

the Commission's jurisdiction, the complaint should be dismissed since electronic postmark is not a postal service.⁴

The motion to dismiss is denied because, as discussed in detail below, the Commission: (a) rejects the Postal Service's contention that the Commission lacks authority to determine the scope of its own jurisdiction; and (b) finds that the parties' conflicting claims whether electronic postmark is or is not a postal service raise genuine issues of material fact that require a hearing in conformity with section 3624. See sections II and III, below. To that end, the Complainant is directed to file a statement, no later than March 20, 2006, estimating the amount of time it will require to develop and file a case-in-chief. Thereafter the Commission will issue a procedural schedule and, if warranted, special rules of practice.

The motion to dismiss is, however, granted in one respect, specifically, as to DigiStamp's claim that the Postal Service violated section 3661 by failing to request an advisory opinion on electronic postmark. See section IV, below.

⁴ *Id.* at 6-17.

I. THE PLEADINGS

The Complaint. DigiStamp's complaint contains three principal claims. First, DigiStamp alleges that the Postal Service is providing electronic postmark service in violation of the Act. It contends that electronic postmark is a class of mail or type of service and thus requires the Postal Service to request a recommended decision pursuant to sections 3622 and 3623 of the Act before service may be implemented or rates charged for the service.⁵ It describes electronic postmark as "largely an electronic service [that] functions as a type of mail (and a service ancillary to mail), using recent technology, to provide evidence of the time and date of a document transmission and security against tampering with the contents of the document." *Id.* at 4, ¶ 21. DigiStamp characterizes electronic postmark as "mail," asserting that it substitutes for hardcopy mail. *Ibid.* ¶¶ 23-24.

Second, DigiStamp contends that the rates charged for electronic postmark fail to comply with section 3622(b).⁶ It asserts that the Postal Service is offering electronic postmark in competition with companies in the private sector, including DigiStamp, providing similar service. *Id.* at 7, ¶¶ 43-44. DigiStamp further alleges that the Postal Service is cross-subsidizing electronic postmark service "with monopoly revenues [which] may inhibit competition to the detriment of consumers of all such services." *Ibid.* ¶ 47.

Third, DigiStamp contends that the provision of electronic postmark violates section 3661,⁷ asserting that electronic postmark may affect the use of other mail services, e.g., First-Class Mail, registered or certified mail, because it will be used in lieu of such services. *Ibid.* ¶ 49. DigiStamp asserts that providing electronic postmark service therefore represents a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis.

⁵ Complaint at 4-5, ¶¶ 17-29.

⁶ *Id.* at 5-7, ¶¶ 30-47.

⁷ *Id.* at 7-8, ¶¶ 48-53.

The Postal Service's responses. Concurrently, the Postal Service filed an answer to the complaint and a motion to dismiss the complaint. In its answer, the Postal Service, among other things:

denies that electronic postmark is a “document delivery service;”⁸ clarifies that electronic postmark service in “its current configuration,” which is offered through a strategic alliance with AuthentiDate, “was launched in January, 2003.” *Id.* at 2, ¶ 2 and 5, ¶¶ 14-16;

denies any continuing relevance of 18 U.S.C. § 1341; *id.* at 3, ¶ 9; admits that electronic postmark is a service provided by the Postal Service; *id.* at 4, ¶ 11;

denies that electronic postmark has incurred a large net loss in its current configuration, stating that a large net loss was incurred during the period from its inception in 1996 until termination of that configuration; *id.* at 5, ¶ 16;

denies that electronic postmark is a class of mail, type of mail service, or service ancillary to mail; *id.* at 6, ¶¶ 17 and 21; and

denies that the Postal Service cross-subsidizes electronic postmark with “monopoly revenue.” *Id.* at 12, ¶ 47.

In moving to dismiss the complaint, the Postal Service advances two principal arguments. First, it contends that its decision to launch electronic postmark is unreviewable by the Commission.⁹ This assertion rests on the premise that the Postal Service’s unilateral classification of a service as “nonpostal” is dispositive and is reviewable, if at all, only by a United States district court. *Id.* at 3.

