

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

Complaint on Electronic Postmark)

Docket No. C2004-2

OFFICE OF THE CONSUMER ADVOCATE
REPLY BRIEF
(October 20, 2006)

Pursuant to Presiding Officer's Ruling No. No. C2004-2/11, issued October 12, 2006, the Office of the Consumer Advocate (OCA) hereby submits its Reply Brief.

In its Initial Brief, the Postal Service articulates the stale bromides always repeated in Complaint cases:

The Commission has no authority to hear complaints on the postal character of a challenged service. (Postal Service Brief at 3 and 4).

Only a United States district court has the authority to adjudicate the "postal" character of a challenged service. (Postal Service Brief at 6).

Both of these sets of arguments were unambiguously rejected in Order No. 1455¹ at 2 and 11. OCA relies on the earlier determinations of the Commission. The remainder of the Reply Brief will address new arguments made in the Postal Service's Initial Brief.

The Postal Service argues that Rule 5s, which defines "postal services" cannot be applied retroactively to services that were established prior to the Commission's issuance of the rule. OCA will demonstrate below that this argument is wholly without merit.

¹ "Order Denying, in Part, Motion to Dismiss and Notice of Proceeding", issued March 3, 2006.

Although this issue has been decided by the Commission, the Postal Service re-argues that all-electronic services cannot be “postal” in character. This repetition of earlier arguments deserves rejection again.

Finally, the Postal Service argues that EPM is neither the receipt, transmission, or delivery of mail nor ancillary to the receipt, transmission, or delivery of mail. The evidence introduced by DigiStamp proves just the opposite.

Case Law Against Retroactive Application of Agency Rules
Is Not Germane to this Proceeding

The Postal Service’s argument that cases such as *Nat’l Mining Assoc. v. Dept. of Labor*² (*NMA*) have any bearing on the application of Rule 5s in the DigiStamp Complaint is flatly wrong. First, *NMA* is inapposite factually. *NMA* involved Department of Labor’s change to an earlier version of rules that were in place at the time certain claims were pending before the Department of Labor. Rule 5s, on the other hand, changes no rule that existed prior to its adoption by the Commission. Quite the contrary, the Commission decided to coin such a definition because there was no rule that articulated clearly the elements of a “postal service,” thereby causing a service to be subject to the Commission’s chapter 36³ authority. Consequently, unlike the parties adversely affected by the Labor Department’s rule change, who may have relied on the earlier rules, there was nothing for the Postal Service to rely on prior to the Commission’s promulgation of Rule 5s.

Second, it is significant in the *NMA* opinion that the Court’s chief aim was to preserve for all Courts of Appeals the opportunity to consider and develop a proper

² 292 F. 2d 849 (DC Cir. 2002).

³ Of the Postal Reorganization Act (PRA).

interpretation of the Black Lung Benefits Act.⁴ This is precisely what the Postal Service invokes *NMA* to prevent, i.e., the Commission's proper exercise of its authority to construe the meaning of "postal services" in chapter 36 of the PRA. If the Commission had not articulated its definition of a postal service in Rule 5s, it would be applying exactly the same concepts in deciding the DigiStamp Complaint as a product of its construction of the term "postal services" in the PRA. The Commission's decision to settle on that precise formulation is not prejudicial to the Postal Service's interests. It is highly probable that a determination made so recently (only 10 months ago)⁵ about the elements of a Postal Service is exactly the same determination that would be made in the instant proceeding. In future cases, the determination would be applied as an administrative precedent, rather than a rule; but the effect would be the same. That the Commission decided to use the mechanism of a rulemaking proceeding (Docket No. RM2004-1) to make a precise formulation works to the benefit of all entities that are affected by the policies of the PRA, including the Postal Service. Docket No. RM2004-1 gave all interested parties an opportunity to present their positions for the Commission's consideration. Eight participants, including the Postal Service, filed multiple sets of comments. The procedures employed by the Commission have been eminently fair.

Third, under 39 U.S.C. §3662, Complainants are afforded all of the protections afforded by the PRA. Congress did not exempt the Postal Service from its obligation of act in conformance with the PRA in this section or any other. If the Postal Service takes

⁴ "[T]he regulations preclude the courts in other circuits from adopting the view of their sister court rejecting the Secretary's position, a possibility that was still available when the cases were initially filed. Thus, to the extent that a new rule reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability, that rule is impermissibly retroactive." *NMA* at 860.

⁵ Order No. 1449, "Order and Final Rule Defining the Term Postal Service," issued January 4, 2006.

actions not in compliance with the policies of the Act, the Commission has a duty to offer Complainants all of the relief that it is empowered to give under the PRA.

