

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

Complaint on Electronic Postmark )

Docket No. C2004-2

OFFICE OF THE CONSUMER ADVOCATE  
INITIAL BRIEF  
(October 6, 2006)

Pursuant to Presiding Officer's Ruling No. No. C2004-2/7, issued August 18, 2006, the Office of the Consumer Advocate (OCA) hereby submits its Initial Brief.

Procedural History

On February 25, 2004, DigiStamp, Inc., filed a Complaint about the Postal Service's sale of an Electronic Postmark service (EPM) to the public without first obtaining a recommended decision by the under 39 U.S.C. §§3622 and 3623.

According to the Complainant:<sup>1</sup>

EPM is a service that involves the use of auditable time stamps, digital signatures and hash codes. Through the USPS EPM service, any third party can verify the authenticity of the EPM purchaser's content. This proof is postmarked by the Postal Service and, according to the Postal Service, provides evidence to support nonrepudiation of the user's content.

The Complainant brought to the Commission's attention several other key facts concerning EPM:

The Postal Service claims that EPM provides document authenticity.<sup>2</sup>

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<sup>1</sup> Complaint of DigiStamp, February 25, 2004, at 1.

<sup>2</sup> Id. at 2, citing a Postal Service white paper, issued September 2003.

The Postal Service advertises EPM as one of several services that “mirror those of First-Class Mail.”<sup>3</sup>

The Postal Service advertises benefits of EPM that are the same as those of its hard copy mail services, e.g., EPM correspondence is subject to confidentiality statutes and regulations; and EPM is part of an array of services that bind the nation together through the correspondence of the people.<sup>4</sup>

Over the course of the proceeding, DigiStamp, through direct and rebuttal testimony, and oral cross-examination of Postal Service witness Foti, proved, without the slightest doubt, that EPM is a postal service.

The Postal Service, in its Answer to the DigiStamp Complaint,<sup>5</sup> claims that the EPM service introduced in 1996 is not the same as that offered today. Also, several attributes for EPM, published at the Postal Service’s website and in Postal Service press releases, such as the legal protections afforded by EPM, are played down as “mistakes.” The Postal Service’s large investment in developing EPM is acknowledged, but is immediately dismissed as related only to an alleged “earlier” version of EPM. The Postal Service states, without proof, that EPM currently covers its costs. The Postal Service also believes (although subsequent statements by the Commission may cause it to reconsider this view) that the “all-electronic” nature of EPM would automatically disqualify it as “mail” subject to §§3622 and 3623.

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<sup>3</sup> Complaint at 2 (also Exhibit A), quoting from a Postal Service press release dated October 16, 1996.

<sup>4</sup> Complaint at 2, citing <http://www.usps.com/electronicpostmark/benefits.htm>.

<sup>5</sup> Filed April 26, 2004.

In a Motion to Dismiss DigiStamp's Complaint,<sup>6</sup> the Postal Service argues that the Commission has no authority to use the Complaint process of 39 U.S.C. §3662 to determine whether an unclassified service such as EPM is a "postal service" or not. As in the Answer, the Postal Service dwells on the all-electronic character of EPM. In addition, the Postal Service insists that EPM "requires no transmission of content" and "it accomplishes no transmission of content." The latter statements have been decisively refuted in DigiStamp witness Rick Borgers' testimony and the testimony of witness Foti during oral cross-examination by DigiStamp.

In Order No. 1455,<sup>7</sup> the Commission decided:

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.

In a Notice of the Chairman, issued April 10, 2006, Commissioner Tony Hammond was designated to serve as the Presiding Officer.

Just before DigiStamp filed its Complaint, the Commission had instituted Docket No. RM2004-1 for the purpose of developing a definition for a "postal service" that could be used to determine whether an unclassified service is, in fact, a postal service and, therefore, subject to 39 U.S.C. §§3622 and 3623. The final rule adopted in that proceeding was published in Order No. 1449, on January 4, 2006. The Commission undoubtedly wished to have a fixed standard against which it would measure the EPM

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<sup>6</sup> Also filed on April 26, 2004.

<sup>7</sup> "Order Denying, in Part, Motion to Dismiss and Notice of Proceeding," issued March 3, 2006.

service. The definition of a “postal service” that was promulgated in the final rule sets forth the essential elements of a postal service:

Rule 5(s) 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.

EPM contains these essential elements. It is of great importance that the Commission makes the express statement in adopting the final rule that:

The revised definition differed from that originally proposed in two principal respects. . . . the accompanying discussion made clear what had been implied—that electronic communication services offered by the Postal Service to the public fell within the scope of the definition.

Rick Borgers, Lead Technologist and CEO of DigiStamp filed two pieces of testimony – DS-T-1 (direct), on April 17, 2006; and DS-SRT-1 (surrebuttal) on September 14, 2006. The Postal Service filed the rebuttal testimony of Thomas J. Foti on July 7, 2006. DigiStamp and OCA cross-examined witness Foti on August 15, 2006.

#### Issues to Be Resolved in this Proceeding

The instant Complaint is being heard under 39 U.S.C. §3662 to see whether “the Postal Service is charging rates which do not conform to the policies set out in this title. Specifically, the Commission will determine whether EPM is a “postal service” under Subchapter II of Chapter 36. If EPM is a postal service, then the Postal Service has unlawfully offered it for sale to the public and is charging rates that do not conform to the policies of the Postal Reorganization Act (PRA).

In Order No. 1455,<sup>8</sup> the Commission observed that the parties expressed sharply contrasting characterizations of EPM. The Postal Service argued that the EPM could

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<sup>8</sup> At 17.

be viewed as a standalone service, independent of transmission, and likened EPM to a notarial service. DigiStamp countered that EPM involves the transference of information from a sender to a recipient. DigiStamp also argues that EPM can act as a value-added service, equivalent to special services such as return receipt, certified mail, and registered mail.