Second, the Postal Service argues that, even assuming the Commission has authority to determine whether electronic postmark is a postal service, “EPM is not a ‘postal service’ for purposes of sections 3622, 3623, 3661, and 3662 of title 39, United States Code.” *Id.* at 6. In support, the Postal Service highlights “the primary

⁸ Answer of the United States Postal Service, April 26, 2004, at 2, ¶ 2 (Postal Service Answer).

⁹ Motion to Dismiss at 2-3.

precedents,” which include the *ATCMU* and *NAGCP I*¹⁰ opinions and the Commission’s decisions in Docket Nos. R76-1, C95-1, and C96-1. Based on its review, the Postal Service concludes that these authorities stand for the proposition that “such services [to be deemed a postal service] must bear, at minimum, some relation to hardcopy postal delivery networks.”¹¹

In addition, the Postal Service contends that electronic postmark service is not a postal service because it is entirely electronic and, further, does not deliver anything between senders and recipients. *Id.* at 12-13. The Postal Service describes the purpose of electronic postmark service as being “to protect the integrity of electronic data.” *Id.* at 13. The Postal Service states that electronic postmark service neither requires nor accomplishes the transmission of content. *Id.* at 14. Thus, the Postal Service contends that, since nothing moves between the sender and recipient, “it is impossible to construe any ‘carriage of mail’ that is the *sine qua non* of a postal service.” *Id.* 14-15.

The Postal Service notes that that electronic postmark service may “enhance the utility of subsequent electronic document exchange,” describing the “EPM process [as] often a step towards broader participation in electronic commerce, and other varieties of electronic information transmission.” *Id.* at 15. It characterizes electronic postmark service as “a wholly independent transaction,” not ancillary to the electronic information transmission.¹²

DigiStamp’s answer to the motion. DigiStamp filed an answer opposing the Postal Service’s motion to dismiss.¹³ It addresses each of the Postal Service’s principal

¹⁰ *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109 (D. D.C. 1975) (*ATCMU*), *affirmed*, *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) (*NAGCP I*), *vacated on other grounds*, 434 U.S. 884 (1977).

¹¹ Motion to Dismiss at 7.

¹² *Ibid.* In an accompanying footnote, the Postal Service briefly discusses the “superficial resemblance” between electronic postmark service and money orders, discounting the appropriateness of any such comparison. *Id.* at 15, n.12. It also compares electronic postmark service with services provided by a notary public. *Id.* at 15-16.

¹³ DigiStamp Answer in Response to Motion of the United States Postal Service to Dismiss, May 3, 2004 (DigiStamp Answer).

claims. First, DigiStamp contests the Postal Service's conclusion that the Commission lacks authority to determine the scope of its own jurisdiction as well as its characterization of the issue as entailing approval or review of the Postal Service's exercise of its independent authority under the Postal Reorganization Act. *Id.* at 2-3. DigiStamp also contends that the Postal Service mischaracterizes the complaint by misreading section 3662. According to DigiStamp, the complaint is not primarily about the lawfulness of electronic postmark service, but whether the Postal Service must obtain Commission review and a recommended decision prior to commencing a new postal service. *Id.* at 3-4. Further, DigiStamp counters the Postal Service's claim that review, if any, is available only by a U.S. district court, arguing that the statute does not preclude review by the Commission via the complaint process. *Id.* at 4-5.

Regarding the Postal Service's second principal argument — that even assuming Commission authority to consider the complaint, electronic postmark is not a postal service — DigiStamp contends that the issue is a matter for hearing. *Id.* at 6-14. In support, DigiStamp, among other things:

cites several examples from a Postal Service press release comparing the similarities of electronic postmark to mail service, *e.g.*, “creating the first in a series of ‘First-Class’ Mail electronic commerce services[,]” and “the Postal Service is developing “a series of services to mirror those of First-Class Mail.” *Id.* at 8, citing Exhibit A to the Complaint;¹⁴

contends that electronic postmark service adds value to the mail similar to other security and evidentiary features such as certified and registered mail; *id.* at 9;

disputes the Postal Service's contention that electronic postmark service does not entail “the transfer of something from a sender to a recipient,’ ... indicat[ing] a product ancillary to mail.” *Ibid.*;

