

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

-----  
Complaint on Electronic Postmark®  
-----

Docket No. C2004-2

-----  
DIGISTAMP ANSWER IN RESPONSE TO MOTION  
OF THE UNITED STATES POSTAL SERVICE TO DISMISS  
(May 3, 2004)  
-----

DigiStamp, Inc. ("DigiStamp") hereby answers the motion filed April 26, 2004 by the United States Postal Service ("Postal Service") to dismiss DigiStamp's complaint in this proceeding.<sup>1</sup> The DigiStamp complaint requests a recommended decision by the Commission rejecting the Postal Service's document delivery service called "Electronic Postmark®" (EPM), and such other relief as may be appropriate, as unsupported and not in accordance with the policies and factors set forth in the Postal Reorganization Act. (Complaint at 9).

DigiStamp vigorously objects to the grounds upon which the Postal Service relies in support of its motion to dismiss its complaint. Neither of the two grounds relied upon by the Postal Service provide justification for dismissal of the complaint. First, the Postal Service contends that this Commission lacks statutory authority to resolve a complaint concerning the Postal Service's unilateral decision to carry out its powers under the Postal Reorganization Act (PRA). It claims the complaint procedures in the

---

<sup>1</sup> DigiStamp, Inc. filed a complaint, "Complaint of DigiStamp," with the Commission pursuant to 39 U.S.C. §3662 of the Postal Reorganization Act on February 25, 2004. Concurrently with its motion, the

PRA are not appropriate for resolving whether the service is jurisdictional and subject to review by the Commission to determine whether it is a postal service. That theory is without merit and has been rejected many times by this Commission.

Second, the Postal Service claims in the alternative that the EPM service is not a postal service. Accordingly, it would have the Commission summarily decide the primary issue raised by the complaint: whether the EPM service is a postal service subject to Commission review. There are several reasons why this service must be considered a postal service. Under one interpretation of the PRA suggested to the Commission, by OCA and Consumer Action, in a current rulemaking, virtually any service of the Postal Service may necessarily be a postal service. In any event, court rulings and Commission statements indicate the service is ancillary to the carriage of mail, even though EPM may be all electronic. If anything, on its face, the complaint establishes the EPM service is a postal service and that the Commission ought to, instead, without a hearing, issue a recommended decision finding the EPM service must either be classified or that the Postal Service must otherwise discontinue operation of that service, subject to court review and stay of the service. While DigiStamp does not propose that resolution at this time, we only note that the weight of the facts better supports that outcome.

- A. The Commission clearly has the statutory authority to review the EPM service to insure the Postal Service has complied with the policies of the Postal Reorganization Act.

The Postal Service contends it has authority to provide EPM service without Commission review because, "Nothing in title 39...gives the Commission 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." (Motion at 1). This claim totally mischaracterizes the issue by assuming that the Postal Service's action to initiate EPM is a matter within its independent authority. Nothing in the PRA indicates the Postal Service has independent authority to determine if it may ignore the operative portions of §§3622 and 3623 that require it to obtain Commission review before initiating new classifications or before commencing to charge rates for new services. DigiStamp's complaint seeks relief based on a determination that the EPM is a postal service and that the Postal Service must obtain classification and rate review prior to providing that service. Otherwise, without Commission authority to review in the first instance such services offered by the Postal Service, the Postal Service would be free to operate costly new services without restraint that cause harm to mailers or competitors in the marketplace. The law is well settled that the Commission has jurisdiction to review its own jurisdiction.<sup>2</sup>

The Postal Service motion also suggests §3662 is limited to hearings on complaints regarding rate matters only and not applicable to complaints that a service was initiated without Commission review. The Postal Service contends that nothing in the PRA grants Commission authority to declare independent actions of the Postal Service to be either lawful or unlawful." (Motion at 3). The Postal Service mischaracterizes the complaint as requiring a statutory finding that the Postal Service EPM

---

2004.

<sup>2</sup> *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This matter is further discussed in the recent response of the OCA and Consumer Action to the Commission's proposed rulemaking in Docket No. RM2004-1, *Proposed Amendment to the Commission's Rules*, "Office of the Consumer Advocate and Consumer Action Reply Comments on Proposed Amendment to the Commission's Rules of Practice and Procedure," April 15, 2004 at 4.

service is lawful or unlawful. This complaint proceeding is not primarily about whether the service is lawful or not, but whether, given the service involved, the Postal Service must comply with the statutory scheme requiring the Postal Service to obtain Commission review BEFORE it undertakes a new postal service.

