Postal Rate Commission
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Before The

POSTAL RATE COMMISSION

WASHINGTON, D.C. 20268-0001

Complaint on Electronic Postmark® Docket No. C2004-2

DIRECT TESTIMONY OF RICK BORGERS,

ON BEHALF OF DIGISTAMP, INC.

(DS-T-1)

Evidence requested by Order No. 1455:

Has the Postal Service introduced a new postal service

ignoring the Commission's oversight and failing to create public good?

(April 17, 2006)

Just when I thought I'd joined the ranks of successful, cutting-edge innovators making our country better, I got squashed by the USPS.

Back in 1998, I was making good career progress as a business consultant and computer engineer, but I really wanted to be on the cutting edge of creating the new world of electronic communications.

It occurred to me that one absolutely foundational need of electronic communications would be the ability to prove who created what, and said or sent what, to whom, when. So I set to work creating a product and a company to do that.

Using standards developed by the Internet Engineering Task Force, my company, called DigiStamp, developed the e-TimeStamp seven years ago. The e-TimeStamp electronically certifies the time and date a document is created. DigiStamp created a profitable, growing business by selling our service to companies, research organizations, and governments.

Just when it looked like I was on the way to solid success, the USPS decided to get in on the act. In 2004, the USPS began offering the same service, calling it the "USPS Electronic Postmark Service."

I thought—“No way. This isn’t right, and it isn’t smart. The USPS has no right to barge into a market created by private business. And the USPS can’t provide this service as well as I can. All it can do is wreak havoc, when government competes with private industry.”

Wreak havoc, it did. Prospective customers quit calling, employee morale collapsed, and potential investors wondered out loud about whether it was smart to “compete with the Postal Service.” Funding dried up for me and everyone else in the market segment.

That’s obviously not good for those of us who had created the product and the market. But it isn’t good for our country, either.

Providing good service in electronic communications requires the ability to innovate, quickly and effectively, as customer needs emerge and as new technologies make new products possible. The fast-moving world of electronic communications depends even more than most industries on the ability to make a better product, or provide better service, when competitors catch up.

In electronic communications, the USPS can only blunt our country by replacing innovative, nimble, competitive businesses like mine with a slow, bloated, bureaucracy-burdened service.

And it has.

The Commission has the power and the responsibility to do something about this.

Digistamp, Inc, contends that the Postal Service created a new postal service by instituting Electronic Postmark® (EPM), and that the Postal Service introduced the EPM in violation of statutory requirements that any new postal service be approved by the Commission.

In the testimony I present to the Commission, I will establish that Electronic Postmark® (EPM) is a postal service under the definition recently adopted by the Commission. This testimony supplements the evidence that is provided in the original complaint[1]. I request that the Commission move quickly to decide the initial jurisdictional question: Clearly, the Postal Service does not have the right to enter any business it chooses--without review by the organization created by Congress to oversee it.

I will be working to encourage that Congress take note of these proceedings: "The Postal Service lost a total of $85 million [on new business], showing a profit on only one of these many services. Who do you think paid for that? The Postal Service consumer." Rep. John McHuch, R-N.Y. before an April 29, 1999 vote in the Government Reform committee. I need my government to police a level playing field and foster private enterprise, innovation.

[1] As requested by the commission in Order 1455 at 17 “The facts necessary to support the parties’ contentions need to be developed on the record.”

I. Overview of evidence: Electronic Postmark® is the Electronic Equivalent of First-Class Mail with Certified Mail

According to the Commission, *postal service* means the receipt, transmission, or delivery by the USPS of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto.[2] The Commission has concluded that services in which the Postal Service receives, transmits, or delivers correspondence, including electronic communication services, constitute postal services under the Act.[3]

The Commission noted, however, that "inclusion of [electronic] services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services." Id. at 4.

Consequently, whether or not electronic postmark service is postal or not turns on the nature of the service provided.[4]

EPM is marketed by the Postal Service, and used by its customers, in the same manner as traditional mail. Two mail services, particularly, are the functional equivalents of EPM.