¹⁴ DigiStamp acknowledges that the press release relates to a superseded version of the service, but asserts that there has been no showing that the essential elements of the current service are significantly different. *Id.* at 8.

quotes material from the Postal Service's web site which, DigiStamp contends, suggests the Postal Service views "EPM service as a substitute for traditional services." *Ibid.*;

cites Postal Service advertising claims implying an ancillary relationship to hard-copy mail and imbuing electronic postmark service with characteristics reserved only for mail service. *Id.* at 10; and

contends that the status of electronic postmark service as a postal service or not "requires a hearing into the specific facts surrounding this service[.]" *Id.* at 14-15.

DigiStamp also moves to supplement its complaint with information not available when the complaint was filed.¹⁵ The motion indicates that the Postal Service's electronic postmark service has been added to South Carolina's Uniform Electronic Transactions Act (UETA) as an alternative to certified or registered mail for certain types of electronic communications, e.g., process of service. *Id.* at 1-2. DigiStamp represents that the electronic service has the "same force of law and legal effect as those physical mail services." *Id.* at Exhibit A. It contends that the "specific application of UETA in South Carolina excludes any service provider other than the Postal Service." *Id.* at 2.

DigiStamp also asserts that "EPM software and service [include] what has been historically marketed as the Electronic Courier Service." *Ibid.* Stating that the Postal Service had discontinued the latter line of business in November 2002, but subsequently re-entered it in July 2004, DigiStamp asserts that "EPM is now being combined with other communications functions to operate as Electronic Courier Service under a new name." *Id.* at 3. It requests that this allegation be made part of its complaint. *Ibid.* The Postal Service did not file an answer to this motion.

¹⁵ See DigiStamp Motion, *supra*, November 12, 2004.

II. THE COMMISSION'S JURISDICTION TO CONSIDER COMPLAINTS

The complaint alleges that electronic postmark is a postal service and therefore the Postal Service should have requested a recommended decision before initiating service. The Postal Service argues that the Commission lacks “authority to approve or review the Postal Service’s exercise of its independent authority to carry out its own powers and duties under the statute.”¹⁶ The issue raised by the complaint is not whether the Postal Service’s action is lawful or not; rather it is whether electronic postmark service is a postal service, a matter appropriately before the Commission.

In Docket No. RM2004-1, the Commission proposed and, after several rounds of comments, subsequently adopted an amendment to its Rules of Practice defining the term postal service as follows: *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto. See PRC Order No. 1449, January 4, 2006. This definition became effective February 16, 2006.

The rulemaking proceeding was initiated, in large part, because the Commission determined that the jurisdictional implications of a spate of new services implemented unilaterally by the Postal Service would be most efficaciously addressed by rule rather than on an ad hoc basis.¹⁷ In Docket No. RM2004-1, based on a detailed analysis of statute, legislative history, precedent, and the parties’ comments, the Commission rejected the Postal Service’s contention that the Commission lacked authority to determine the scope of its own jurisdiction. Consequently, the Commission finds it

¹⁶ Motion to Dismiss at 1. As a variation of this claim, the Postal Service argues that the Commission lacks authority “to declare independent actions of the Postal Service to be either lawful or unlawful.” *Id.* at 3.

¹⁷ PRC Order No. 1389, January 16, 2004, at 8; PRC Order No. 1424, *supra*, at 3 and PRC Order No. 1449, *supra*, at 16-17.

unnecessary to revisit that issue, choosing instead to incorporate by reference its findings and conclusions from that rulemaking.¹⁸

Section 3662, 39 U.S.C. § 3662, provides interested parties an independent means to bring rate and classification matters before the Commission between rate cases. A complaint will lie if the interested party believes that “the Postal Service is charging rates which do not conform to the policies set out in [title 39] or . . . that [he/she is] not receiving postal service in accordance with the policies of this title[.]” If, in its discretion, the Commission holds hearings, its response is dependent, in the first instance, on finding the complaint to be justified and, secondly, on whether the subject matter of the complaint is covered by subchapter II of title 39. Subchapter II encompasses rate and classification matters.