The Postal Service contends the better procedure and one that has been historically followed is for complaints of this nature to be filed with the district court rather than with this Commission. But even if such a procedure is available to DigiStamp, it does not necessarily foreclose Commission action here. In fact, the historical cases cited by the Postal Service occurred over twenty five and thirty years ago.<sup>3</sup> On the other hand, in the much more contemporary 1996 Pack & Send case cited by the Postal Service,<sup>4</sup> the Commission followed the approach of hearing the complaint rather than requiring the complainant to withdraw the complaint and file in district court. In any event, this Commission need not undertake forum shopping on behalf of DigiStamp. DigiStamp has chosen to file this complaint with the Commission; and even if jurisdiction might also lie with the district court, this Commission ought to hear this matter in the interests of providing timely relief for DigiStamp. We know of no doctrine that suggests that matters such as those raised here must, or even should, be first brought before a district court. In fact, to the contrary, more recently, the opposite practice has been followed by this Commission even though, as in the Pack & Send

---

<sup>3</sup> The Postal Service refers to the *ATCMU* case, *supra*, decided in 1975, a United Parcel Service case decided in 1978, and a commission order No. 724 issued in 1986.

<sup>4</sup> *Complaint of Coalition Against Unfair USPS Competition*, "Declaratory Order Finding Complaint to be Justified and Providing for Further Proceedings," Docket No. C96-1, Order No. 1145, December 16, 1996. See also, *Complaint on PostE.C.S.*, *supra*, Docket No. C99-1, May 3, 1999.

situation, the statute appeared to prevent the Commission from providing the desirable remedy most favorable to the complainant.

To support its position, the Postal Service also quotes the Postal Service Governors' statement in the Pack & Send case that they "do not concede that section 3662 gives the Commission jurisdiction to review new products and services to establish their status as postal or nonpostal services." (Motion at 5). Not only is the Governors' view irrelevant to the Commission determination of its own jurisdiction, the very case from which that statement was drawn provides an example where the Commission did review the complaint, just as DigiStamp has requested in this case. Thus, contrary to the Postal Service's argument, the Commission did not implicitly acknowledge that it does not have authorization to hear complaints of the DigiStamp variety. In fact, the Commission has precisely the authorization requested by this complaint.

Moreover, despite the view of the Postal Service that the Commission's authority in Pack & Send was insufficient to deal with the complaint, the fact remains that the Commission's order determined the Pack & Send service was a postal service, and for whatever reason, led the Postal Service to reconsider the service and the service has never commenced.<sup>5</sup> In one way, the Commission's declaratory order in the Pack & Send case may not have appeared to have granted the relief requested by the complaint. In the end, however, the Commission's action was taken within the framework of its jurisdiction and, after hearing the complaint, it resolved the matter favorable to the complainant. Thus, there is no doubt this Commission has the authority to hear the DigiStamp complaint and grant the relief requested.

We urge the Commission to engage its learned staff and procedures to exercise oversight of the USPS, minimally to conduct hearings. The Commission represents a valuable public asset given their background and knowledge of the Postal Service purpose and charter.

The USPS operates with significant public monies and is without stockholders and market-based controls; evidenced by their losses in every electronic commerce endeavor they pursue. We urge the Commission to hold hearings on this complaint and thus help government to take a wiser approach to encourage the growth of the important e-commerce industry.

Wise government policies and actions could foster the development of a reliable digital trust network for the country. Any company that develops products and services in this growing industry needs to know that it will compete on a level playing field. That's the main role of government in business—to ensure that everyone abides by the policies and practices necessary for our common good. No company needs to be worried that the government will step into its market, using the vast influence and power of the state to drain the profits away from creative pioneers.

Without the oversight of the Commission, we are effectively encouraging the USPS to use its monopoly government position to subsidize unfair competitive ventures against free enterprise.

B. The issue of whether the EPM service is a postal service subject to Commission jurisdiction, or otherwise, is a matter for hearing on the complaint and is not an issue to be decided on the motion to dismiss.

---

<sup>5</sup> The order did not reach any conclusions regarding pricing but found that pricing issues would require or warrant further exploration should the Pack & Send service be considered pursuant to §§3622 and 3623. Order at 21-22.

