including the distinctions between closures or consolidations and relocations or rearrangements of postal retail facilities, and the interpretation and application of the sole source standard which provides for Commission jurisdiction over certain CPUs. Title 39 U.S.C. 404(d) sets forth the procedures the Postal Service shall follow when closing or consolidating a post office and delineates the Commission's prescribed authority to review these closures and consolidations. "Closing" refers to the elimination of a post office in a community,<sup>3</sup> while "consolidation" has not been defined by the Commission since the Postal Service updated its regulations in 2011 and changed its definition of "consolidation."<sup>4</sup>

<sup>1</sup> Docket No. A2013–5, *Glenoaks Station Post Office, Burbank, California*, Order Affirming Determination, October 31, 2013 (Order No. 1866).

<sup>2</sup> Docket No. A2015–2, *Careywood Post Office, Careywood, Idaho*, Order Dismissing Appeal, May 27, 2015 (Order No. 2505).

<sup>3</sup> See, e.g., Docket No. A86–13, *In the Matter of Wellfleet, Massachusetts 02667*, Order Dismissing Docket No. A86–13, June 10, 1986 (Order No. 696).

<sup>4</sup> In the 2011 update, the Postal Service defined "consolidation" as a conversion from a Postal Service-operated retail facility to a contractor-operated retail facility that reports to a Postal Service-operated retail facility. See 39 CFR

The Commission's limited authority to review post office closings and consolidations is provided by 39 U.S.C. 404(d)(5).<sup>5</sup> That section requires that the Commission review the Postal Service's determination on the basis of the record that is before the Postal Service. The Commission is empowered by section 404(d)(5) to set aside any determination or findings and conclusions that the Commission finds to be: (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) without observance of procedure required by law; or (C) unsupported by substantial evidence in the record. Should the Commission set aside any such determination or findings and conclusions, it may remand the entire matter to the Postal Service for further consideration. Section 404(d)(5) does not, however, authorize the Commission to reject or modify the Postal Service's determination by substituting its judgment for that of the Postal Service.<sup>6</sup>

The Commission requests comments on whether its regulations in 39 CFR part 3025 and their application by the Commission in prior orders interpreting the statute and regulations are sufficiently clear.

**A. Relocations and Rearrangements**

The Commission has determined that when the Postal Service redeploys retail facilities within a community, such a change constitutes a relocation or rearrangement of postal retail services within a community, as opposed to a closing or a consolidation. A relocation or rearrangement is not subject to section 404(d) and therefore not within the Commission's jurisdiction. This interpretation of the definition of closing affords the Postal Service, as the operator and provider of service, the flexibility to organize and place its retail service outlets in the ways it sees best. Although the relocation of postal retail services is not defined by statute, the Postal Service defines and distinguishes

241.3(a)(2)(iv). Previously, the Postal Service had defined "consolidation" as the act of subordinating day-to-day overall management of one office with a postmaster to the administrative personnel of another office. See *Knapp v. U.S. Postal Service*, 449 F.Supp. 158 (E.D. Mich. 1978) (*Knapp*).

<sup>5</sup> The word "appeal" in the statute is somewhat imprecise, as the Commission does not have the authority to reverse or undo the Postal Service's action. If the Commission remands the Postal Service's determination, the Postal Service's regulations require that any deficiencies identified by the Commission be corrected before closing the facility. See 39 CFR 241.3(g)(4)(ii).

<sup>6</sup> However, section 404(d)(5) does authorize the Commission to suspend the effectiveness of a Postal Service determination pending disposition of the appeal.

it from facility discontinuances and consolidations. *See* 39 CFR 241.4.