DigiStamp’s complaint includes both rate and classification elements. It complains that the rates charged for electronic postmark service do not conform to the policies of title 39 since: (a) the Postal Service implemented service and began charging rates without first obtaining a recommended decision from the Commission; (b) the rates charged do not comply with section 3622(b); and (c) the rates for electronic postmark service are being cross-subsidized.¹⁹

DigiStamp’s classification claim, that the Postal Service has failed to comply with section 3623,²⁰ also bears on the issue whether “postal service” is being received in accordance with the policies of title 39. That facet of the complaint is framed in terms of a competitor, not user of the service. DigiStamp’s claim of unfair competition goes to this issue.²¹

¹⁸ See PRC Order No. 1424, November 12, 2004, at 6-39, and PRC Order No. 1449, *supra*, at 5-21. The Postal Service Motion to Dismiss predated both of the foregoing orders. Postal Service arguments in this proceeding reiterated arguments it advanced in Docket No. RM2004-1. The merits of its arguments were thoroughly considered in the latter docket.

¹⁹ See Complaint at 4-8, ¶¶ 20, 27-29, 42, 45-47, and 54. DigiStamp’s allegations of an unlevel playing field may have implications for whether or not the Postal Service’s provision of this service has a substantial public effect. See *ATCMU, supra*, 405 F. Supp. at 1115.

²⁰ Complaint at 4-5, ¶¶ 19, and 27-29.

²¹ See Complaint at 3-4, ¶ 13, 7, ¶ 45, and Exhibit G.

The gravamen of the complaint, according to the Postal Service, is unrelated to the rates being charged, “but [rather] whether the Postal Service acted lawfully when offering USPS EPM without a recommended decision from the Commission.”²² The Postal Service mischaracterizes the complaint. DigiStamp contends that electronic postmark is a postal service. Its complaint satisfies the elements of section 3662 by raising both rate and service issues. It may be that the latter become moot if the Commission concludes that electronic postmark is not a postal service, but that conclusion (or any other jurisdictional finding made by the Commission) is not, as the Postal Service would characterize it, synonymous with finding the Postal Service’s actions lawful or unlawful. Rather, the result is a product of the Commission acting properly under the statute to determine the scope of its own jurisdiction.

The Postal Service argues its decision not to seek a recommended decision is unreviewable by the Commission and that review, if any, may be obtained by DigiStamp only by filing suit in a United States district court. *Id.* at 2-3. The Postal Service argues that its position is supported by “the contemporaneous interpretation” of the Act “immediately following postal reorganization.” *Id.* at 3. Citing the *ATCMU* case, it concludes that “district courts are available to address and resolve the exact issue upon which the DigiStamp complaint must hinge.”²³ While this statement is accurate regarding the availability of district court review, it does not get the Postal Service very far.

First, that parties in prior cases challenged certain services as postal by filing in district court rather than with the Commission is not dispositive of subsequent

²² Motion to Dismiss at 2.

²³ *Ibid.* (footnote omitted). Regarding the *ATCMU* case, the Postal Service asserts that it initially took the position that “all special services were ‘nonpostal’ and [thus] excluded from Commission jurisdiction.” *Ibid.* That contention appears to misstate the Postal Service’s argument regarding the special services at issue in that case. The Postal Service did not argue that those special services were nonpostal. Rather, it argued, *inter alia*, that those services were not subject to the requirements of Chapter 36 of the Act and further that “special” services were exempt from the Commission’s jurisdiction by virtue of section 404(a)(6). See *ATCMU, supra*, 405 F. Supp. at 1116-18. The court rejected the Postal Service’s arguments.

complainants' choice of forum. They are free to elect to proceed under section 3662, an election made by DigiStamp.