In section 3623(d) of title 39 of the U.S. Code, Congress required the Postal Service to maintain one or more classes of mail for the transmission of letters sealed against inspection. First-Class Mail is the class of mail "sealed against inspection." First-Class Mail is used to ensure the security, privacy, and confidentiality of communications between senders and recipients. EPM is used (and marketed) for the same purpose: to provide security, privacy, and confidentiality for electronic communications.

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[2] PRC Order No. 1449, January 4, 2006.
[3] PRC Order No. 1424, supra, at 31-39
[4] PRC Order No. 1455 at 13

The second mail service that functions identically to EPM is Certified Mail. Section 941.1 of the Domestic Mail Classification Schedule (DMCS) states that: "Certified Mail provides a mailer with evidence of mailing and, upon request, electronic confirmation that an article was delivered or that a delivery attempt was made, and guarantees retention of a record of delivery by the Postal Service for a period specified by the Postal Service." Section 941.21 of the DMCS makes available Certified Mail for "matter mailed as First-Class Mail." When a mailer adds Certified Mail to First Class, the mailer will also obtain proof of when the sealed, confidential document entered the postal system and when delivery has been attempted. These features are also all part of EPM. A customer using EPM can obtain a receipt to prove that a communication was created, sent or received. The Postal Service retains a record of the message content for a period that it has specified.

In its marketing, sales, policy, and practices, USPS has consistently asserted, affirmed, and advocated that the EPM is a postal service.

THE USPS states plainly on the home page of the EPM web site that "Certified Electronic Communication has arrived". http://www.uspsepm.com/ The USPS software provided by, and downloaded from, the USPS web site clearly indicates that the software provides "Certified Electronic Communication."[5]

The USPS calls its timestamp an "electronic ***post*** mark" for a reason—namely, that it wants prospective purchasers to recognize immediately that EPM added to an electronic communication, will serve the same purpose as First-Class Mail with Certified Mail service. These are the statements at the Postal Service's web site to describe EPM:

> The advent of the Internet increased the need for efficient communication of electronic information with the same level of trust and value that the United States has come to expect from the USPS in the physical world. Created to facilitate secure electronic communication for government and commercial

[5] Postal Service web site www.uspsepm.com

> systems, the USPS EPM service has the potential to strengthen the security, privacy, and productivity of communication in the nation's electronic future.[6]
>
> As an added feature, you can also request a receipt from the USPS as proof of electronic mailing and delivery of documents bearing the EPM.
>
> The State of South Carolina has enacted legislation recognizing the USPS EPM Service as an option for electronic communications between State agencies and within the legal community.
>
> Receipt from USPS verifying proof of document integrity, electronic mailing and delivery for courts, compliance or auditing.[7]

It is evident from these statements that the Postal Service views (and wants prospective customers to view) EPM as equivalent to the “trust and value” that the USPS provides with physical mail in the “physical world.” As with sealed First-Class Mail, EPM is intended to provide security and document integrity. To conform to legal requirements of courts, State agencies, and other legal entities, the Postal Service can provide a receipt verifying proof of document integrity, electronic mailing and delivery.

The consistent practice of the USPS is to sell and deploy the EPM as a validator of communications.

For example, the first use of the EPM was by the Social Security Administration as a feature of the PosteCS service in 2000.[8] In 2003, the Social Security Administration had become the largest user of the EPM, under the name *Secure Transport Service*.[9]

For another example, a 2004 EPM sales proposal by the USPS to the Securities and Exchange Commission (SEC) states

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[6] Main “home” page of the Postal Service web site for the EPM service https://www.uspsepm.com/info/main.adate

[7] From the “home” page of the Postal Service web site for the EPM service click on “About EPM” for their summary of the service. https://www.uspsepm.com/info/about.adate

[8] United States Postal Service 2001 Comprehensive Statement on Postal Operations, page 60

[9] The Electronic Post Mark: security for cyberspace mail Universal Postal Union 2003 page 2

> The EPM can prove that orders are neither altered nor discarded once the order is postmarked. A post trader audit of trades against the EPM repository can verify that all orders are accounted for.[10]

Obviously, an order is a communication—a transmission and receipt of information—the proof of the order's content is transferred to a Postal Service repository.