The Postal Service argues alternatively in its motion that even assuming the Commission is authorized to determine whether EPM is a postal or nonpostal service, the complaint should be dismissed because the service is "clearly" a nonpostal service. (Motion at 6). The Postal Service argues that past court cases and Commission review of the issue of whether a service is a postal service have turned upon the service in question having "some relation to hardcopy postal delivery networks." (Motion at 7). The Postal Service concludes that the EPM service has no such relationship. In fact, the Commission cannot on the pleadings before it reach any such conclusion.

The Postal Service attempts to distinguish the EPM service from other Postal Service activities that were the subject of court rulings finding particular services to be postal services that involved an aspect of posting, handling and delivery of mail matter.<sup>6</sup> However, when the facts surrounding the Postal Service's public presentation of EPM service are considered in conjunction with the district court's holding in the *ATCMU* case, it is apparent that those cases lead to a result exactly opposite of the Postal Service's conclusion. That district court case and the opinion on appeal not only do not support the Postal Service's conclusion, but would compel a finding that the EPM service is a postal service<sup>7</sup> in the context of the Commission's duties to the public.

The DigiStamp complaint includes, as Exhibit A, the Postal Service's press release for the EPM service. The press release relates to service initiated in 1996 and later superceded in January of 2003 when the service was offered through a strategic alliance between the Postal Service and AuthentiDate. (See Postal Service Answer at 5).

---

<sup>6</sup> The Postal service cites to *Associated Third Class Mail Users v. U.S. Postal Service ("ATCMU")*, 405 F. Supp. 1109 (D.D.C. 1975) and the appeals from that decision. (Motion at 7-8).

Although the press release relates specifically to the earlier service, there is no showing that the essential elements, purpose or intentions of the Postal Service in its strategic alliance with AuthentiDate differ in any significant way from the earlier service discussed in the press release.<sup>8</sup>

In at least five places on the one page press release, the Postal Service indicates the similarity and ancillary relationship of EPM to mail service. In the first paragraph of the release it states, "creating the first in a series of 'First-Class' Mail electronic commerce services." By invoking the Postal Service's trademark word "First-Class" Mail, the Postal Service tells the world this EPM service is a special service ancillary to mail service. The press release further states, "a series of services to mirror those of First-Class Mail." If the service "mirrors" First -Class Mail, then how is it different from First-Class Mail? A distinction is not made in the PRA providing for no jurisdiction over "mirror" mail services. The press release continues, "Other services will include: return receipt, certified, registered, verification of sender and recipient, and archiving services." These services are already determined to be postal services except for archiving services where presumably the Postal Service would take control of the documents for a period of time and return them to sender in a type of transmission and delivery sequence operation. Further, the press release refers to the EPM service as an "electronic postmark," and invokes the authority of the Postal Service under the criminal statutes to investigate tampering. Using the term "postmark" in common

---

<sup>7</sup> OCA and Consumer Action pointed out in their Comments to the Commission in Docket No. RM2004-1, at n. 15, that the *ATCMU* opinion views nonpostal services as likely to be limited to services provided on behalf of other governmental agencies.

<sup>8</sup> Furthermore, in Docket No. RM2004-2, the Commission's proposed rules indicate that it views commercial activities performed pursuant to a strategic alliance with an outside entity, such as AuthentiDate, as, at least in part, activities *of the Postal Service*.

parlance immediately suggests to the public a mail type of operation. If not, then why not use the term "datemarked" instead of the Postal Service term-of-art "postmark," a word commonly used only in conjunction with mail service.

Finally, this brief press release notes that a third party sends the message to the recipient "via a value-added network." If a mailer buys the EPM service for documents carried through the mails, there can be no question that the EPM service adds value to the mail--for the potential benefit of both the mailer and the recipient. The service adds value in the same way that value is added by other security and evidentiary features of special services with certified mail, registered mail, verification of sender and recipient, and signature confirmation. Indeed, the EPM service may even replace and cannibalize some of those other special services such as certified mail, return receipt, registered and delivery confirmation. (For an amplification of this discussion, see Complaint at 7-8). In many cases, and contrary to the fundamental supposition of the Postal Service in its motion, and even assuming the standards for a postal service definition are as the Postal Service suggest, there will nevertheless apparently be the "transfer of something from a sender to a recipient." (See Motion at 12) and that indicates a product ancillary to mail.