Second, the court's jurisdiction is not exclusive. See 39 U.S.C. § 409(a). (“[T]he United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.”) Furthermore, section 409(a) expressly exempts cases covered by section 3628 from its reach, thus assuring the Commission's primary jurisdiction over postal rate and classification matters. In sum, nothing in the statute either precludes a complainant from electing to proceed under section 3662 or bars the Commission from considering, on complaint, the jurisdictional status of the subject service.²⁴

The court cases relied upon by the Postal Service stand for the proposition that the services there at issue fell within the Commission's jurisdiction. In the first two omnibus rate cases, the Postal Service did not propose any changes in special service fees. The Commission, nonetheless, asserted its jurisdiction over special services.²⁵ That issue, however, did not come to a head until the Postal Service proposed a unilateral increase in special service fees in 1975. The litigation that ensued — *ATCMU* and *NAGCP I* — resolved the issue whether those services were postal or not and, in doing so, confirmed that the Commission had primary jurisdiction over postal rate and classification matters, including determining the scope of its own jurisdiction. In discussing the “great deference [a reviewing court must give] to the interpretation given a statute by the agency charged with its administration,” the *NAGCP I* court observed, “[t]he district court, in short, without expressly stating so might simply have deferred to a

²⁴ The Postal Service also cites Order No. 724 as lending support for its contention that the district court is the only forum in which this complaint may be heard. Its reliance on Order No. 724 is misplaced. The Postal Service suggests that in Order No. 724 the Commission “redirect[ed] parties initiating complaints under section 3662 to district court.” Motion to Dismiss at 4. In fact, however, the Commission asserted jurisdiction over the complaint filed in that proceeding. The language relied on by the Postal Service is taken out of context and does not support the Postal Service's position. The passages cited by the Postal Service concern a challenge to a Postal Service regulation issued in the Domestic Mail Manual. The Commission found that the regulation did not raise a classification issue and therefore was outside its jurisdiction. The relevant point, however, is that the Commission did decide the jurisdictional issue in that proceeding, the very result that DigiStamp urges in this proceeding.

²⁵ See, e.g., PRC Op. R74-1, August 28, 1975, Appendix F.

long-held and reasonable interpretation given the statute by the very agency [the Commission] whose jurisdiction is at issue.”²⁶

²⁶ *NAGCP I, supra*, 569 F.2d. at 595, n.110.

III. ISSUES OF MATERIAL FACT

The Postal Service's contention that electronic postmark service is a nonpostal service has two prongs: first, that it is a totally electronic service and, second, that it does not entail the transfer of something from a sender to a recipient, which the Service characterizes as the essence of a postal function.²⁷ It contends that "either of these facts would be sufficient to demonstrate that USPS EPM is not a postal service." *Ibid.*

That electronic postmark service is totally electronic is not conclusive of whether or not it is a postal service. Currently, the Postal Service offers several wholly electronic services that are postal services, *e.g.*, electronic return receipt, Confirm, and Delivery Confirmation. Moreover, this issue was specifically addressed in Docket No. RM2004-1 in orders issued subsequent to the Postal Service's filing of its motion to dismiss. The Commission concluded that services in which the Postal Service receives, transmits, or delivers correspondence, including electronic communication services, constitute postal services under the Act.²⁸ The Commission noted, however, that "inclusion of [electronic] services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services." *Id.* at 4. Consequently, whether or not electronic postmark service is postal or not turns on the nature of the service provided.

The Postal Service and DigiStamp offer significantly different views on the nature of the service itself. The parties agree, however, that electronic postmark: features the use of auditable time stamps, digital signatures, and hash codes; provides proof (as postmarked by the Postal Service) for a third party to verify the authenticity of the electronic postmark item's content; provides evidence to support non-repudiation of the item's content; and is designed to deter and detect any tampering or alteration of the

²⁷ Motion to Dismiss at 12.

²⁸ PRC Order No. 1424, *supra*, at 31-39.

item's content.²⁹ They differ in almost all other respects about the nature of electronic postmark service.

The Postal Service states that electronic postmark service neither requires nor accomplishes transmission of content.³⁰ The Postal Service argues that “[t]here is no necessary linkage between application of an USPS EPM to electronic data, and the transmission of that data between a sender and a recipient.” *Ibid.* According to the Postal Service, this is not meant to imply that electronic postmark service could not be used to “enhance the utility of subsequent electronic document exchange.” *Id.* at 15. The Postal Service views electronic postmark service as a totally independent transaction, not ancillary to any electronic transmission. It compares electronic postmark with notarial services, noting that the Commission previously found notary public services by postmasters in Alaska to be nonpostal. *Id.* at 15-16.

