

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

REVIEW OF NONPOSTAL SERVICES)
)
) Docket No. MC2008-1

**REPLY BRIEF OF
EPOSTMARKS, INC.**

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Epostmarks, Inc. respectfully submits its reply brief in this proceeding.

SUMMARY OF ARGUMENT

The initial briefs of other participants in this proceeding confirm that the USPS electronic postmark (“EPM”) serves a strong public need, and that the private sector, which lacks the trusted brand name, enforcement powers, and UPU membership of the Postal Service, cannot fill that need. The arguments to the contrary offered by Digistamp, the lone market participant that opposes continuation of the EPM, are unsupported by the record and at odds with the overwhelming consensus of the other private sector participants, which range from Microsoft Corporation to small start-up companies.

The Commission has authority to allow the Postal Service to continue providing the EPM under 39 U.S.C. § 404(c)(3) because the EPM was “offered” by the Postal Service “as of January 1, 2006” within the meaning of § 404(c)(2). Digistamp’s objection that the Postal Service has changed its marketing channel from direct sales to sales through licensees is a distinction without a difference. Section 404(c)(2) provides

only that a nonpostal service must have been “offered” as of January 1, 2006; the statute does not require that the sales channel used to offer the service remain unchanged.

The EPM should be classified as a market dominant service.

ARGUMENT

I. THE USPS ELECTRONIC POSTMARK SERVES A STRONG PUBLIC NEED THAT THE PRIVATE SECTOR CANNOT FILL.

A. The USPS Electronic Postmark Meets A Strong Public Need.

The initial briefs filed on or about September 10 underscore the industry consensus that the electronic postmark (“EPM”) provided by the Postal Service— buttressed by the trusted brand name and federal enforcement powers of the Postal Service—meets a strong public need for an effective trust system to deal with the proliferation of spam and email fraud. Epostmarks Br. 2-6; Public Representative Br. 31 & n. 27; USPS Br. 87-89 (citing record); Comments of Epostmarks, Inc., Microsoft Corp., Striata, Goodmail Systems, Inc., GovDelivery, Inc., and Iconix, Inc. (Aug. 20, 2008); Comments of Maryland Delegate Jeannie Haddaway-Riccio (Aug. 26, 2008); Comments of Delaware Rep. Donna Stone (Sept. 17, 2008).

The only dissenter, Digistamp, offers no credible argument to the contrary.¹ Digistamp asserts that the USPS EPM is unnecessary because internet traffic and E-commerce are already “growing explosively today” even without large-scale deployment of the EPM. Digistamp Br. 8-9. The obvious rejoinder, however, is that spam and email fraud are also growing explosively. As the July 30 Statement of Epostmarks president Adam Grossman notes, 90 percent of all email sent today is spam. Over 25,000 unique phishing attacks were reported in December 2007, representing approximately seven million emails per day. Total financial losses in 2007 from spoofing or phishing emails alone were more than \$3.2 billion. And the increasing restrictiveness of spam filters has imposed massive additional costs on the public. Grossman Direct ¶¶ 22-31. There is clearly a strong public need for services that can reduce these costs. Digistamp says nothing about these concerns.

B. The Private Sector Cannot Meet The Need For The USPS Electronic Postmark.

The initial briefs filed on or about September 10 also underscore the industry consensus that the private sector cannot provide many of the key attributes of the USPS EPM, including its trusted brand, the enforcement powers of the USPS, and the integration of the USPS in the established international treaty network of the UPU.

¹ Digistamp’s claim that the Postal Service has failed to meet “its” burden of proof because the USPS did not submit testimony responding to the July 30 statement of Digistamp witness Borgers (Digistamp Br. 2-3) overlooks the fact that this case is not a private dispute between Digistamp and the Postal Service, but an industry-wide proceeding in which numerous industry providers (many of them relatively small companies) as well as the public have a stake. In determining whether the EPM satisfies the standards of 39 U.S.C. § 404(e)(3), the Commission needs to consider the evidence and arguments of *all* of the participants that have commented on the public value of the EPM—including the detailed responses to Mr. Borgers’ claims offered by Epostmarks witness Grossman.