### Argument

I. The Postal Service Has Failed to Establish that EPM Falls Outside the Commission's Definition of a Postal Service.

The evidence presented by the Postal Service is found in the testimony of witness Foti. One of witness Foti's chief arguments is that the Postal Service's largest purchaser of EPM uses it "to verify electronic content of faxes received" to ensure content integrity."<sup>9</sup> A second customer uses EPM to document the contents of Workers Compensation claim forms as they were constructed at a certain date and time.<sup>10</sup> Other examples are doctors' transcriptions of daily handwritten notes into electronic records (not forwarded to another entity) and documentation of inventors' notes, research results, schematics, etc. to protect patents.<sup>11</sup> The EPM time and date is considered very significant.

With respect to the largest customer (the fax customer), witness Foti repeats the vague statement "I could dispute whether or not a fax is considered an electronic media transmission," under HIPAA Security Rules<sup>12</sup>, both in writing and orally, but this point is

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<sup>9</sup> Tr. 1/56. The fax customer's purchases constitute 85% of EPM volume. All other types of usage (discussed in USPS-RT-1) are less than 1% per type. Id. at 68.

<sup>10</sup> Id. at 56B.

<sup>11</sup> Id.

<sup>12</sup> E.g., id. at 69 and 204.

not only irrelevant, it is utterly refuted by witness Borgers.<sup>13</sup> During oral cross-examination, witness Foti explains that the fax customer is a durable medical equipment provider that receives doctors' orders/prescriptions for medical equipment.<sup>14</sup> Witness Foti also concedes that these transmissions constitute "*an example of a communication being sent to the [durable medical equipment] company.*"<sup>15</sup> Postal Service counsel recognized that the witness "said it was a communication," although he disputes whether it is electronic.<sup>16</sup>

By means of a demonstration using screen shots from the Postal Service's EPM website,<sup>17</sup> Mr. Borgers established that use of EPM at the Postal Service's website involves a communication transmitted from a sender to a recipient by means of a Postal Service server. In the demonstration, Mr. Borgers is sending a contract from himself to his business partner,<sup>18</sup> an example of a traditional document that one individual might send to another using regular First-Class Mail. Mr. Foti apparently does not understand how EPM functions, because he insists that "USPS never takes control of the document" sent through EPM; and that "[t]he Postal Service never receive[s] [the] document, so therefore could not send it to" the recipient.<sup>19</sup> Later in Mr. Borgers' cross-examination, he establishes that exactly the opposite is true – the encrypted documents

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<sup>13</sup> DS-SRT-1 at 5 -7.

<sup>14</sup> Id. at 201-03.

<sup>15</sup> Id. at 203.

<sup>16</sup> Id.

<sup>17</sup> Id. at 259-64.

<sup>18</sup> Id. at 175.

<sup>19</sup> Id. at 176 and 182. Mr. Foti repeats his mistake again at 185.

go through a postal data center and from there to the recipient;<sup>20</sup> in other words, a document is submitted to the Postal Service, routed through a postal data center computer, and delivered by the Postal Service to a recipient.

During the demonstration, Mr. Borgers establishes that:

a postmark is applied to the document sent through EPM,<sup>21</sup>

a return receipt can be ordered,<sup>22</sup>

multiple recipients can receive the document, and will receive e-mails from the Postal Service.<sup>23</sup>

A brief summary of evidence wrested from witness Foti is that EPM frequently involves the electronic carriage of an encrypted document from a sender to a recipient by means of postal service computers. The Postal Service's largest customer, whose business comprises 85% of EPM volume, uses the Postal Service as a carrier of doctors' orders/prescriptions to a durable medical equipment company. In addition to the transmission of information, the Postal Service "adds value" by providing a postmark (time and date stamp) and security for the information.

## II. DigiStamp Has Established that EPM is a Postal Service Under the Commission's Definition

Witness Borgers accurately testifies that EPM is marketed by the Postal Service as the electronic equivalent of traditional mail.<sup>24</sup> He refutes the Postal Service's

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<sup>20</sup> Id. at 227-28.

<sup>21</sup> Id. at 176-77.

<sup>22</sup> Id. at 177.

<sup>23</sup> Id. at 178-79.

<sup>24</sup> Id. at 12-16.

argument that EPM is merely “notarial” in function.<sup>25</sup> Indeed, EPM functions just like hardcopy correspondence, using electronic media. According to witness Borgers:<sup>26</sup>

It is simply true that for the everyday use of a USPS EPM by any ordinary customer, the customer’s document is sent to the Postal Service. The Postal Service then creates an email, attaches the document and delivers the document to the address specified by the sender.

Mr. Borgers established these functions both in his oral cross-examination of witness Foti and in his direct and surrebuttal testimonies.

### Conclusion

DigiStamp, through direct and surrebuttal testimony, and written and oral cross-examination has proven that EPM has all of the elements of a “postal service” under Rule 5(s): documents are transmitted, received, and delivered by the Postal Service. These documents can span a wide variety of purposes, including personal and business correspondence; and the Postal Service adds value to these transmissions in a manner similar to its provision of special services incidental to hardcopy mail. The added value

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<sup>25</sup> Id. at 17-19.

<sup>26</sup> DS-SRT-1 at 4.

is in the form of a postmark (also applied to hardcopy mail) and with the security and verification features of special services such as Certified Mail, Return Receipt, Delivery Confirmation, and Registered Mail. The fact that EPM is all-electronic in no way exempts it from the definition of a postal service.

Respectfully submitted,

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