

Before The
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Review of Nonpostal Services

Docket No. MC2008-1

DigiStamp Response to the Postal Service's Proposed Classification
Language for the "USPS Electronic Postmark Service (EPM) Program"
(December 12, 2008)

In Order No. 120,¹ the Commission directed the Postal Service to file formal classification language for each nonpostal service that the Postal Service wished to continue under §404(e) (title 39) of the Postal Accountability and Enhancement Act (PAEA). The Postal Service made the requisite filing on November 7, 2008, in "United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Six Nonpostal Services Pursuant to Order No. 120." The Postal Service defines Electronic Postmark service as follows:

XXXX USPS Electronic Postmark Service (EPM) Program

XXXX.1 Description

The Electronic Postmark (EPM) program authorizes vendors to provide their customers with Postal Service-authorized timestamps for the purpose of substantiating at a later time that the original form of the electronic information presented for timestamping has not been altered. The vendor is required to meet certified standards for creating a secured environment for the auditable timestamps, digital signatures, and hash codes. Once certified, the provider is authorized to use Postal Service licensed technology, intellectual property and patents. The authorized vendor generates the

¹ October 23, 2008.

timestamp, called an Electronic Postmark, on a secure server that it owns and maintains. The vendor fee is paid quarterly and includes 1,500,000 Electronic Postmarks per quarter. If, in any quarter, the number of postmarks exceeds 1,500,000, an additional fee is charged

XXXX.2 Prices

	(\$)
Per quarter, per license, up to 1,500,000 Electronic Postmarks,	75,000
Over 1,500,000 Electronic Postmarks in a quarter, each additional postmark	0.02

This language is striking in several respects. First, the contrast between Electronic Postmark (EPM) service as it was being offered as of January 1, 2006, and the Postal Service's current form of the service are starkly different in several key respects. Second, the price for the service that the Postal Service publishes in the classification schedule demonstrates a point that DigiStamp made as far back as 2004² -- the Postal Service is using EPM to cannibalize its First-Class letter, Certified Mail, Return Receipt, and Registered Mail revenues. This worsens an already bad financial situation for the Postal Service and may hasten the time that the Postal Service makes a special request to the Commission to have an extraordinary infusion of cash from core postal ratepayers. Third, the claims by states such as Delaware and Maryland, that there is a need for the Postal Service's involvement in EPM, are undermined by the form of EPM that the Postal Service currently proposes to offer (post-August-2007), as contrasted with the service that it offered as of January 1, 2006.

DigiStamp argued earlier in this proceeding that the type of EPM service now formally proposed by the Postal Service in the above-quoted classification

² Complaint of DigiStamp, filed February 25, 2004, Docket No. C2004-2, at 7-8.

section is fundamentally different from the EPM service offered prior to August 2007. What the Postal Service led Congress to believe prior to PAEA enactment is that the *Postal Service* itself was the vendor of an EPM service that it owned and operated through a partnership with Authentidate.³ In the first Notice filed by the Postal Service in this proceeding, the Postal Service informed the Commission that, heedless of Congress' explicit directive in §404(e), and without consultation with the Commission, the Postal Service decided to make fundamental changes to the legal and technical configuration of EPM. The Postal Service stated that, on July 30, 2007, the Postal Service did not renew its former Strategic Alliance Agreement with Authentidate. In place of that, it entered into a non-exclusive licensing agreement. The Postal Service underscored that it "does not engage in direct governance," nor in price-setting, marketing, or sales. The Postal Service claims that its role is limited to "simply licens[ing] its brand and marks, for a flat quarterly fee."