The USPS claims and exercises legal authority to investigate any counterfeiting, tampering, or other misuse of EPM precisely because it asserts that the EPM is postal in nature:

> USPS [states] that under its recent delegation of authority from the Attorney General, the Inspection Service would investigate illegal interception or tampering involving the USPS electronic postmark (EPM), including cases where the USPS EPM is used by a private company that recently purchased the EPM for inclusion with some of its electronic communications. Any such efforts would be based on the provision in this delegation that specifically defines "criminal conduct that has a detrimental effect upon the operations of the Postal Service" to mean "conduct that directly affects the counterfeiting or misuse of any electronic postmarks used by the Postal Service." In this regard, USPS told us that the Inspection Service has no authority to investigate electronic communications that do not "have a postal nexus." Finally, USPS said that violations of federal law relating to electronic communications without the EPM would be investigated by other federal law enforcement agencies.[11]

THE USPS has lobbied State legislators to recognize the EPM as a validator of communications. Such lobbying includes South Carolina, West Virginia, Maryland, Nebraska, Pennsylvania, and New Jersey. In the case of South Carolina, the USPS has already succeeded, with the South Carolina Uniform Electronic Transaction Act, which

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[10] Postal Service White Paper on Mutual Fund Reform and the USPS Electronic Postmark page 4 Feb 2, 2004

[11] September 2000 GAO/GGD-00-188 USPS' E-Commerce Activities and Laws

also *excludes any service provider other than the Postal Service and extends the government monopoly into an electronic communications market*.

On November 12, 2004, I filed a Motion to Notify the Postal Rate Commission of a Recent Example Where the Use of USPS EPM Replaces Traditional Mail Service. I attached an article from Business Wire reporting that "South Carolina is First State to Make E-Mail with United States Postal Service Electronic Postmark Equivalent to Certified or Registered Mail." A reading of the article reveals that the Postal Service is attempting to engineer a non-statutory monopoly for the security and validity of e-mailed communications that includes verification of mailing and receipt. In effect, the Postal Service is cannibalizing its physical First-Class Mail, with Certified Mail service, in its efforts to convince courts, states agencies, and other legal and commercial customers to substitute the equivalent EPM product.

The Postal Service argued in its Motion to Dismiss my complaint, on April 26, 2004, at page 12, that "the transfer of something from a sender to a recipient . . . is not part of an USPS EPM transaction." Nothing could be farther from the truth. It is clear from the use that South Carolina and other states may make of EPM that it is almost always used in connection with a communication. The Postal Service's argument that EPM fails to involve a "transfer" of something is baffling. Of course there is a transfer – of information. That is the purpose of EPM and the reason that a customer is willing to pay for the security and verification that EPM provides. It is proof of the integrity of the transfer of information that customers are paying for; and, in any case, EPM is surely a "service incidental" to the transmission of information. In the vast majority of cases (ninety percent, for Digistamp), EPM is used as part of a sender-to-recipient communication.

The nature of digital time stamps is to validate the transmission of communications. Without the transmission of documents, the EPM is pointless and without use.

The USPS claims that the EPM is not postal, but more like a notary function:

> Given its general purpose of protecting the integrity of electronic data, the nonelectronic services most analogous to USPS EPM service are those provided by a notary public.[12]

While the analogy with a notary can be useful in explaining time stamps to a layman, for the purposes of this complaint, the analogy is simply spurious. A notary cannot certify the transmission of anything.[13]

If an EPM is simply a notary function, all of the USPS marketing, sales, regulation and investigation of EPM use, and promises to state legislatures are simply deceptive.

I know from seven years of experience in this business that the vast majority of digital timestamp transactions involve a communication made from a sender (mailer) to a recipient which the purchaser wants to ensure is secure (has not been tampered with) and often wants to be able to prove it has been mailed or received. This is true of nearly every type of communication sent via First-Class Mail. For instance, bills and statements contain private, confidential information that the sender and recipient want to be "sealed" against tampering by others. Legal and business documents are frequently sent through the mail, with the understanding that their valuable and/or confidential contents will not be tampered with nor backdated.