For its part, DigiStamp refers to a 1996 Postal Service press release that characterizes electronic postmark service in terms of its postal or mail-like attributes, including, for example, describing electronic postmark as the first in “a series of services to mirror those of First-Class Mail.”³¹ The Postal Service denies that this press release “accurately describes the current status of, or its current expectation regarding, the Postal Service’s programs in these areas.”³² This denial, however, does not resolve the factual dispute between the parties. That the “current status” is different from what it may have been does not reveal what it has become or how it is different. Nor does the denial shed any light on the Postal Service’s current expectations. Moreover, as DigiStamp observes, the Postal Service has not shown that its strategic alliance with

²⁹ See Complaint at 1, ¶ 3 and Postal Service Answer at 2.

³⁰ Motion to Dismiss at 14.

³¹ Complaint at Exhibit A; see *also* DigiStamp Answer at 7-9. In addition, the press release identifies future electronic services such as return receipt, certified, registered, and verification of the sender and recipient, each of which, DigiStamp contends, are already deemed to be postal services. DigiStamp Answer at 8.

³² Postal Service Answer at 3, ¶ 6.

AuthentiDate, apparently commenced in 2003, effects any significant change in the elements of the service.³³

DigiStamp also cites statements contained on the Postal Service web site which it contends give the impression that electronic postmark is, at a minimum, “a service ancillary to the Postal Service’s historical activity of carrying the mail.” *Id.* at 10. These include attributing unique postal statutory attributes to electronic postmark service such as: “correspondence handled by USPS [is] subject to confidentiality statutes and regulations;” referencing the mandate of section 101 of the Act “to bind the nation together through the ... correspondence of the people;” and the history of providing postmarks with legal significance. *Ibid.*

In addition, the web site also lists various criminal statutes applicable to the Postal Service’s electronic postmark, e.g., 18 U.S.C. § 1343 concerning wire fraud, and § 2510 concerning electronic communications. See <http://www.usps.com/electronicpostmark/benefits.htm>. DigiStamp argues that by extending the criminal statutes designed to protect mail to electronic postmark service, the Postal Service gives “EPM the status of a mail service.” *Ibid.* The Postal Service acknowledges that, at the time the complaint was filed, the web site did include a reference to 18 U.S.C. § 1341, concerning mail fraud. It states, however, that the reference was inadvertent, has been removed, and denies that section 1341 has any continuing relevance to this matter.³⁴

³³ DigiStamp Answer at 8.

³⁴ Postal Service Answer at 3, ¶ 9. The Postal Service suggests that criminal interference with the operation of the Postal Service’s electronic postmark service may be subject to investigation by the United States Postal Inspection Service and to prosecution under several federal statutes. *Id.* at 4, ¶ 11.

DigiStamp describes the Postal Service's electronic postmark as a document delivery service, a characterization that the Postal Service rejects, arguing that there is "no necessary linkage" between application of the electronic postmark to data and the transmission of that data.³⁵ DigiStamp takes issue with the Postal Service's statement. It notes that the Postal Service's previously mentioned press release specifically states that a third party sends the electronically postmarked message to the recipient "via a value-added network."³⁶ DigiStamp asserts that electronic postmark service adds value similar to that of various special services, such as certified mail, registered mail, and signature confirmation.³⁷ DigiStamp concludes, contrary to the Postal Service's characterization, that "there will nevertheless apparently be the 'transfer of something from a sender to a recipient' ... indicat[ing] a product ancillary to mail." *Ibid.*

Elsewhere, DigiStamp expands on its contention that electronic postmark is a value-added service, arguing that it has the attributes of a special service. *Id.* at 11. DigiStamp compares electronic postmark service to money orders, noting that transactions involving the latter may be independent of subsequent mailing.³⁸ In response to the Postal Service's discussion of notarial services, DigiStamp argues that the mails can serve a similar purpose suggesting the postmark and certified delivery offer third-party proof that a document existed or was received on a specific date. Implicitly acknowledging that the comparison may be less than perfect, DigiStamp's larger point appears to be that the legal implications of the effects of changing technology on services offered by the Postal Service must be considered and that hearings on its complaint are an appropriate forum for doing so. DigiStamp Answer at 11-12.