Generally speaking, relocation involves the moving of retail services from one station or branch to another postal facility within the same community. *Id.* The Commission has concluded that a Postal Service action affecting a postal retail facility constitutes a relocation and falls outside the scope of 39 U.S.C. 404(d) if both the existing site and the proposed site of the retail facility are located in the same community.<sup>7</sup> This view is consistent with the Commission's predecessor, the Postal Rate Commission's ruling in *Oceana*, where it held that when enacting section 404(b),<sup>8</sup> Congress did not intend for the procedures and appeal right to apply to the specific building housing the post office, but rather Congress was concerned with the provision of a facility within the community. Order No. 436 at 1. The Commission has determined that Postal Service decisions to relocate retail facilities within the same community are not closings or consolidations and, therefore, fall outside the scope of the Commission's jurisdiction under 39 U.S.C. 404(d). *See* Order No. 436.

The Commission has applied this rationale in several post office closing appeals and found that transfers of retail operations constituted relocations over which it lacked section 404(d) jurisdiction to review. For example, in *Venice*, the Commission dismissed an appeal of a Postal Service decision to transfer retail operations to a carrier annex approximately 400 feet away as a relocation falling outside the scope of 39 U.S.C. 404(d).<sup>9</sup> In *Santa Monica* and *Ukiah*, the Commission determined that the transfer of retail operations to a carrier annex approximately 1 mile away from the main post office constituted a relocation of retail services falling outside the scope of 39 U.S.C. 404(d).<sup>10</sup> Similarly, in *Wellfleet*, the Postal Rate Commission determined that moving retail operations to a new location 1.2 miles away was a relocation

and 39 U.S.C. 404(d) did not apply. *See* Order No. 696.

The Commission also has determined that section 404(d) does not apply to Postal Service actions that rearrange retail services within a community. In *Oceana*, the Postal Rate Commission determined that the Postal Service decision to close the Oceana Station was part of an overall plan to rearrange postal retail and delivery operations within the Virginia Beach community and section 404(d) did not apply. The plan included building a new post office within Virginia Beach approximately 4 miles away from the site of Oceana Station, reorganizing carrier operations, improving retail services, and opening a CPU. Order No. 436 at 4–5.

The Commission has consistently applied its rationale used in *Oceana* and dismissed several post office closing appeals on the grounds that the Postal Service action constituted a rearrangement of retail facilities within a community. In *Sundance*, the Commission held the transfer of postal retail operations to a postal facility within the same community was a rearrangement of retail facilities and not subject to 39 U.S.C. 404(d).<sup>11</sup>

Currently, the Postal Service's regulations regarding the relocation of postal facilities within a community can be found in 39 CFR part 241—Establishment, Classification, and Discontinuance; expansion, relocation, and construction of post offices, and was most recently revised February 20, 2015, and became effective March 23, 2015.<sup>12</sup> However, Commission regulations do not specifically address relocations or rearrangements and, in light of previous Commission orders, it is interested in receiving comments regarding this issue.<sup>13</sup>

#### B. Sole Source

CPUs and Community Post Offices (CPOs) are types of contractor-operated (as opposed to Postal Service-operated) facilities. *See* 39 CFR 241.3(a)(2)(ii). A CPU is a contract station, contract branch, or CPO operated under contract by persons who are not postal employees in a space provided by the contractor.<sup>14</sup> Village Post Offices

(VPOs), although operated under a contract, are not classified by the Postal Service as a CPU.<sup>15</sup> While CPUs generally do not fall within the scope of 39 U.S.C. 404(d), in select circumstances when the Commission determines that a CPU is the sole source of postal retail services to a community, it has found that section 404(d) (both the statutory intent and language) justifies the Commission exercise of review authority over sole source CPU closures and consolidations.<sup>16</sup>

A CPO is a contractor-operated facility that provides services in small communities where an independent post office has been discontinued; a CPO bears its community's name and ZIP Code as part of a recognized mailing address. POM section 123.126, *see also* Glossary of Postal Terms.