A review of Postal Service rebuttal testimony filed in Docket No. C2004-2 reveals that the Postal Service made a point of familiarizing interested members of Congress with a pre-2006 configuration of EPM. Postal Service witness Foti testified that in the period 1996 – 97, "several members of Congress were . . . briefed, as was The Electronic Frontier Foundation and similar groups." In July 2007, witness Foti presented a flowchart of the operations and responsibilities involved in providing EPM service. If written today, the flowchart would contain three critically important differences. First, an EPM purchaser will no longer receive a "USPS digital signature." (See proposed classification language, above) Rather, the digital signature provided will be the private key signature of the vendor. Second, in a reversal of the responsibilities outlined in the pre-August-2007 flowchart, no "USPS EPM Server Certificate" will be produced since, according to the proposed EPM classification, the private vendor will produce the timestamp on its own server. Third, the timestamp and user's

³ United States Postal Service Notice of Submission of Sworn Statement on "Nonpostal Services" Pursuant to 39 U.S.C. § 404(e), filed March 19, 2008, at 29 - 30.

signature are no longer sent to a Postal Service repository. Instead, these are sent to the private vendor's repository. Classification language that reflected EPM'S design at the time of PAEA enactment would not have referred to the *vendors' customers*. Rather, the customers were the *Postal Service's customers* on January 1, 2006. Also, classification language describing EPM in January 2006 would have stated that the Postal Service creates the EPM timestamp on a Postal Service, rather than a vendor, server. Furthermore, a Postal Service server would be the repository for the timestamp and user signature

Interested members of Congress were familiar with EPM's configuration at the time that the PAEA was enacted because of contacts that Rick Borgers had with many of them. Congress had no idea what would be coming nearly one and one-half years later (in August 2007) when the Postal Service decided to make unlawful, unauthorized material changes to EPM. For the Commission to entertain even the possibility of allowing EPM to continue, the classification language that would be the basis for approval could not look like the language quoted at the beginning of this document.

Nowhere in witness Foti's rebuttal testimony, nor in any statements made by the Postal Service in this proceeding, has the Postal Service indicated that Congress was informed about the fundamental change that the Postal Service intended to make in August 2007. Therefore, the evidence presented in Docket No. C2004-2 and in the current proceeding leads inescapably to the conclusion that Congress did not know about the drastic changes that the Postal Service would make to EPM seven months after the critical January 1, 2006, date that Congress deliberately included in the PAEA. Moreover, the Commission should be concerned about how the public has been misled and confused about what kind of service it has, and will, be purchasing under the EPM label.

The state officials who have intervened in this proceeding attach great importance to having the Postal Service provide the timestamp. For example, Delaware State Representative Donna Stone wrote that: "The unique

competencies and resources of the USPS as well as the unique qualities of the USPS Electronic Postmark are paramount in addressing the problems of today.”⁴ Her reliance on the Postal Service as the provider, stressing the Postal Service’s unique competencies and resources, is ironic in light of the EPM proposal that the Postal Service makes in its proposed classification. Delaware’s “Act To Amend Title 6 Of The Delaware Code Relating To Electronic Postmarks And The Uniform Electronic Transactions Act,” contains the following text:

This bill provides that a legal requirement to send, communicate, or transmit a record by registered or certified mail is satisfied by an electronic record that: (1) is addressed properly or otherwise directed properly to an information processing system designated by the recipient; (2) either enters an information processing system outside the sender's control or enters a region of an information processing system under the recipient's control; (3) is postmarked with a postal service's electronic postmark; and (4) is authenticated by an electronic postmark certificate. An electronic record is subject to the same legal protections as the U.S. mail if it meets these requirements and the U.S. Postal Service is the postal authority that postmarked it. The bill does not authorize the use of an electronic postmark or electronic certificate for the purpose of service of a summons, complaint, or other document for the purpose of obtaining jurisdiction over a defendant in a lawsuit.

The U.S. Postal Service, through its partner, Authentidate, Inc., offers an electronic postmark to verify times and dates that electronic mail (e-mail) is sent and received. The service also verifies the content of the e-mail. The process complies with the federal Electronic Signatures in Global and National Commerce Act, which is similar to Delaware's Uniform Electronic Transactions Act, and provides for the validity of electronic signatures and records.