³⁵ Compare Complaint at 4, ¶ 12 and Postal Service Answer at 2, ¶ 2; and see Motion to Dismiss at 14.

³⁶ DigiStamp Answer at 9; see also Complaint, Exhibit A.

³⁷ DigiStamp Answer at 9. As relates to its third claim, DigiStamp argues that electronic postmark service may even replace or cannibalize some special services. *Ibid.*

³⁸ The Postal Service, too, discusses money orders, arguing that, unlike purchasers of electronic postmark service, purchasers are unlikely to use money orders other than to transfer funds from one person or entity to another. It contends that "[t]he broad range of potential applications of EPMS precludes any such facile analysis." Motion to Dismiss at 15, n.12.

Based on the pleadings, the Commission is unable to determine whether electronic postmark service is or is not a postal service. The parties' sharply contrasting contentions regarding the nature of the service cannot be resolved on this record. Thus, it would be premature to grant the Postal Service's motion to dismiss. The facts necessary to support the parties' contentions need to be developed on the record.

Each party challenges the other's characterization of the service. For example, the Postal Service argues that electronic postmark service can be viewed as a stand-alone service, and that it is independent of transmission. It suggests that the non-electronic service most analogous to electronic postmark is notarial service.³⁹

DigiStamp counters that apparently something is transferred between the sender and recipient. In addition, DigiStamp touts electronic postmark's value-added properties, contending that electronic postmark service has attributes indistinguishable from recognized special services such as return receipt, certified mail, registered mail, and verification of the sender and recipient.

Furthermore, in its supplemental motion addressing South Carolina's legislation adopting the UETA,⁴⁰ DigiStamp alleges that electronic postmark software and service "includes what has been historically marketed as the Electronic Courier Service." *Ibid.* It provides a brief timeline of the latter, noting that Docket No. C99-1 was dismissed when the Postal Service exited that business, but contending "that EPM is now being combined with other communications functions to operate as Electronic Courier Service under a new name." *Id.* at 3. It requests that its complaint be broadened to include this allegation. As noted above, the Postal Service did not respond to this motion. The relationship between these two services may be addressed at the hearings. However, if

³⁹ Motion to Dismiss at 15-16. The Postal Service also suggests that electronic postmark may be applied to electronic data intended to be stored in the user's own files; for example, a doctor might apply it to electronic notes of patient records on a daily basis to verify, if required, that the records were created contemporaneously with the patient's visit. *Id.* at 14.

⁴⁰ DigiStamp Motion, *supra*, at 2. Under the legislation, USPS EPM applied e-mails may be used as an alternative to certified or registered mail for certain types of electronic communications. DigiStamp contends that the Postal Service is the exclusive electronic postmark provider. *Ibid.*

no nexus is demonstrated between the two services, the Commission reserves the right to limit the issues to the original complaint.

In Docket No. RM2004-1, the Commission adopted a definition of the term postal service. That definition became effective February 16, 2006. In light of this and in summary fashion, the task of the parties in this proceeding is to develop a record demonstrating that, by the nature of the service provided, electronic postmark falls within (or outside) that meaning. The parties' contentions lack factual support needed before the Commission can fairly determine whether electronic postmark service is (or is not) a postal service. In addition to the foregoing, the parties may also wish to develop a record, to the extent deemed relevant, on the experience of foreign posts in offering electronic postmark as a postal service or not. Accordingly, the Commission shall set this matter for hearing.

IV. DIGISTAMP'S THIRD CLAIM

Neither party devotes much attention to DigiStamp's third claim, that the Postal Service failure to request an advisory opinion on electronic postmark service violates 39 U.S.C. § 3661. DigiStamp predicates this claim on electronic postmark being a postal service.⁴¹ It argues that electronic postmark service may have an adverse affect on the use of various mail services, such as First-Class Mail, Express Mail, Certified Mail, Return Receipt, and Delivery Confirmation. DigiStamp contends that by cannibalizing these services, electronic postmark will generally affect service on a nationwide basis. *Id.* at 7-8, ¶¶ 49-50.

