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

Motion of DigiStamp to Withdraw Complaint and
Terminate the Docket Without Prejudice
(December 14, 2006)

By means of this document, I, Rick Borgers, on behalf of DigiStamp, withdraw the Complaint that I filed on February 25, 2004. I move that the Commission terminate this proceeding without prejudice. The reason I am taking this step is that Congress passed the Postal Accountability and Enhancement Act (PAEA) on December 9, 2006, thereby creating a monumental change in the Postal Service's authority to provide postal and "nonpostal" services to the public. Prior to the enactment of the PAEA, I could choose either of two courses of action: file an action in the federal court system to prevent the Postal Service from providing an unauthorized service–Electronic Postmark (EPM)– to the public, or use the Complaint procedure available at the Postal Rate Commission to force the Postal Service to follow the requirements of sections 3622 and 3623 title 39 of the U.S. Code. I chose the latter course because of the existing casework in Docket C99-1, and I thought DigiStamp could present this complaint without an attorney.

The passage of the PAEA impels me to reassess how I can best meet my objective. My objective is to have the Postal Service stop offering EPM. More generally, we don't like the USPS using its unique status as a government agency to compete

directly with private enterprise where there is no overriding public need for it to do so. We don't like it for ourselves and we don't like it for the country. The USPS needs to stick to its core mission of providing traditional mail services. I have expended considerable resources to develop evidence that would persuade the Commission that EPM is the type of service that came within the Commission's jurisdiction due the definition of a "postal service" in Commission Rule 5(s), 39 C.F.R. §3001.5(s). I appreciate that the Commission also expended considerable resources in allowing me to pursue my Complaint this far. I am grateful for the Commission's decision to hear the complaint and allowing me to pursue it thoroughly. I particularly thank the Presiding Officer, Commissioner Tony Hammond, for his strong and skillful management of the proceedings.

I understand that withdrawing my Complaint at this late stage may appear to be wasteful of Commission resources.[1] I regret any such impression, but I do not think that the record developed in Docket No. C2004-2 will prove to be a hollow exercise. Section 102(c)(3) of the PAEA requires the Postal Regulatory Commission to review every nonpostal service offered by the Postal Service as of January 1, 2006. I expect that the Regulatory Commission will establish such a review proceeding within the two-year-period set forth in the statute. Much of the record developed in Docket No. C2004-2 will be relevant to the Regulatory Commission's review of EPM.

[1] Unfortunately, this is the second time in just 5 days that such requests to terminate have been filed with the Commission. Just yesterday the Commission granted a joint request of the Postal Service and Washington Mutual Bank to terminate Docket No. MC2006-3, which reached a procedural stage just short of the one reached in this Complaint proceeding. Order No. 1483, "Order Granting Joint Motion of United States Postal Service and Washington Mutual Bank to Terminate Proceedings," December 12, 2006.

EPM was initially offered to the public without the prior scrutiny of hearings held under 39 U.S.C. §§3622 and 3623. The Postal Service has argued repeatedly that EPM is a nonpostal service. If the Commission allows me to withdraw my Complaint, the status of EPM as a nonpostal service will remain unchallenged. The Rate Commission will not have an opportunity to find that EPM is a postal service under the Rule 5(s) definition. This is a result I fought hard to achieve under the ratemaking system of the Postal Reorganization Act (PRA) and would have welcomed a Rate Commission decision finding EPM to be a postal service subject to the requirements of §§3622 and 3623. Ironically, for purposes of the PAEA, a determination that EPM is a postal service will have serious consequences for DigiStamp.

If the Commission were to deem EPM a postal service under the PRA, then it would not be subject to the review intended by Congress in Section 102(c)(3) of the PAEA. This is true particularly if the Commission was to direct the Postal Service to file a request under 39 U.S.C. §3623 and later was to recommend to the Postal Governors that EPM be made part of the Domestic Mail Classification Schedule. By the time the PAEA Section 102(c)(3) review was undertaken by the Regulatory Commission, EPM would not be subject to review as a nonpostal service, having already been established as a postal service. EPM would have the status of a postal service. I would then have to file a new Complaint under Section 205 of the PAEA. The nature of such a Complaint would be that EPM is not a postal service, but a nonpostal service, under Congress' new definition of a postal service in Section 101 of the PAEA (39 U.S.C. 102(5)), and that as a nonpostal service EPM should be subject to the PAEA Section 102(c)(3) review process.

I recognize that the Commission rule defines a postal service differently from the PAEA. The Rule 5(s) definition is:

> *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto.

The PAEA definition is:

> 'postal service' refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.

The Commission's use of the words "transmission" and "correspondence" particularly suggest that EPM might very well have the character of a postal service under the PRA, but not under the definition coined by Congress in the PAEA. Nevertheless, I would be at a distinct disadvantage if I had to use the PAEA Complaint procedure to have EPM re-defined as a postal service. For one thing, in the PAEA, Congress grants the Postal Regulatory Commission considerable discretion about whether to hear a Complaint or not. Under section 39 U.S.C. §3662(b)(2) (as amended), it is possible that my Complaint might not be acted upon within 90 days, which would have the effect of a dismissal. Also, I would have the burden of proof that EPM is a nonpostal service, not a postal service. This could be difficult to satisfy if the Commission has recently found EPM to be a postal service. Alternatively, if EPM's status remains that of a nonpostal service upon withdrawal of my Complaint, in the Section 102(c)(3) review procedure, the Postal Service would have the burden of proving that EPM, as a grandfathered nonpostal service, is needed by the public and that the private sector cannot meet the need.

It is important to note that Sections 102(c)(3) and (4) of the PAEA establish a *requirement* that the Commission review every grandfathered nonpostal service:

> (3) Not later than 2 years after the date of enactment of the Postal Accountability and Enhancement Act, the Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service on the date of enactment of that Act and determine whether that nonpostal service shall continue, taking into account—
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> > (A) the public need for the service; and
> > (B) the ability of the private sector to meet the public need for the service.
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> `(4) Any nonpostal service not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.

I further note that the kind of review that must be made under Section 102(c)(3) is exactly suited to my main concerns about the Postal Service's offering of EPM. Throughout the current docket, I have stressed that there is no public need for the Postal Service to be engaged in EPM and that my company, and others like mine, fully satisfy the public's need. EPM doesn't work properly either. Beyond that, the public's need is actually dis-served by having the Postal Service pit its $74 billion of revenue against the smaller resources of a company like mine. Do we want the entrepreneur afraid to develop new business for fear that the government will step in and take over? Whether EPM is a postal service or a nonpostal service is a formal question that has implications under the PRA and the PAEA but does not address the main issue– Is the public better served by having the Postal Service provide electronic services that stifle competition and innovation in the private sector or not? This is the narrow issue posed by Congress in the PAEA.

I would like to share some facts with the Commission, of which it may be unaware, concerning the insertion of Section 102(c)(3) in the PAEA. I believe it is

possible that Congress placed in the PAEA the language requiring a "public need" assessment of grandfathered nonpostal services as a result of the activities in these proceedings and my extensive letter-writing campaign to key Representatives and Senators who were so active in bringing about the passage of the PAEA. I am very grateful that these legislators took seriously my concerns about how to best serve the public. I think the Commission will understand that I would like to take advantage of a review procedure that may very well have been inserted specifically for the benefit of DigiStamp, while also benefiting other similarly situated competitors of nonpostal services.

In conclusion, I withdraw my Complaint in this docket and ask that this case be dismissed without prejudice.

Respectfully submitted,

Rick Borgers
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