

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint on Electronic Postmark®

Docket No. C2004-2

MOTION OF THE UNITED STATES POSTAL SERVICE
TO STRIKE PORTIONS OF THE SURREBUTTAL TESTIMONY
OF DIGISTAMP WITNESS BORGERS
(September 20, 2006)

Pursuant to Presiding Officer's Ruling No. C2004-2/7 (August 18, 2006), the surrebuttal testimony of Digistamp witness Borgers was filed on September 14, 2006. The Postal Service hereby moves to strike those portions of that testimony that are not admissible evidence under Rule 31 of the Commission's Rules of Practice and Procedure.

Reviewing the document filed by Mr. Borgers as surrebuttal testimony on September 14, 2006, it is obvious that everything between the cover and page 10 constitutes argument, rather than testimony. Rule 31 indicates that "relevant and material evidence which is not unduly repetitious or cumulative shall be admissible." The first 8 pages of the text of the surrebuttal testimony largely consist of: 1) material quoted from the Transcript of August 15, 2006, of this proceeding, encompassing part of the cross-examination of Postal Service witness Foti by Mr. Borgers; and 2) Mr. Borgers' arguments concerning witness Foti's responses to his cross-examination, and related material. Mr. Borgers does not present new facts and expert opinion that would constitute evidence in these pages. Rather, he quotes the record extensively and offers his comments and analysis on the evidence contained therein. He attempts to draw conclusions advocated by DigiStamp, and attempts to refute conclusions advocated by

the Postal Service. Mr. Borgers is certainly free to cut and paste those portions of the document into his brief, but he is not entitled to have them admitted into evidence. They present argument, not testimony.

It is long-established in Commission proceedings that argument is the province of the lawyer, not the witness, and will not be received into evidence. It should, rather, be presented in brief or memoranda. These principles have been clearly laid out in the past, and there has never been any indication that they have been rescinded. Thus, for example, they appear in the Special Rules for Docket No. R97-1, as they did in the Special Rules for many rate cases before:

Argument will not be received in evidence. It is the province of the lawyer, not the witness. It should be presented in brief or memoranda. Legal memoranda on matters at issue will be welcome at any stage of the proceeding.

Presiding Officer's Ruling No. R97-1/4, Attachment B (August 11, 1997).¹

Therefore, the Postal Service objects to the admission into evidence of the pages numbered 2 through 9 in the Surrebuttal Testimony of Rick Borgers, filed on September 14, 2006, and requests that they be stricken (along with the corresponding portions of

¹ In later cases, the Commission fell out of the practice of reissuing special rules for each case (see, for example, page 10 of Order No. 1279, Docket No. R2000-1, January 14, 2000). But there is nothing to suggest that the policy of excluding argument from evidence was ever intended to be modified. See Order No. 1274, Docket No. RM98-3, at 5 (December 17, 1999).

the Table of Contents on the first page) before that document is received into evidence.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorney:

Eric P. Koetting
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

Eric P. Koetting

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