The Postal Service addresses the claim in a footnote, arguing that the claim is without merit because section 3661 does not apply to nonpostal services.⁴² In addition, the Postal Service argues that, while unstated by DigiStamp, this claim must be in the alternative to the first claim "because there is no basis in the Act . . . that a new service proposed to be established in accordance with sections 3622-3625 also be the subject of a request for an advisory opinion pursuant to section 3661." *Ibid.* DigiStamp does not address the Postal Service's arguments in its reply to the Service's motion to dismiss.

It is not apparent that premising this claim on electronic postmark being a postal service is necessary to support a claim based on section 3661. If the Commission finds electronic postmark service to be a postal service, section 3623, change in mail classification, would apply, rather than section 3661, concerning a change in the nature of postal services. On the other hand, if electronic postmark is found not to be a postal service, section 3661 may apply if, as DigiStamp alleges, there is a nationwide or substantially nationwide affect on existing postal services. Nonetheless, since DigiStamp premises its third claim on electronic postmark being a postal service and further chose not to reply to the Postal Service's arguments, the Commission will

⁴¹ Complaint at 7, ¶ 48.

⁴² Motion to Dismiss at 2, n.1.

dismiss this claim from this proceeding without prejudice to reconsidering this issue, on motion or otherwise, should the record developed herein support it.⁴³

⁴³ A similar issue arose in Docket No. C99-1. The Commission found that considering the issue would not exceed the scope of its authority under section 3662, noting that “to the extent that the § 3662 complaint mechanism has been viewed as a remedial supplement to the review of substantially nationwide service changes required under § 3661, consideration of a Postal Service action purportedly in violation of § 3661 in a complaint proceeding appears compatible with the statutory scheme of the Reorganization Act.” PRC Order No. 1239, May 3, 1999 at 14 (footnote omitted).

V. PROCEDURAL MATTERS

Hearing. For the reasons discussed above, the Commission concludes that consideration of DigiStamp's complaint is authorized under 39 U.S.C. § 3662. Accordingly, this matter will be set for hearing.

Notice. Pursuant to Rule 17 of the Commission's Rules of Practice and Procedure, 39 C.F.R. § 3001.17, this Order provides notice of this proceeding.

Intervention. Those wishing to be heard in this matter are directed to submit a notice of intervention, on or before March 21, 2006, via the Commission's Filing Online system, which can be accessed electronically at <http://www.prc.gov>. Persons needing assistance with Filing Online may contact the Commission's Docket Section at 202-789-6846. Notices shall indicate whether participation will be on a full or limited basis. See 39 C.F.R. §§ 3001.20 and 3001.20a.

Statement. To facilitate the development of a procedural schedule for this docket, DigiStamp is directed to provide a statement, due on or before March 20, 2006, estimating the amount of time it will require to develop and file a case-in-chief. The Commission will thereafter issue a procedural schedule and, if need be, special rules of practice.

Representation of the general public. In conformance with § 3624(a) of title 39, the Commission designates Shelley S. Dreifuss, Director of the Commission's Office of the Consumer Advocate, to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

Public notice. The Commission directs the Secretary to arrange for publication of this Order in the *Federal Register*.

It is ordered:

1. The Motion of the United States Postal Service to Dismiss, filed April 26, 2004, is denied, in part, and granted, in part, as set forth in the body of this Order.
2. Proceedings in conformity with 39 U.S.C. § 3624 shall be held in this matter.
3. The Commission will sit *en banc* in this proceeding.
4. Notices of intervention are due no later than March 21, 2006.
5. Shelley Dreifuss, Director of the Commission's Office of the Consumer Advocate, is designated to represent the interests of the general public in Docket No. C2004-2.
6. Complainant shall provide a statement, due on or before March 20, 2006, estimating the amount of time it will require to develop and file a direct case in this proceeding.
7. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission
(SEAL)

Steven W. Williams
Secretary