Epostmarks Br. 7-9; Comment of Rep. Donna Stone; see also Public Rep. Br. 32 (noting that eliminating the Postal Service's authority to participate in development of UPU standards could harm the public). Digistamp's arguments to the contrary are unsubstantiated.

First, the notion that private sector "date/time stamps" could develop an adequate substitute for the USPS EPM if only the USPS got out of the way and stopped deterring investment in firms like Digistamp is wishful thinking. Digistamp at 6. The fundamental reason for the failure of the private sector to develop an alternative to the USPS EPM is not a shortage of investment dollars, but the lack of a widely trusted brand name and enforcement powers comparable to those of the USPS. Grossman Direct ¶¶ 32-35; Grossman Reb. ¶ 16; Lesur (Microsoft) Comments ¶ 4. If investment dollars were the obstacle, then Microsoft Corporation—with nearly \$24 billion in cash and no debt²—should have been able to develop a substitute for the USPS EPM a long time ago. Microsoft, however, agrees that "The EPM enables the USPS to meet the public need for trusted electronic communication in a way that *no private sector organization could rival.*" Lesur (Microsoft) Comments at 5, lines 23-25. The inability of the private sector to find investors willing to invest in efforts to develop a substitute for the USPS EPM platform is evidence not of the deterrent effect of the (currently small) USPS presence on private sector investment, but of the fundamental *nonfinancial* obstacles that lie in the path of a private alternative.

Digistamp's claim that the private sector—including firms like Verisign, Entrust, Digital Signature Trust, GlobalSign—"already has methods for audits and certification

² *Value Line Investment Survey* (August 22, 2008) (entry for Microsoft Corp.).

authorities in the ecommerce market” (Digistamp at 9-10) is a red herring. These companies are vendors of digital signature systems. Digital signatures, like date/time stamps, are *components* of an EPM that offer neither the trusted brand nor the enforcement powers of the Postal Service, and thus are ultimately irrelevant to the questions before the Commission. Digistamp offers no evidence that most consumers have even heard of these companies, let alone that their brands command the level of trust possessed by the Postal Service. Nor does Digistamp offer any reason to believe that any of these companies can enforce compliance with the required processes on the necessary scale

The alleged alternatives of public sector accreditation by the National Institute of Standards and Technology (“NIST”), NIST-approved Common Criteria Labs, AICPA WebTrust standards, SAS 70 audits and a 1999 directive of the European Union for its “member standards” (Digistamp Br. 10-11) are also irrelevant. These are all potential benchmarks that the USPS could use to define certification standards. They are not substitutes for the trusted brand name and enforcement powers that inhere in the Postal Service EPM as a whole. Moreover, as Epostmarks and the Public Representative have noted, Section 404(e) asks the Commission to determine whether there is a viable *private sector* alternative to the Postal Service for the provision of nonpostal services. Congress has not asked the Commission to undertake a comparative ranking of the various branches of the federal government—let alone foreign governments. Public Rep. Br. 32-33; Grossman Reb. ¶¶ 19-20.

Digistamp claims that the deletion of a former reference to the mail fraud statute, 18 U.S.C. § 1341, on a Postal Service web page maintained for the general public is an

admission that the Postal Service lacks authority to enforce compliance with the EPM licensing requirements. Digistamp at 7-8. A public website for consumers, however, is obviously not a binding or exhaustive statement of the law. The Postal Service's ownership of the intellectual property needed to run applications built on the EPM platform provides clear legal authority to enforce compliance with the standards and processes that EPM licensees must implement. The Postal Service has made clear that it will use its enforcement powers—including the resources of the Postal Inspection Service—to enforce compliance with these standards and processes. Grossman Reb. ¶ 11.