THE USPS claims that

> Of critical significance, not only does USPS EPM service require no transmission of content, but it accomplishes no transmission of content.[14]

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[12] Postal Service Motion to Dismiss page 15-16

[13] It's worth noting, in this regard, that in DigiStamp's original business plan we believed that during our first year that 3% of the transactions would be used for a notary function, more specifically the function of "witnessing of intellectual property". And then decreasing. Those estimates proved to be correct. Our customers have shown us that the true function—the nature—of this tool is to certify communication. This is an empirical fact, not a speculative argument.

[14] Postal Service Motion to Dismiss DigiStamp complaint at 14.

The USPS might as well claim that a hammer does not drive nails.

The nature of a tool—of any artifact—is its use. People use hammers to drive nails (though they may at times use them for other things, as well), even if the hammer itself doesn't require or accomplish the driving of nails.

In fact, the principal use of all digital time stamps, including USPS EPMs, is to certify the transmission of information.

While we do not have access to USPS records, in the experience of Digistamp, more than ninety percent of all time stamps are used to certify the transmission of communications. We suggest that an independent assay of USPS records would show the same to be true.

USPS customers certainly understand the nature of the EPM to be certifying transmission of information. A few examples[15]:

> Liberty Healthcare Group Inc., a national medical products company that is a subsidiary of PolyMedica Corporation (NASDAQ: PLMD), uses EPMs to verify Doctor Orders that it receives via fax every day. It is anticipated that the Liberty implementation will utilize 1.5 to 2 million EPMs annually.[16]
>
> Kodak states that "Integrating the USPS Electronic Postmark Service can bring a new level of trust and integrity to our Secure Email Service enabling customers to take full advantage of its speed and simplicity to securely deliver patient data." Patrick Faure, Privacy and Security Services Manager for Kodak's Health Group.[17]

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[15] It is worth noting, in each example, that the customer buys and licenses the EPM service directly from the USPS, not Authentidate, and the Postal Service sets the price. This is a postal service, Postal Service. These are more recent examples to supplement similar examples given in the original DigiStamp complaint.
[16] Authentidate press release Apr 13, 2005 (BUSINESS WIRE)
[17] Authentidate press release Mar 10, 2005 (BUSINESS WIRE)

> CareCert, which certifies doctors orders for the home medical equipment industry, integrates the United States Electronic Postmark(R) (USPS EPM(R)) into its product to legal trust and security to each transaction. CareCert offers healthcare providers a secure, speedy and efficient solution to process forms online.[18]
>
> CareFax integrates EPMs into fax transmissions, according to Suren Pai, President and CEO, AuthentiDate Holding Corp, to "increase . . . confidence in the integrity of the information sent and received via fax.[19]

The USPS clearly knows that the point, purpose, use, and value of its EPM lies with certifying the transmission of communications.

For it to claim otherwise in the current proceedings contradicts its own marketing, sales practices, products, policies, and practices.

Furthermore, it is simply factually true that time stamp customers use the product predominantly in service to communication. This is demonstrably true in the experience of private industry, and the available information on how the USPS sells, regulates, and protects its product indicates that the same is true for USPS customers.

II. The Postal Service should not extend its government monopoly status to compete in the electronic communications industry

One responsibility of the Commission is to prevent the USPS from using its monopoly power to the detriment of the public. While the USPS EPM is a postal service under the

[18] Authentidate press release Jan 6, 2005 (BUSINESS WIRE)
[19] Authentidate press release October 18, 2005

definition established by the Commission, it is a service that the USPS provides without justification, badly, and to the public detriment.

The proper role of the USPS, like all government-created programs, is to create a "public good"—something from which citizens benefit but which private business does not have the resources or self-interest to create. The USPS has not created a public good, but seeks to usurp, exploit, and profit from the work of private business, and does so in an ineffective manner.