The cost to send a one-ounce letter via certified mail, return receipt requested, is \$4.42. The cost to send a one-ounce letter via registered mail, return receipt requested, is \$9.62. Depending on the number of electronic postmarks purchased under a contract, the cost per electronic postmark could be about \$0.80 each. For small businesses that send many communications by certified or

⁴ Letter from State Representative Donna D. Stone to the Commission, filed September 17, 2008. Similar views were expressed in a letter from Maryland Delegate Jeannie Haddaway-Riccio to the Commission, filed August 26, 2008.

registered mail to meet a legal requirement, the savings could be significant.

There are several ironies that stand out in the text of this bill. First, the Delaware legislature has the impression that the Postal Service is providing this service: “An electronic record is subject to the same legal protections as the U.S. mail if it meets these requirements and the U.S. Postal Service is the postal authority that postmarked it.” In allowing Delaware’s residents to forgo certified mail with return receipt, and substitute an EPM-postmarked electronic record, Delaware’s legislature clearly has the expectation that the EPM postmark will have the same legal effect as a certified mail with return receipt. This expectation cannot be satisfied. In a report issued in 1999, GAO warned that:⁵

EPM does not have the same legal status as the physical postmark on U.S. mail, which is a byproduct of USPS processing and indicates USPS possession of an item for handling and delivery. As evidence that an item is “mail,” the physical postmark may trigger a number of criminal statutes in the case of obstruction or theft. To the extent a physical postmark has additional legal significance, such as indicating the date when an item is deemed to have been delivered, that effect is the result of nonpostal federal and state laws and regulations, as well as contracts between private parties.

For electronic communications that would contain the EPM postmark, GAO gave the additional warning: “PosteCS communications do not have the same legal status as U.S. mail, because they are not physical mail. Thus, although a number of laws apply to and protect such messages, other laws applicable only to physical U.S. mail do not.”⁶ It is significant that the reservations expressed about the enforceability of postal laws for electronic messages came from the Postal Service legal department. The Commission should be concerned that the Postal Service either has deliberately misled or has not taken the trouble to warn the

⁵ GAO/GGD-00-188, “Postal Activities and Laws Related to Electronic Commerce,” September 2000, at 42.

⁶ Id.

state legislatures and other prospective purchasers of EPM that EPM *does not have the same legal force as hardcopy Certified Mail with Return Receipt*.

The Postal Service is well aware that several criminal laws that are vital to the Delaware legislature's substitution of EPM timestamped electronic records for hardcopy mail do not apply to EPM electronic communications. For example, 18 U.S. Code §1341, that prohibits frauds and swindles by use of the mails, has never been addressed by any court.⁷ As for federal laws 18 U.S. Code §§1691 – 1738, the Postal Service states absolutely that they *do "not apply to e-commerce products and services that do not involve hard copy mail"* and *"that enforcement of these criminal statutes is limited to hard-copy mail."*⁸ An additional concern is that the Postal Service expressed these reservations for a USPS-owned and operated EPM. It is obvious that Courts would be even less likely to accord the protections of postal laws to mere *vendors* of EPM. If the Postal Service has confidence that the legal protections of postal statutes apply equally to EPM, why isn't that critical declaration included in the proposed classification language filed on November 7, 2008? In the proposed classification, the lack of any commitment by the Postal Service to enforce any legal protections and the absence of an assurance to the public that such protections are a certainty in a court of law is conspicuously absent.

There are other statements contained in the Delaware electronic timestamp law that should concern the Commission. The Delaware legislature was under the impression that only Authentidate, the Postal Service's *former* strategic partner (pre-August-2008), would be providing this service to Delaware residents. The Postal Service now proposes to open up EPM to an unlimited number of vendors. Delaware legislators seemingly had confidence in Authentidate's technical qualifications. Would they have equal confidence in future Postal Service licensees? Again, the Postal Service's repudiation of its former configuration, in August 2007, generates risks that state legislatures were not

⁷ Id. at 69.

⁸ Id. Emphasis added.

aware of at the time they enacted EPM substitution statutes. The Postal Service's failure to keep state legislatures updated about the material changes it was making to its EPM system should disqualify EPM from being grandfathered on public policy grounds alone.