Today, on the USPS website is another description given by the Postal Service where they view the EPM service as a substitute for traditional services. The Postal Service's EPM user-license reads that it is solely for "postmarking and transmitting Electronic Files..." and further, that "...all notices...will be in writing...will be transmitted by postage prepaid registered or certified mail, return receipt requested;...or by electronic mail via the Internet with a USPS EPM and receipt being acknowledged by the recipient..." Thus, the license agreement tells EPM customers to use the EPM

service to transmit documents as a substitute for traditional services. (See <https://www.uspsepm.com/crm/terms.adate>.)

The DigiStamp complaint also recites the Postal Service's advertising claims that leave the impression the EPM service bears an ancillary relationship to hard copy mail service. For instance, the DigiStamp complaint notes the Postal Service website copy about the EPM service states that "correspondence handled by USPS [is] subject to confidentiality statutes and regulations" and recalling the Postal Service's "[h]istory of providing postmarks with legal significance" and the statutory purpose of binding the nation together through correspondence. (Complaint at 2). Each of these statements strongly suggest the intent to provide a service ancillary to the Postal Service's historical activity of carrying the mail. It is well settled that a postal service does not necessarily always need to be used in conjunction with mail in order to be deemed a postal service subject to Commission jurisdiction.

The Postal Service's own advertising is evidence of its position that the criminal statutes designed to protect mail are also available to provide security to all of their customers who use the EPM. The bundling of these unique service-qualities of mail with the EPM gives the EPM the status of a mail service. No private industry can have this special legal status or a staff of federal law enforcement agents. Thus, as the EPM has been given the unique qualities that are reserved for only mail service, then the EPM has been declared a mail service by the Postal Service.

Moreover, even if the plain meaning standard is applied to the EPM service as the Court of Appeals did in *NAGCP I* (on appeal of the district court's decision in *ATCMU*),

EPM is a postal service.<sup>9</sup> The Postal Service also references the PRC Op. R76-1 as invoking the standard that a service is a postal service if it relates to the carriage of mail or can fairly be said to be ancillary to the carriage of mail. (Motion at 14). Applying the plain meaning of postal service to EPM service, one must conclude that it too is a special service and directly enabled by special legal standing of traditional mail services. In such cases, EPM meets the standard applied by the Commission in Docket No. R76-1 to determine whether a service is jurisdictional.

In this vein, the *ATCMU* court noted that money orders might not be closely related to the delivery of mail because they can be used equally well without being delivered by mail. However, it went on to conclude that since the vast majority of money orders sold at post offices are actually sent by mail, they may also be considered "postal services" in ordinary parlance. (*ATCMU* at 1115). Thus, money orders too, like EPM, can be a wholly independent transaction rather than always being used in conjunction with mail and may or may not be transmitted through the mail. Purchasers of money orders may "never touch or interact with a collection box or mailbox." Also, even though EPM may not be purchased as a retail option at a post office while money orders can be, that does not have the significance the Postal Service contends. (Motion at 12-13). In either event, the purchaser is dealing with a Postal Service authority, website, or representative to purchase the service even though further contact with the postal service mail network may never occur.

The Postal Service makes the argument that EPM is most analogous to services of a notary public. (Motion at 15). Given the Postal Services' analogy of a Notary, the

---

<sup>9</sup> *National Assoc. of Greeting Card Publishers v. U.S. Postal Service* ("NAGCP I"), 569 F. 2d 570 (D.C. Cir. 1976), vacated on other grounds, *U.S. Postal Service v. Associated Third Class Mail Users*, 434

Postal Service postmark and certified delivery of hard copy mail can serve similar purposes. They act as proof by a disinterested third party (the Postal Service) that a document existed or has been received on a date evidenced by the postmark. The combination of an EPM hash code and time/date stamp are also analogous to current practices with hard copy mail – retaining the envelope with the document you received or enclosing a document in a First-Class envelope, mailing it to oneself, and leaving it sealed as proof that the document existed in a certain configuration on a particular date, as evidenced by the postmark. It is a complex subject as the digital age is changing current legal practices; analogies can help us understand but still lack clarity. The hearings are an appropriate forum to consider how the government in the form of the USPS can best serve the public in this transition, likely not by competing with private industry where the public is already well served.