The technology for digital time stamps was developed entirely by private industry, with standards created by industry members working as the Internet Engineering Task Force (IETF)[20] in the late 1990s. The USPS was not a contributor to this work.

The digital time stamp product, and the market for the product, were effectively created before the USPS ever entered the market.

In 1999, DigiStamp delivered a working service. By 2002, when the USPS posted in the Federal Registry for a technical partner to develop a digital time stamp, DigiStamp had already provided service to thousands of customers, including the States of Washington and Ohio, and even the Mexican Government.[21]

The USPS now uses engineering that was done by private industry. The USPS did not develop an independent product, but hired a private business, AuthentiDate, to create its EPM.

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[20] The Internet Engineering Task Force (IETF) has responsibility for developing and reviewing specifications intended as Internet Standards. It is an international community (non-governmental) that is open to any interested individual; thousands of volunteers from private industry and academia. In 1999, DigiStamp built a test implementation of the early time stamp protocol drafts and a test environment that was used for interoperability testing.

[21] It is worth noting that the public solicitation was open for only 3 weeks and there was no attempt to encourage additional bids. DigiStamp has repeatedly inquired about the "exclusive" nature of this contract and has never received a response from the Postal Service about the inquiries.

Interestingly, many of the Postal Service's peripheral product lines operate at a huge loss.

The electronic postmark has cost the postal service more than $30 million. Reports show by 1997 a cost of $20M for R&D and then by 2002, $9 million trying to develop the service. When compared to DigiStamp's costs, this sounds like another case of public money being spent freely by a bureaucratic agency.

Digital timestamps are a valuable service created, supplied by, and rightfully profited-from by private business. From the indisputable facts that private industry created digital time stamps, created the market for digital time stamps, and serves that market effectively and efficiently, it follows that **digital time stamps are not a "public good."**

In fact, ***the USPS EPM does not even work correctly.*** **Far from doing a better job than private business can do, the USPS does a worse job.** As DigiStamp will prove, the USPS EPM service allows a person to get a "certified receipt" from the USPS for a document that, in fact, was never received.

The Commission should order the USPS to desist offering the EPM for the simple, straightforward reason that **USPS sidestepped the legal authority of the Commission by ever offering the EPM.**

The Commission should forbid the USPS from any further offering of EPMs. Far from providing a public good, the USPS EPM undermines the welfare of citizens who need certification and legally-sound proof of delivery of electronic documents.

If the USPS is allowed to offer digital time stamps, we can foresee the USPS extending a strategy to skim profits from the work of private industry; all based on the marketing jingle “backed by the federal government” claim it already uses. This will drive private industry from the market, since we do not have the USPS multi-billion-dollar brand or the thousands of outlets (Post Offices) that the USPS can exploit. The consequent loss of competition will insure higher prices for time stamps, decreased innovation, and loss of tax revenue to local, state, and federal governments.

