

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VENICE STAKEHOLDERS)	
ASSOCIATION, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 12-1110
)	
POSTAL REGULATORY COMMISSION,)	
)	
Respondent,)	
)	
UNITED STATES POSTAL SERVICE,)	
)	
Intervenor.)	

**PETITIONERS’ RESPONSE IN OPPOSITION TO
RESPONDENT’S MOTION TO DISMISS**

Petitioners Venice Stakeholders Association, *et al.*, hereby respectfully oppose the motion of respondent Postal Regulatory Commission (“PRC”) to dismiss and request that the motion to dismiss be denied. Petitioners brought this petition under 39 U.S.C. § 3663, which provides for appellate review of final orders or decisions of the Postal Regulatory Commission.

The Postal Regulatory Commission has filed similar motions in two other cases, *Mittleman v. Postal Regulatory Commission*, No. 12-1095 (D.C. Cir.), and *McClung v. Postal Regulatory Commission*, No. 12-1157 (D.C. Cir.).

The United States Postal Service is an intervenor in this proceeding. The Postal Service has authorized respondent PRC to state that the Postal Service supports the respondent's motion to dismiss.

PERTINENT STATUTORY PROVISIONS

39 U.S.C. § 3663. Appellate review.

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, 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, and chapter 158 [28 USCS §§ 2341 et seq.] and section 2112 of title 28, on the basis of the record before the Commission.

(As amended Dec. 20, 2006, P. L. 109-435, Title II, § 205, 120 Stat. 3217.)

39 U.S.C. § 404. Specific powers.

(d)(5) Any determination of the Postal Service to close or consolidate any post office may be appealed by any person served by such office to the Postal Regulatory Commission within 30 days after such determination is made available to such person under paragraph (3). The Commission shall review such determination on the basis of the record before the Postal Service in the making of such determination. The Commission shall make a determination based upon such review no later than 120 days after receiving any appeal under this paragraph. The Commission shall set aside any determination, findings, and conclusions found 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 on the record.

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 [5 USCS §§ 556, 557, and 701 et seq.] shall not apply to any review carried out by the Commission under this paragraph.

Amendments:

2006. ... Such Act further designated subsecs. (b) and (c), as added and amended by the Act, as subsecs. (d) and (e) respectively; and inserted new subsecs. (b) and (c).

1976. Act Sept. 24, 1976, P. L. 94-421, §9(a), 90 Stat. 1310, ... inserted “(a)”; and added subsec. (b).

LEGISLATIVE HISTORY

There are several provisions contained in H.R. 22 within the Committee on the Judiciary’s subject matter jurisdiction. Specifically, section 205 of the legislation revises the complaint and appellate review of the Postal Regulatory Commission.

Letter dated May 12, 2005, to Rep. Tom Davis from Rep. F. James Sensenbrenner, Jr.

151 Cong. Rec. H6511, 6521. Regarding H.R. 22 (July 26, 2005)

Section 3663 provides for appeals of any order or decision of the Postal Regulatory Commission to the United States Court of Appeals for the District of Columbia Circuit in accordance with chapter 706 of title 5 and chapter 158 of title 28.

H.R. Rep. No. 108-672 Part 1, at 11. To accompany H.R. 4341 (Sept. 8, 2004)

REGULATIONS

39 C.F.R. § 241.4 Expansion, relocation and construction of post offices

(d) *Discontinuances of post offices; historic preservation.* (1) It is the policy of the Postal Service, by virtue of Board of Governors Resolution No. 82-7, to comply with Section 106 of the general provisions of the National Historic Preservation Act, 16 U.S.C. 470, *et seq.*, Executive Order 12072, and Executive Order 13006. Therefore, any facility project that will have an effect on cultural resources will be undertaken in accordance with that policy.

FACTUAL BACKGROUND

A. United States Postal Service Strategies.

On May 9, 2012, the Postal Service issued press release No. 12-054 (available at http://about.usps.com/news/national-releases/2012/pr12_054.htm).

The press release discusses the new strategy of the Postal Service to preserve post offices. The new plan would keep existing post offices in place, but with modified retail window hours to match customer use. The press release explained that the Postal Service had implemented a voluntary moratorium on all postal facility closings through May 15, 2012, and that no closings or changes to Post Office operations would occur until after that time.

It is not clear at this time whether the Postal Service will revoke or withdraw the Final Determinations it has issued to close post offices in light of the new strategy to keep post offices in place, but to modify retail window hours.