As far as the Postal Service's capability to evaluate the technical qualifications of EPM vendors is concerned, the Commission should heed the concerns voiced by the Information Assurance Consortium (IAC) in its letter to the Commission on September 30, 2008. In a paragraph labeled "IAC and EPM: A History of Futility," IAC expressed grave concerns about the jeopardy the Postal Service's EPM program posed for the public and the entire timestamping industry. According to IAC, the Postal Service's EPM program "could jeopardize the US market for trusted time stamping for all vendors and could expose individual citizens to significant risk." In an earlier communication with the Postal Service, IAC had stated that its analysis had exposed⁹

fundamental flaws that would need to be addressed before going live with the proposed licensing program and thereby averting irreparable damage to the trust associated with the USPS EPM. Just one of these concerns relates to the transparency, auditability, and inherent risk of USPS EPM vendors who would be licensed to enter the market through a process of self-certification.

IAC even offered to work with the Postal Service to make EPM a secure time stamp service, but the Postal Service's technical capabilities were so deficient that "the USPS did not have in its employment individuals with technical expertise in trusted time stamping methods or solutions. Further, the USPS representatives indicated that there was no intention and were no plans to hire technically qualified personnel." The Postal Service's virtual silence in the current proceeding and failure to inform the Commission that it could, and would, commit to providing ironclad, unbreakable security for EPM reinforces the statement of IAC. A review of the Postal Service's bland, noncommittal statements in this proceeding is itself evidence that the Postal Service lacks the technical expertise to defend its position in the current docket and is unwilling to commit resources to maintain the technical

⁹ Letter dated February 27, 2007, from the officers of IAC to Nick Barranca, Vice President, Product Development, USPS. This letter was furnished as an attachment to IAC's September 30 letter to the Commission.

expertise necessary even to make an informed evaluation of prospective EPM vendors. Why doesn't the Postal Service require prospective EPM vendors to adopt the X9.95 Trusted Time Stamping standard that was referenced in the IAC letter? The most likely explanation is that the Postal Service utterly lacks the technical personnel to understand the standard, let alone use it to evaluate prospective EPM licensees.

Another irony reflected in the Delaware UETA statute is that the Postal Service is encouraging the states and their citizens to forgo paying the Postal Service \$4.42 for Certified Mail with Return Receipt and \$9.62 for a Registered, Certified letter with Return Receipt. What revenues will the Postal Service enjoy when an EPM substitution is made for a hardcopy substitution? *Two cents per message*, according to the Postal Service's classification proposal (see above). The Postal Service wants to cannibalize its premium, high revenue hardcopy products, that bring in roughly \$1 billion per year, so that it can earn 2 cents per message on EPM products.

Conclusion

The proposed classification language for EPM submitted by the Postal Service on November 7, 2008, both reinforces old concerns and presents new ones that should lead the Commission to reject EPM as a candidate for grandfathering under PAEA §404(e):

- EPM service that the Postal Service is seeking to grandfather is a fundamentally different service than the service that was being offered to the public at the time that Congress enacted the PAEA.
- The Postal Service is completely unqualified to act as a licensor of EPM services. The postal staff that is responsible for running the program is practically nonexistent and lacks any of the technical qualifications that are necessary to furnish a sound, secure, dependable timestamp service to the public.

- The Postal Service lacks the resources and commitment to keep the public informed about the fundamental changes it makes to EPM and makes changes at will, without consultation with the Public Regulatory Commission.
- The Postal Service misleads the public into believing that EPM offers legal protection equivalent to hardcopy mail services, especially Certified Mail, Return Receipt, and Registered Mail.
- The Postal Service, which already is facing financial difficulties, irrationally is trying to cannibalize its high-revenue, premium hardcopy services in order to bring in a mere 2 cents per piece instead.

Respectfully submitted,

Rick Borgers
Lead Technologist, CEO
DigiStamp, Inc.
<http://www.digistamp.com>