

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

Complaint on Electronic Postmark)

Docket No. C2004-2

OFFICE OF THE CONSUMER ADVOCATE
RESPONSE IN SUPPORT OF DIGISTAMP MOTIONS
TO SUPPLEMENT SURREBUTTAL TESTIMONY AND DELAY
THE FILING OF REPLY BRIEFS BY ONE WEEK
(October 12, 2006)

Pursuant to Commission Rule 21(b), 39 C.F.R. §21(b), the Officer of the Consumer Advocate (OCA) hereby submits this response in support of two DigiStamp motions filed earlier today, i.e., "Motion of DigiStamp to Be Permitted to Supplement the Surrebuttal Testimony of Rick Borgers (DigiStamp-SRT-1)," and "Motion of DigiStamp to Postpone Filing of Reply Briefs Until October 20, 2006." DigiStamp has made a compelling case for the Presiding Officer to take the unusual step of allowing Rick Borgers (DigiStamp's Chief Technologist and an engineer) to supplement his surrebuttal testimony.

It is troubling that the Postal Service used the medium of a brief to raise new matters that are technical in nature. Such subjects are not the province of lawyers, but of technical experts such as Mr. Borgers. If the Postal Service wished to introduce new characterizations of the operation of the Electronic Postmark (EPM) Microsoft application, it should have asked leave of the Presiding Officer through the mechanism of a motion for permission to do so.

The Postal Service opposes DigiStamp's dual motions on the following grounds:¹

[I]f DigiStamp is of the opinion that the record does not support arguments made in the Postal Service's initial brief, it has every opportunity to pursue such a claim in its reply brief. That is, in fact, one of the primary purposes of reply briefs. DigiStamp cannot, however, now be allowed to go back and supplement the record in order to oppose arguments presented in the Postal Service's initial brief. Allowing a party to add to the record after it has seen the opposing party's brief would appear to be unprecedented in Commission practice and would, in any event, be a clear violation of the due process rights of the opposing party.

The Postal Service states correctly that the primary purpose of a brief is to present arguments based on record evidence. It is improper, however, as Mr. Borgers has explained, for the Postal Service to use the brief as a vehicle for introducing new facts of a technical nature. The best way for Mr. Borgers to refute such technical material is through his testimony. Mr. Borgers has exceptional credentials – he has managed a firm that offers an electronic time/date stamp product (similar to EPM) for many years and is its Chief Technologist. He is an engineer who demonstrated his mastery of the technical operations of EPM during his cross-examination of witness Foti. In fact, Mr. Borgers seemed to know more about EPM's operation than the Postal Service's own witness. Mr. Borgers' testimony would make a valuable addition to the record in this proceeding if the Presiding Officer gives him leave to file additional testimony.

The Postal Service also claims that allowing Mr. Borgers to supplement his surrebuttal testimony would violate its due process rights; but Mr. Borgers states very plainly in his motion to supplement his surrebuttal testimony that: "If the Presiding Officer grants this motion, then I will defer to his authority on the best way to allow the

¹ "Reply of the United States Postal Service in Opposition to Digistamp's Motions to Supplement Surrebuttal Testimony and to Delay Reply Briefs" at 1.

Postal Service to respond to my supplemental testimony.” Mr. Borgers plainly does not want to violate the Postal Service’s rights and will allow the Presiding Officer to decide what procedures are best to protect these rights. Mr. Borgers also proposes to allow the Postal Service an additional week to “digest” his additional testimony. If the testimony is very short and focused, this amount of time is probably sufficient. OCA suggests that the Presiding Officer allow Mr. Borgers to file his supplemental testimony and then evaluate it to see if it is best viewed as evidence that is technical in nature and best made part of the record or simply arguments that best belong in a brief. Furthermore, the postponement of reply briefs for only one week constitutes a very modest change in the procedural schedule.

Respectfully submitted,

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