B. Venice Main Post Office.

The Venice Main Post Office is located at 1601 Main Street, Venice, California. In a letter dated September 23, 2011, David E. Williams of the Postal Service explained that he was designated as the decision maker in the request for review of the decision to relocate retail services currently located at 1601 Main Street, Venice, California. The final decision of the Postal Service regarding the requests for review concerning that facility was attached to the letter. Mr.

Williams stated that he would not set aside the original decision. The September 23, 2011, letter and the final decision are attached as Exhibit B to Respondent's Motion to Dismiss.

The final decision addressed the historic preservation issues for the Venice Main Post Office as follows:

The Venice Main Post Office was constructed in 1939 and is eligible for listing in the National Register of Historic Places. An oil-on-canvas mural entitled "Story of Venice" by artist Edward Biberman is currently on display in the lobby. Several customers expressed concern that the building and/or mural would not be preserved.

Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to take into account the effects of their proposed undertakings on historic properties, and when such effects are possible, to initiate and complete the Section 106 consultation process. Section 106 review ensures that federal agencies consider historic properties, along with other factors such as cost and agency mission, in the planning process of proposed undertakings. However, the preservation of every historic property is not the goal of Section 106, nor does Section 106 require a business to continue to operate in a historic property even if doing so causes the business to become unprofitable.

The relocation of retail services is not an "undertaking" within the meaning of Section 106. An undertaking is a "project, activity or program" that can result in changes in the character or use of historic properties. The relocation of retail services does not alter the character of the Venice Main Post Office building or the mural. Nor does it change the uses that can be made of the property. There will be no "undertaking" within the meaning of NHPA until the Postal Service adopts a plan for the reuse of the Venice Main Post Office or the transfer of the Post Office building from Postal Service ownership to private ownership. The Postal Service will initiate the Section 106 consultation process when it develops plans for the reuse or disposal of the property, and

the City of Venice will be a consulting party. The Postal Service will include measures to ensure the mural will remain available for public viewing in any plan for reuse or disposal of the Post Office property.

It should be noted that there is no “City of Venice.” Venice is a beachfront district on the Westside of Los Angeles, California. It has been a neighborhood of Los Angeles since being annexed by the city in 1925. *See* Venice Chamber of Commerce information, available at <http://venicechamber.net/visitors/about-venice/>.

In a press release dated July 18, 2011, the Postal Service announced that it had approved the relocation of the Venice Post Office, 1601 Main Street, to the Venice Carrier Annex, 313 Grand Boulevard. The press release is available at http://about.usps.com/news/state-releases/ca/2011/ca_2011_0718b.htm. It indicates that, once the move is completed, plans call for the sale of the building at 1601 Main Street. Further, the press release explains that the facility is a registered historic building and the Postal Service will ensure the historic characteristics are maintained through covenants conveyed to a future buyer as an attachment to the deed.

In a press release dated May 30, 2012, the Postal Service announced that the Venice Post Office will open in its new location on June 18, 2012. The release is available at http://about.usps.com/news/state-releases/ca/2012/ca_2012_0530.htm.

According to media reports, the Venice Main Post Office has been sold. One article indicates that film producer Joel Silver has signed papers and is waiting on the United States Postal Service to finalize things. The article further explains that Mr. Silver has stated that he is willing to sign a binding covenant to preserve the building and the “Story of Venice” mural in its historic condition. He would also guarantee public access to the building’s foyer and the mural. Mr. Silver is known as a preservationist and has restored the Frank Lloyd Wright-designed Storer House on the western end of Hollywood Boulevard. *See Superproducer Joel Silver Buying, Saving Venice Post Office*, Curbed LA, June 11, 2012, available at http://la.curbed.com/archives/2012/06/superproducer_joel_silver_buying_preserving_venice_post_office.php.

It appears that the Venice Main Post Office is in the process of being sold. However, the status of any Section 106 consultation process conducted by the Postal Service is unclear. Further, it is not known what measures are being undertaken by the Postal Service to ensure that the mural will remain available for public viewing in any plan for reuse or disposal of the Post Office property.

On October 17, 2011, Mark Ryavec and Venice Stakeholders Association filed a petition with the Postal Regulatory Commission seeking review of the final decision of the Postal Service to relocate the Venice Main Post Office. Several additional similar petitions for review were also filed. *See* PRC Order No. 1166

Granting Motion to Dismiss in Docket No. A2012-17, January 24, 2012, at 1. The PRC Order is attached as Exhibit A to Respondent's Motion to Dismiss.