In *Knob Fork*, the Commission first established the sole source exception, applying 39 U.S.C. 404(b) to a CPU<sup>17</sup> closure when that facility was the sole source of retail postal services to a community. *Knob Fork* at 10. In *Knob Fork*, the Postal Service emphasized that the main difference between a CPO and an independent post office was the employment status of the facility operator. *Id.* at 6. The Commission noted that if it accepts the Postal Service's statement that a CPO serves the public in the same way as a post office, it is reasonable to apply the section 404(b) procedures whenever the Postal Service proposes to close or consolidate a community's retail postal facility. *Id.* at 7. The Commission found that applying the section 404(b) closing procedures, given the Postal Service's definition of a CPO as the sole postal retail source serving a community, is consistent with Congress's intent that section 404(b) apply to the closing of the

*also*, Publication 32—Glossary of Postal Terms, July 2013, <https://about.usps.com/publications/pub32/> (Glossary of Postal Terms), defining a CPU as a “postal unit that is a subordinate unit within the service area of a main Post Office. It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected Special Services (e.g., Postal Money Order or Registered Mail). Also called contract branch, contract station, and community Post Office unit.”

<sup>15</sup> *See* Village Post Offices Fact Sheet, July 2011, <https://about.usps.com/news/electronic-press-kits/expandedaccess/assets/pdf/vpo-fact-sheet-110726.pdf>. VPOs, like CPUs and CPOs, are part of the Postal Service's “Approved Postal Provider” network and are retail outlets for postal products and services operated by a third party.

<sup>16</sup> *See* Docket No. A83–30, *In the Matter of Knob Fork, West Virginia 26579*, Commission Opinion Remanding Determination for Further Consideration 39 U.S.C. 404(b)(5), January 18, 1984, at 7 (*Knob Fork*).

<sup>17</sup> The specific type of CPU at issue in *Knob Fork* was a CPO.

<sup>7</sup> *See* Docket No. A82–10, *Oceana Station, Virginia Beach, Virginia*, Order Dismissing Docket No. A82–10, June 25, 1982, at 7 (Order No. 436).

<sup>8</sup> Section 404(b) of title 39 was renumbered to section 404(d) with the enactment of the Postal Accountability and Enhancement Act, Public Law 109–435, December 20, 2006.

<sup>9</sup> Docket No. A2012–17, *Venice Post Office, Venice, California*, Order Dismissing Appeal, January 24, 2012 (Order No. 1166).

<sup>10</sup> Docket A2013–1, *Santa Monica Post Office, Santa Monica, California*, Order Granting Motion to Dismiss, December 19, 2012 (Order No. 1588); Docket No. A2011–21, *Ukiah Main Post Office, Ukiah, California*, Order Granting Motion to Dismiss, August 15, 2011 (Order No. 804).

<sup>11</sup> Docket No. A2010–2, *Sundance Post Office, Steamboat Springs, Colorado*, Order Dismissing Appeal, April 27, 2010 (Order No. 448).

<sup>12</sup> 80 FR 9190 (Feb. 20, 2015).

<sup>13</sup> Previously the Commission deferred consideration of a definition of the term “relocation.” *See* Order No. 1171, Docket No. RM2011–13, Order Adopting Final Rules Regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices, January 25, 2012, at 8.

<sup>14</sup> Postal Operations Manual section 123.126, Issue 9, July 2002, Updated With Postal Bulletin Revisions Through October 31, 2013 (POM); *see*

sole postal retail facility serving a community. *Id.* at 8.

In *Green Mountain*, the Commission reiterated that section 404(b) applies to sole source CPOs:

It is the view of the Commission that Congress expected the section 404(b) procedures to apply not only to independent post offices, as defined by the Postal Service, but also Community Post Offices when they are the sole source of postal services to a community. The Postal Service's consistent position is that the service of a Community Post Office is equivalent to that of an independent post office it seeks to consolidate. Therefore, the most reasonable reading of section 404(b) and Congressional intent is that 404(b) must apply whenever there is a proposed closure or consolidation of a community's sole retail postal facility, including a Community Post Office.<sup>18</sup>

Over the last 30 years, when determining whether a CPU is the sole source of postal retail services in a community, the Commission has considered other sources of retail postal services to the community at issue. For example, in *Alplaus*, since there was a post office located approximately 1 mile from the Alplaus CPO and there were over 20 alternate access locations within a 5-mile radius, the Commission concluded that the Alplaus CPO was not the "sole source" of postal services for the community.<sup>19</sup> Accordingly, the Commission determined that since the Alplaus CPO was not the sole source of postal services for the community, section 404(d) did not apply.