Another reason why dismissal of the DigiStamp complaint at this time would be inappropriate is due to two pending rulemakings. In those rulemakings, the issue of the breadth of the meaning of "postal service" is being considered by this Commission. The issue is currently directly before the Commission in one rulemaking intended to define postal service in the Commission's rules of practice and procedure for the first time.<sup>10</sup> The issue is also directly relevant to a second rulemaking for which responsive comments to the initial comments of participants are not yet due.<sup>11</sup> It would be

---

U.S. 884 (1977).

<sup>10</sup> *Proposed Amendment to the Commission's Rules*, Docket No. RM2004-1, "Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure," Order No. 1389, January 16, 2004.

<sup>11</sup> *Reporting Requirements for Nonpostal Services*, Docket No. RM2004-2, Order No. 1394, "Proposed Rulemaking Concerning Reporting Requirements for Nonpostal Services," March 5, 2004.

premature for the Commission to dismiss the complaint in a manner that effectively prejudices the issues in those rulemakings.

In the rulemaking to define a postal service, the Commission's OCA filing together with Consumer Action raised issues in comments that are fundamental to the interpretation of the PRA. OCA and Consumer Action contend that nonpostal services within the meaning of the PRA are only those services provided to other governmental agencies and that a fair reading of the statute requires that all other activities of the Postal Service (except international mail) are services of the Postal Service potentially subject to the Commission's review jurisdiction pursuant to the classification, rate, and other provisions of Chapter 36 of title 39, regardless of whether they are matters similar or ancillary to the carriage of hard copy mail. (OCA and Consumer Action Comments at 18-22.) The OCA and Consumer Action further contend in their comments that even though the Postal Service has the authority such as that granted in §404(a)(6) of the Postal Reorganization Act to provide, establish, change or abolish special services (as pointed out by the Postal Service in its motion to dismiss at 6-7), that power is still subject to the limitations of Chap 36. (*Ibid.*).

Alternatively, in any event, the United Parcel Service's comments in the rulemaking propose a definition of postal services to include electronic services.<sup>12</sup> That proposal was fully supported by the OCA and Consumer Action.<sup>13</sup> The Commission has not heard any evidence in any proceeding as to whether, or even how, to begin to draw a distinction among electronic services that may be postal services and those that may not

---

<sup>12</sup> "Comments of United Parcel Service in Support of Proposed Rule," March 9, 2004.

<sup>13</sup> "Office of the Consumer Advocate and Consumer Action Reply Comments on Proposed Amendment to the Commission's Rules of Practice and Procedure," April 15, 2004 at 2.

be postal services. That specific issue was presented to the Commission in the complaint previously filed by Consumer Action.<sup>14</sup> There the Commission decided to defer action on the issue of electronic services pending the outcome of the rulemakings it subsequently initiated.<sup>15</sup>

The issue as to whether an electronic service is a postal service had previously been presented to the Commission in the complaint filed by United Parcel Service in the Post E.C.S. case.<sup>16</sup> The Commission order denying a motion to dismiss the complaint about the all electronic service did not decide the issue of whether the Post E.C.S. service was a postal service but said, "applying the criteria that were used in assessing controversial services in the past does not necessarily compel a conclusion that the all-electronic Post E.C.S. service is 'nonpostal,'" (Order at 18). Further, the order stated:

...while the guiding standard focuses on "carriage of mail"...it is not restrictive as to the technological means used to perform any of those functions. Thus, the fact that a given service accomplishes one or more functional components of "the carriage of mail" by means that do not involve a physical object does not necessarily support a conclusion that the service is "non-postal. (Order at 19).

Significantly, the Commission denied the motion to dismiss and set for hearing the matter of whether the electronic service was a postal service. Thus, it is clear that, at this time, the Postal Service's contention that, merely because the EPM service is totally electronic negates the possibility that EPM may be a postal service, is, at best, premature. Further, it is a claim that requires a hearing into the specific facts

---

<sup>14</sup> "Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of Fourteen Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services," October 15, 2002.

<sup>15</sup> "Order Denying, In Part, and Granting, In Part, Petition," Consumer Action Petition for Review of Unclassified Services, Order No. 1388, January 16, 2004.

<sup>16</sup> *Complaint on Post E.C.S.*, Docket No. C99-1.

surrounding this service, as well as a Commission resolution of the issues of statutory interpretation raised in the ongoing rulemakings, discussed above.

Wherefore, for the above reasons, the Postal Service's motion to dismiss must be denied.

Respectfully submitted,

---

Rick Borgers  
Lead Technologist, CEO  
DigiStamp, Inc.