Petitioners, who had sought review of the final decision before the PRC, filed a petition for review of PRC Order No. 1166, issued January 24, 2012, in this Court. The petition for review in this Court was timely filed on February 22, 2012, pursuant to 39 U.S.C. § 3663.

ARGUMENT

I. The plain language of 39 U.S.C. § 3663 provides for review in this Court of a final order of the Postal Regulatory Commission.

The Postal Accountability and Enhancement Act of 2006 ("PAEA"), Pub. L. No. 109-435, 120 Stat. 3198, included provisions to address the functions of the Postal Service and oversight of the Postal Service by the Postal Regulatory Commission. One of the provisions, 39 U.S.C. § 3663, provides review in this Court of a final order or decision of the Postal Regulatory Commission.

There is a strong presumption that Congress intends that the federal courts review agency action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). If there is substantial doubt about congressional intent concerning judicial review, the general presumption favoring judicial review of administrative action is controlling. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351, 104 S.Ct. 2450, 2457, 81 L.Ed.2d 270 (1984). The standard for determining whether "a particular statute precludes

judicial review is determined not only from the express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and nature of the administrative action involved.” *Id.* at 345, 104 S.Ct. at 2453.

This Court has previously considered appeals of orders of the Postal Regulatory Commission. *See United States Postal Service v. Postal Regulatory Commission*, 599 F.3d 705 (D.C. Cir. 2010); *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011); *United States Postal Service v. Postal Regulatory Commission*, 2012 WL 1292571 (D.C. Cir. April 17, 2012); *LePage’s 2000, Inc. v. Postal Regulatory Commission*, 642 F.3d 225 (D.C. Cir. 2011); *LePage’s 2000, Inc. v. Postal Regulatory Commission*, 674 F.3d 862 (D.C. Cir. 2012).

It is clear that Congress intended that a final order of the PRC can be appealed to this Court. In a letter dated May 12, 2005, to Rep. Tom Davis from Rep. F. James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, there was a discussion about provisions involving the subject matter jurisdiction within the Committee on the Judiciary. Rep. Sensenbrenner wrote that:

There are several provisions contained in H.R. 22 within the Committee on the Judiciary’s subject matter jurisdiction. Specifically, section 205 of the legislation revises the complaint and appellate review of the Postal Regulatory Commission.

151 Cong. Rec. H6511, 6521. Regarding H.R. 22 (July 26, 2005).

The Report for an earlier version of this legislation plainly states that:

Section 3663 provides for appeals of any order or decision of the Postal Regulatory Commission to the United States Court of Appeals for the District of Columbia Circuit in accordance with chapter 706 of title 5 and chapter 158 of title 28.

H.R. Rep. No. 108-672 Part 1, at 11. To accompany H.R. 4341 (Sept. 8, 2004).

Thus, there is no doubt that an appeal to this Court of a final order of the PRC is permitted. There is no language in this statute which precludes an appeal. To the contrary, there is language in 39 U.S.C. § 3663 which specifically permits a “person ... adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission” to file a petition for review in this Court.

II. This appeal is from an order of the Postal Regulatory Commission and not from an order of the United States Postal Service.

The appeal in this case is from an order of the Postal Regulatory Commission. It is not an appeal from an order or decision of the United States Postal Service. The PRC in its motion appears to assume that this is an appeal from an order of the United States Postal Service or that the cases concerning the Postal Service are pertinent. For example, the PRC cited cases involving the Postal Service in its motion at pages 11-12.

The PRC discussed what it described as a similar provision in 39 U.S.C. § 410(a). However, that provision concerns whether federal laws should apply to the exercise of the powers of the Postal Service. This Court has indicated that § 410(a)

exempts the Postal Service from notice and comment rulemaking procedures of the Administrative Procedure Act (“APA”). See *Aid Association for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1172 (D.C. Cir. 2003), citing *Nat’l Easter Seal Soc’y for Crippled Children & Adults v. USPS*, 656 F.2d 754, 766 (D.C. Cir. 1981).

There are numerous reasons why that argument is simply not applicable here. First, the question of judicial review in that case concerned the Postal Service and not a final order of the PRC. Second, judicial review in that case concerned litigation in a district court, not a petition for review in this Court pursuant to 39 U.S.C. § 3663. Finally, this Court held that judicial review was available in that case. *Aid Association for Lutherans v. USPS*, 321 F.3d at 1168. Thus, that case provides no support for the PRC’s argument that a final order of the PRC is not reviewable in this Court.