Similarly, in the past 3 decades since the sole source standard was set forth in *Knob Fork*, there have been advancements in technology, creation and expansion of commercial business centers, evolution of the postal retail network, and different modes of transportation. The Commission has continued to apply the sole source framework using a reasonable standard based on the statute and legislative intent. The sole source standard is not based simply on whether a facility is the only postal retail service facility located in a community. The standard is whether that retail facility is the sole provider of services to a community. This standard allows the Commission to recognize ongoing developments in travel, communication, and other

services that may impact a community in how it receives its postal services.

In *Careywood*, the most recent Commission decision to apply the sole source standard, the Commission recognized that approved shippers, contract units such as VPOs, and automated postal centers may not be currently available. However, it acknowledged that other categories of postal services, such as another postal retail facility approximately a 7-minute drive away, rural carriers, <https://www.usps.com>, and the Internet are available. Order No. 2505 at 12. The Commission noted that a facility that decades previously may have been considered the sole source may no longer be the sole source in part due to improved road safety, provisions of services by alternate means, and migration of business services to different areas. *Id.* The Commission also referenced Congress's requirement in section 302 of the Postal Accountability and Enhancement Act of 2006, that the Postal Service develop a plan for the expansion of access to alternate retail services including the Internet and non-post office access channels. *Id.* The Commission also held that while the Careywood CPU was the only physical postal retail provider in the community, it was not the community's only source for postal retail services, therefore section 404(d) did not apply. *Id.* at 13. The Commission explained that the closure of the Careywood CPU did not eliminate the Careywood community's access to postal retail services. *Id.*

The Commission requests comments on the issue of the sole source standard used to determine whether section 404(d) applies to the closure or consolidation of a CPU.

### III. Conclusion

The Commission invites public comment on the Commission's interpretation of the language and intent of 39 U.S.C 404(d) with regards to the relocation and rearrangement of postal retail facilities, and the criteria and application of a sole source standard to CPU closures and consolidations. Additional information may be accessed via the Commission's Web site at <http://www.prc.gov>. Interested persons may submit comments no later than January 29, 2016. Reply comments may be filed no later than February 23, 2016.

### IV. Public Representative

Pursuant to 39 U.S.C. 505, Lauren A. D'Agostino is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

### V. Ordering Paragraphs

*It is ordered:*

1. The Commission hereby establishes Docket No. PI2016-2 to review issues related to the scope of its appellate authority over relocations and rearrangements of postal retail facilities and the closure or consolidation of CPUs.

2. Interested persons may submit comments no later than January 29, 2016.

3. Reply comments may be filed no later than February 23, 2016.

4. Pursuant to 39 U.S.C. 505, the Commission appoints Lauren A. D'Agostino to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

5. The Secretary shall arrange for publication of this notice in the **Federal Register**.

By the Commission.

**Stacy L. Ruble,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76613; File No. SR-NYSEMKT-2015-89]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change to Its Rules To Provide That the Co-Location Services Offered by the Exchange Include Three Time Feeds and Four Bundles of Co-Location Services

December 10, 2015.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on November 27, 2015, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>18</sup> Docket No. A94-9, *In the Matter of Green Mountain, Iowa* 50637, Commission Opinion Affirming Decision Under 39 U.S.C. 404(b), August 16, 1994, at 5 (*Green Mountain*).

<sup>19</sup> Docket No. A2012-88, *Alplaus Post Office, Alplaus, New York*, Order Dismissing Appeal, March 21, 2012, at 6 (Order No. 1293).