Respectfully submitted,

Rick Borgers
Lead Technologist, CEO
DigiStamp, Inc.
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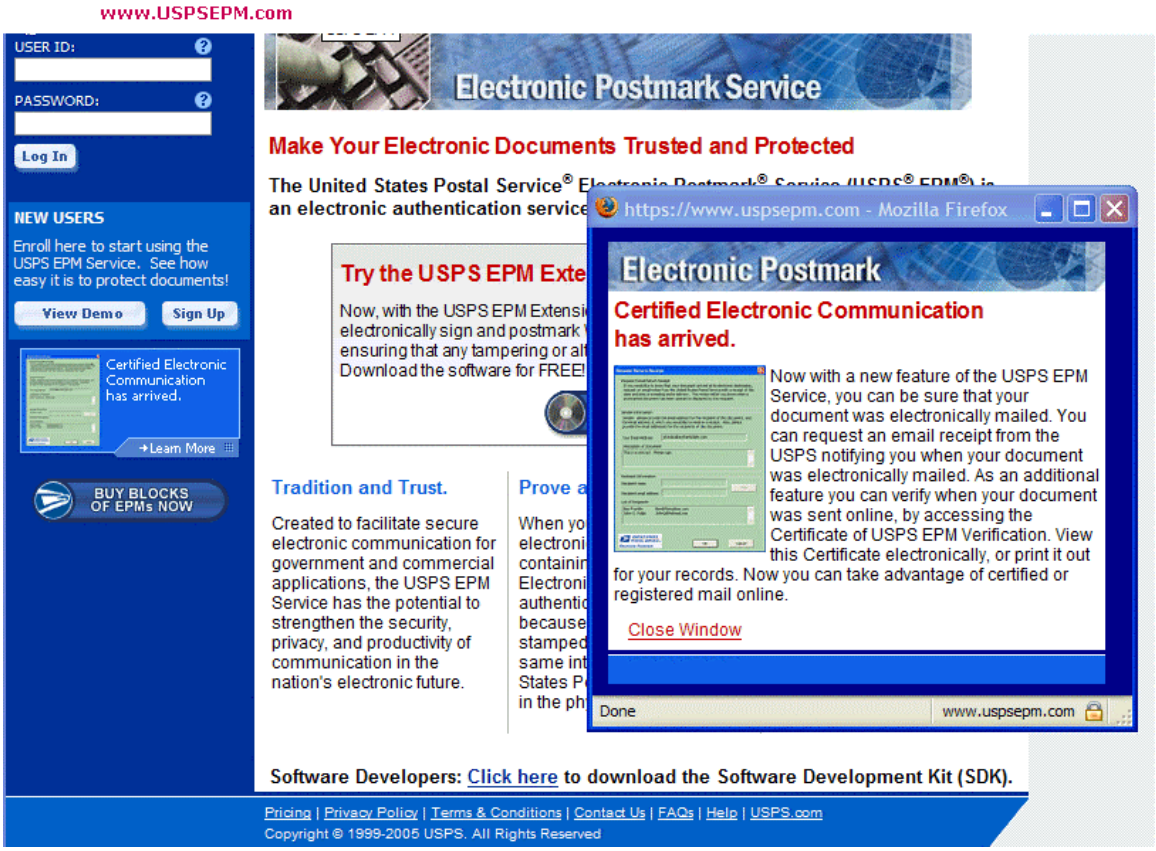
Appendix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Tradition and Trust.
Created to facilitate secure electronic communication for government and commercial applications, the USPS EPM Service has the potential to strengthen the security, privacy, and productivity of communication in the nation's electronic future.
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Certified Electronic Communication has arrived.
Now with a new feature of the USPS EPM Service, you can be sure that your document was electronically mailed. You can request an email receipt from the USPS notifying you when your document was electronically mailed. As an additional feature you can verify when your document was sent online, by accessing the Certificate of USPS EPM Verification. View this Certificate electronically, or print it out for your records. Now you can take advantage of certified or registered mail online.
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ADAT: Message Board for AUTHENTIDATE ... .NET Momentum in the Public Sector

United States Postal Service: United States Postal Service Creates Electronic Postmarks for Documents

"Building a solution on Windows has enabled the Postal Service to rapidly extend the capabilities of its EPM service to millions of potential users."

Leo Campbell,
EPM Program Manager,
United States Postal Service

The United States Postal Service (USPS) was founded in the late eighteenth century with the mission of supplying a reliable and trusted means of communication for the nation. In recent years, the agency has used technology to support that mission, such as using bar-code scanners to speed the sorting of mail and deploying an award-winning public Web site. With e-mail becoming a common means of communication, the USPS wanted to provide a way for consumers and businesses to use electronic postmarks (EPMs) to conduct electronic transactions securely over the Internet. The key to widespread adoption of EPMs, however, was to make the technology easy for people to use.

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Creating Digital Signatures

The USPS created a solution that lets people easily and quickly add electronic postmarks within Microsoft Office Word documents. Based on the Microsoft Visual Studio .NET 2002 development system and the Microsoft Office System, the solution enables users to add a digital signature with a time stamp to a document and then lock the document. This prevents any alterations to the document and provides proof of when it was created. Because a document can contain multiple EPMs, the service can be used in transactions that require multiple signatures—for example, in contracts involving two or more parties.

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