Moreover, the PRC asserts in its motion at p. 12 that every Circuit to have addressed the question has concluded that § 410(a) bars judicial review of Postal Service actions under the Administrative Procedure Act. The PRC did cite several cases in which the argument about judicial review of Postal Service actions was considered waived. One of those cases cited by the PRC is *Top Choice Distribs., Inc. v. U.S. Postal Serv.*, 138 F.3d 463 (2d Cir. 1998). In that case, the Postal

Service had conceded that judicial review of final agency actions pursuant to the Administrative Procedure Act is appropriate. *Id.* at 465 n. 1.

Further, in discussing the language of § 404(d)(5) in the motion at pp. 13-14, the PRC states that the statutory language was that the APA shall not apply to Commission decisions reviewing post office closure or consolidation determinations. The PRC does not correctly describe the statutory language, which is that “[t]he provisions of section 556, section 557, and chapter 7 of title 5 [5 USCS §§ 556, 557, and 701 et seq.] shall not apply to any review carried out by the Commission under this paragraph.” The statutory provision involving the APA concerns “any review carried out by the Commission” and not “Commission decisions.” A fair reading indicates that the identified provisions of the APA do not apply to the procedures used during the review process conducted by the PRC. By contrast, the APA does apply to the review in this Court of a final order or decision of the PRC.

The PRC notes the holding in *Lundeen v. Mineta*, 291 F.3d 300, 305-11 (5th Cir. 2002), which discussed the specific language in 23 U.S.C. § 134(f)(2) that precludes judicial review. That statute provides that “[t]he failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this title, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a transportation improvement plan, a project or

strategy, or the certification of a planning process.” The language of that provision explicitly states that the failure to consider any specified factor “shall not be reviewable by any court.” That language is a sharp contrast to § 404(d)(5), which provides that certain provisions of title 5 “shall not apply to any review carried out by the Commission.”

The PRC points to the comment that reading the text of § 217(g) of the statute “in a vacuum” would seem to support APA review. However, the court explained that reading § 217(g) in the context of other provisions, statutory structure, legislative history and the nature of the administrative remedy indicates that § 217(g) does not permit judicial review. *Lundeen*, 291 F.3d at 310-11. Utilizing that method of thorough statutory analysis in this case confirms that judicial review is available pursuant to 39 U.S.C. § 3663.

The PRC again confuses the meaning of § 404(d)(5) in its argument at p. 15 about general and specific statutory provisions. The PRC states that “Congress retained the provision precluding APA review of Commission decisions under 39 U.S.C. § 404(d)(5)” when it amended portions of § 404(d). However, the provision in § 404(d)(5) does not preclude APA review of PRC decisions, as the PRC claims. The provision indicates that certain sections of the APA shall not apply to any review carried out by the PRC. Thus, there is no issue of seemingly inconsistent provisions in the same statute. The language of § 404(d)(5) and §

3663 refer to different situations. Those provisions are not contradictory or inconsistent.

This Court recently discussed the status of certain proceedings before the PRC. In *LePage's 2000, Inc. v. Postal Regulatory Commission*, 674 F.3d at 868, there was a question about the type of proceedings before the PRC for the determination of attorneys' fees. The proceedings before the PRC in that case, which were governed by 39 U.S.C. § 404(e)(3), did not require a hearing. Thus, the proceedings were not considered an "adversary adjudication" for purposes of awarding attorneys' fees. This Court further explained that the generic provisions of chapter 5 of title 5 may apply even if the formal adjudication provisions of § 554 do not.

Similarly, in this case, even if certain provisions of title 5 do not apply to proceedings before the PRC, generic provisions of title 5 may apply. Moreover, these provisions concern proceedings before the PRC and not petitions for review by this Court of a final order of the PRC. The statutory provision of 39 U.S.C. § 3663 states that this Court shall review the PRC order in accordance with section 706 of title 5 on the basis of the record before the PRC. It is clear that a final order of the PRC can be reviewed by this Court.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners Venice Stakeholders Association, *et al.*, respectfully request that respondent's motion to dismiss be denied.

Respectfully submitted,

/s/ Elaine J. Mittleman

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2012, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Respectfully submitted,

/s/ Elaine J. Mittleman
Elaine J. Mittleman