

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

Complaint on Electronic Postmark®)

Docket No. C2004-2

RESPONSE TO MOTION OF THE POSTAL SERVICE TO
STRIKE PORTIONS OF THE SURREBUTTAL TESTIMONY
OF DIGISTAMP WITNESS BORGERS
(September 27, 2006)

On September 20, 2006, the Postal Service filed a Motion to Strike Portions of the Surrebuttal Testimony of DigiStamp Witness Borgers, namely pages 2–9 with the corresponding listings in the Table of Contents.

The Postal Service's motion to remove my testimony states: "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."

On page 2, line 2, through page 3, line 17 it is certainly true that I quote the record. This is not "repetitious," but is a simple matter of making clear which misstatements of fact by Mr. Foti that the subsequent testimony addresses.

The Postal Service's objection seems to expect us to address its misstatements without specifying which misstatements we are addressing, which is absurd. To say, "Here is the specific statement that you made which I will now address," is simply good communication—and, for that matter, good manners. It is not irrelevant repetition. How the Postal Service thinks the Commission would know which of their misstatements I'm addressing, unless I quote those misstatements, is a mystery to me. Thus, the Postal Service's objection to the quoting of the record is without merit.

From page three, line 18, to page 5, line 10, I do in fact submit facts, and then page 5, lines 11 through 16, simply summarizes the facts and their direct relevance to Mr. Foti's misstatements.

Legal argument—which I agree is the province of the lawyer, not of testimony—is an application of facts to laws. I have not adduced any laws in these pages; hence, these pages cannot constitute legal argument.

As a matter of plain fact, I presented new factual material to rebut statements made by witness Foti in writing and orally, and I offered expert opinion on the nature of the Postal Service's EPM activities. I am, in fact, an expert on electronic communication, and on time stamps, and the facts adduced within these pages fall squarely within my expertise.

From page 5, line 17, through page 7, line 8, we directly address an issue raised by Mr. Foti, namely the application of HIPAA rules to the issue at hand. It is certainly true, again, that we quote the relevant portion of the record; But, again, this is not “repetitious,” but is a simple matter of making clear which misstatements of fact by Mr. Foti that my subsequent testimony addresses.

It is Mr. Foti, not I, who entered the HIPAA rules into evidence—repeatedly. Why the HIPAA rules constitute evidence when he introduces them, but my rebuttal of his argument is not evidence, is quite indecipherable.

I do, in fact, introduce facts about the HIPAA language—but I do not then apply HIPAA rules to facts to draw legal conclusions. That is, I do not make any legal argument. I simply point out that Mr. Foti's introducing these rules into evidence is an error. If the Postal Service wants to withdraw any and all claims it has made that HIPAA rules are relevant to the current proceeding, I will surely accede to that. However, for so long as the Postal Service continues to pursue the erroneous contention that the HIPAA rules are evidence in its favor, I insist on the simple right to point out in testimony that they have mischaracterized those rules.

From page 7, line 10, through the end of surrebuttal testimony, I introduce facts about the EPM and, using basic concepts accepted by experts within my field, offer only my expert opinion as to their relevance. Again, I do not even mention any laws. It therefore cannot be the case that my expert testimony constitutes legal argument.

I conclude that the objection to my testimony is without merit and the motion to strike should be denied.

Respectfully submitted,

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