“Retroactivity” creates no exemptions from lawful conduct by the Postal Service.

All-Electronic Services Sold to the Public by the
Postal Service Are Encompassed by the Rule 5s Definition
Of Postal Services

The Postal Service challenges the Commission’s authority to find that an all-electronic service can be “postal” in character. (Postal Service Brief at 3). No new arguments are made in the Postal Service’s Initial Brief that should cause the Commission to reconsider its decision that all-electronic services may be “postal services” under the PRA.

The Postal Service repeats the same arguments based on the *ATCMU* and *NAGCP I* cases in the instant proceeding that it made in Docket No. RM2004-1. These were roundly rejected by the Commission.⁶

The Postal Service’s premise, that the meaning of the term “postal service” was resolved in the 1970s, is flawed. First, the question before the *ATCMU* court was a narrow one, namely whether or not certain special services were subject to the Commission’s jurisdiction. In affirming the Commission’s jurisdiction, neither the *ATCMU* nor the *NAGCP I* courts addressed the jurisdictional status of services not before them, let alone completely new forms of service.

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[T]he Postal Service overreaches in characterizing the matter as settled based on the *ATCMU* opinion.

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In contrast, in Docket No. C99-1, the Commission found existing precedent inadequate to resolve the jurisdictional dispute regarding Post E.C.S. service, an all-electronic means of transmitting documents securely via the Internet. PRC Order No. 1239, May 3, 1999, at 18. As noted

⁶ Order No. 1449 at 15-16 and note 28.

above, the Commission did not find it dispositive that Post E.C.S. service did not entail hard-copy mail. *Id.* at 15-21.

Most importantly, the Commission decided that:⁷

The revised definition differed from that originally proposed in two principal respects. . . . the accompanying discussion made clear what had been implied—that electronic communication services offered by the Postal Service to the public fell within the scope of the definition.

EPM Is a Postal Service: It Is an Integral Part of
Electronic Communications that Function Identically
to Hard Copy Mail Services

The Postal Service denies that EPM is ancillary to the receipt, transmission, or delivery correspondence. (Postal Service Brief at 3). This is flatly incorrect. The Postal Service markets EPM as a value-added service for electronic correspondence, and currently provides EPM services that are an integral, even an essential, component of electronic correspondence.

The Postal Service's website channel for EPM, using Microsoft Outlook technology, functions exactly like familiar hardcopy mail services. A customer enters his/her correspondence at the website; Postal Service software creates a hash code and applies a time/date stamp; the document is received at the Postal service's data center; and the Postal Service then relays the document to the recipient as an e-mail attachment from the Postal Service. (OCA Initial Brief at 5-7).

The Postal Service's largest customer, a durable medical supply company, uses EPM in the correspondence it receives from doctors submitting prescriptions for medical equipment. There is no dispute that the prescription submissions are communications from doctors (analogous to mailers) to the medical supply company (analogous to mail

⁷ *Id.* at 2.

recipients). The Postal Service adds value to this correspondence by adding the hash code and time/date stamp. Both of these additions function in a manner analogous to postmarked Certified Mail and Registered Mail. These services offer security features (protection against, and proof of, non-tampering) and time of acceptance by the Postal Service. It is important to bear in mind that the communication between the doctors and the medical supply company *cannot be completed without the EPM activities of the Postal Service*. In SRT-1 at 8-9, Mr. Borgers establishes that:

[T]he communication between sender and recipient cannot be completed without the EPM being attached. That is why the EPM is useful as a security measure. If the recipient could access the information in the file without the EPM's being attached, the file simply would not be secure, and the EPM would serve no purpose in the transfer of information from sender to recipient.

* * * * *

USPS computers and processes intervene between the sender's transmission of and the recipient's access to the information. It is therefore obviously essential to the communication process. It is in no way analogous to an in-house processing of documents already received, or an in house process of reception.

Conclusion

In summary, the Commission clearly has jurisdiction to offer DigiStamp all of the protections offered by 39 U.S.C. §3662. The application of Rule 5s is appropriate and is in no way prejudicial to the interests of the Postal Service. All-electronic services such as EPM may function identically to traditional mail services. When they do, the Postal Service must file a request under 39 U.S.C. §§3622 and 3623 before offering them to the public. EPM is unquestionably a Postal Service under the Commission's definition.

Respectfully submitted,

Shelley S. Dreifuss
Director
Office of the Consumer Advocate

901 New York Avenue, NW Suite 200
Washington, D.C. 20268-0001
(202) 789-6837; Fax (202) 789-6891
e-mail: shelley.dreifuss@prc.gov