Finally, Digistamp's complaint that the Postal Service is moving too slowly to certify additional licensees of the EPM beyond Authentidate, the current licensee, is an argument for approving, not rejecting, continued USPS provision of the EPM. The difficulties currently encountered by potential licensees are precisely what one would expect of a program whose very existence is under a legal cloud. Grossman Reb. at ¶ 30. Resolving the legal status of the EPM should free management and other resources for the program that the Postal Service currently (and understandably) devotes elsewhere. If Epostmarks subsequently concludes that the Postal Service is unreasonably delaying the issuance of EPM licenses to additional participants beyond Authentidate, the current licensee, Epostmarks will not hesitate to seek relief under 39 U.S.C. § 403(c) and other provisions of the law. See Public Rep. Br. 33 (noting discrimination remedies). But killing a service of potentially enormous value merely because of management problems that are clearly due in large part to resource constraints that are almost an inevitable consequence of the currently unsettled legal status of the EPM would be completely irrational. See Grossman Reb. ¶¶ 31-36.

II. THE POSTAL SERVICE HAS OFFERED ITS ELECTRONIC POSTMARK SERVICE TO THE PUBLIC SINCE BEFORE JANUARY 1, 2006.

Digistamp's further claim that the EPM program cannot be approved under 39 U.S.C. § 404(e) because the "service" was not "offered in its current form . . . as of January 1, 2006" (Digistamp Br. 4-5) mischaracterizes both the statute and the program. The gist of Digistamp's position is that the Postal Service offered EPM directly as of January 1, 2006, but currently offers EPM through a licensee, Authentidate. This, however, is a distinction without a difference.

39 U.S.C. § 404(e)(2) extends the option of grandfathering to "nonpostal services which were offered as of January 1, 2006". Nothing in the statute limits the grandfathering option to services which were offered as of January 1, 2006, *through the same sales channel*.

While the sales channel used to offer the EPM has changed since 2006, the service itself has not. "New business arrangements for the EPM have made it easier for additional partners to participate, but have not fundamentally altered the service for its customers." Grossman Rebuttal at 9 ¶ 26. As Mr. Grossman explained, "my company can buy the same EPM, with the same account and the same software as in 2005. The only difference is we now do so through a new customer agreement with AuthentiDate instead of with the USPS." Grossman Rebuttal at 9 ¶ 26.

Even Mr. Borgers has acknowledged at points in his testimony that the EPM service has not changed. On page 23, line 3, of his statement, for example, he claims that "The new business model for EPM involves a branding and licensing agreement, which allows for **continuation of the service without disruption.**" *Id.* at 23, lines 21-

23 (emphasis in original). He then goes on to say “The truth is the new EPM program ... needed to approve AuthentiDate simply to *maintain the service operations.*” *Id.* at 23, lines 3-6 (emphasis added). Finally, he summarizes the USPS decision to replace the strategic alliance agreement with a branding and licensing agreement in the following terms: “A more accurate description is that the USPS has *continued the old program with a new method for collecting fees* from the EPM user.” *Id.* at 27, lines 13-14 (emphasis added). Epostmarks agrees.

III. THE EPM SHOULD BE CLASSIFIED AS MARKET DOMINANT.

The private sector is unable to offer a substitute for the EPM with the same level of trust, enforcement powers, and intellectual property protection that bars private firms from using the EPM without a license from the Postal Service. As the Postal Service has noted in the analogous context of Customized Postage, “Only the Postal Service can authorize participation in the program. Therefore, it should be classified as a market dominant product pursuant to 39 U.S.C. § 3642.” USPS Br. at 103.

CONCLUSION

For the foregoing reasons, and those stated in the initial brief of Epostmarks, the Commission should find that the USPS EPM serves a significant public need that the private sector cannot fill effectively, and should authorize the Postal Service to continue providing the EPM.

Respectfully submitted,

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