

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

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Review of Nonpostal Services  
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Docket No. MC2008-1

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Supplemental Statement of Rick Borgers  
on behalf of DigiStamp Inc.  
(August 20, 2008)  
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The purpose of this Supplemental Statement is to respond to facts introduced in the testimony of Adam Grossman, Chairman of Epostmarks. My position, briefly summarized, is that Congress never intended to have the Postal Service inject itself into the quagmire of network neutrality. The certified email product that Mr. Grossman discusses in his statement is just the type of new nonpostal product that Congress explicitly forbids the Postal Service from engaging in, per 39 U.S.C. section 404(e)(1). The Epostmarks certified email product would be offered by the Postal Service as one of the licensed products it intends to offer under the *new* licensing/branding role it adopted at the end of July 2007.

Allowing the Postal Service to expand into this new nonpostal service will cause the kind of harm that Congress specifically acted to prevent in section 404(e)(1). In addition, the type of arrangement that Epostmarks has been able to negotiate with the Postal Service in the last several months (or years) exposes the falseness of Mr. Foti's June 23, 2008, statement that the Postal Service has established a fair, open system for qualified private digital time/date stamp

providers, like Digistamp, to become licensed EPM providers. Awarding the Postal Service the role of regulator and licensee for an unlimited number and types of new electronic communication services loosely strung together under the EPM label will cause dangerous distortions and imbalances in the electronic communications market. With full justification, in section 404(e)(1) of the Postal Accountability and Enhancement Act (PAEA), Congress prohibits the Postal Service from wreaking harm in these nonpostal markets. I demonstrated through emails attached to my initial Statement that the Postal Service evaded serious discussions with my company, Digistamp, to allow Digistamp to become one of the licensed providers of EPM. The Postal Service does not have an open, transparent system for allowing any qualified digital time/date stamp provider to have access to EPM. From my involvement in the time/date stamp industry, I know that Epostmarks' officers have personal ties to Postal Service officials, giving them access that I cannot get as an outsider. I believe it would be a serious mistake for the Commission to allow the Postal Service to become the "regulator" of this industry without explicit authority from Congress and without a fair system of rules that would ensure an even playing field in the electronic communications industry.

Mr. Grossman's statement raises the issue of the problem that SPAM has created and solutions that might be developed in the private sector to improve email. Many companies are working to solve problems and provide competitive services to the marketplace. The market for **secure digital communications** is vast and evolving quickly.

This is a relatively complex subject: digital security and the associated market influences. This is the subject of significant research, development and private industry investment.

In this document I would like to respond to Mr. Grossman's statement in five specific areas:

1. Postal Service is not needed because private industry has proven they can provide these services.
2. Free market systems should decide.
3. Public is being misled by claims of special legal backing.
4. The new EPM is a new type of nonpostal service that Congress explicitly barred.
5. If Congress had intended that the most important electronic communications questions pending today be resolved by the Postal Regulatory Commission, it would have been more explicit in drafting the PAEA.

Mr. Grossman describes in his statement a particular solution that has been referred to in literature as "Certified Email". I think the Commission needs to know that Certified Email has not been universally accepted as a good solution to SPAM and has been the subject of much public discourse--pro and con. There is a variety of other solutions that are superior to Certified Email and will win in the market.

**1. Postal Service is not needed because private industry has proven they can provide these services.**

Mr. Grossman describes the "certified email" solution of his partner company Goodmail. Goodmail is providing certified email today. Goodmail can and does provide their certified email service today without the use of the USPS EPM.

There are many companies that provide the qualities of secure digital communications that Mr. Grossman describes--today and without the USPS EPM.

An article in Wikipedia® on Certified Mail and Authenticated Email describes a variety of current and competing solutions

([http://en.wikipedia.org/wiki/Certified\\_e-mail](http://en.wikipedia.org/wiki/Certified_e-mail)  
[http://en.wikipedia.org/wiki/Email\\_authentication](http://en.wikipedia.org/wiki/Email_authentication) )

Allowing the Postal Service to introduce more turmoil in the net neutrality controversy is bad public policy and something Congress never intended. I have previously testified before the Commission that the Postal Service wants to enter the electronic communications market in order to boost its revenues by taxing the digital time/stamp products of other companies. That is why the Postal Service wants to establish itself as a licensee and regulator of this industry. Please see ([http://en.wikipedia.org/wiki/Network\\_neutrality](http://en.wikipedia.org/wiki/Network_neutrality) ) One major faction of the net neutrality controversy has testified before Congress that taxes such as these cause substantial harm to small businesses, nonprofit organizations, and individuals:<sup>1</sup>

Fifty businesses, non-profit organizations and online advocacy groups have formed an unlikely alliance to protest an AOL proposal to offer a certified e-mail system, which the coalition likens to an e-mail taxation scheme that would allow senders to bypass spam filters.

On Tuesday, the anchors of the coalition – the Electronic Freedom Foundation and Free Press -- hosted a national conference call asking for allies to unite to fight AOL's "e-mail tax."

Under the banner of DearAOL.com, a total of fifty organizations, including MoveOn.org, Civic Action, Gun Owners of America, The Association of Cancer Online Resources and Craig Newmark of Craigslist.com joined in to offer up a number of explanations as to why such a "pay-to-send" policy would harm the Internet forever.

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<sup>1</sup> *Coalition Protests AOL Anti-Spam Add-On*, PC MAGAZINE, March 1, 2006.  
<http://www.pcmag.com/article2/0,1895,1932785,00.asp>

"AOL's e-mail tax is one part of a recent assault on a free and open Internet... On this front we have large e-mail providers, including AOL, that want to turn e-mail communication into a privileged realm for those who can afford to pay corporate tax," said Timony Karr, campaign director for Free Press. "The flow of online information, innovation and ideas is not a luxury to be sold off to the highest bidder."

Congress is in the process of investigating this issue. The Commission should not blindside Congress by endorsing the Postal Service's attempt to institute this kind of email tax. I will discuss below what Congress understood the Postal Service's nonpostal EPM service to be at the time it enacted 404(e)(1) of the PAEA.

## **2. Free market systems should decide.**

Mr. Grossman describes one of the many services and methods that are competing in this market. At this time, and without explicit authorization by Congress, it would be bad public policy to enshrine one method as backed by federal law enforcement in preference over other competing solutions. Sound economic principles require that the market decide this matter. I know of competing solutions that will be better for the consumer. Congress did not intend that the Postal Regulatory Commission choose market winners in this situation.

I would like to add to the record some of the public discourse on this subject of certified email. Please, I invite you to review the material provided in the Appendix A.

In my experience, when technical committees work to ratify standards, it is always important to understand the patent environment. The Internet community has avoided solutions that are encumbered by patents. There is some question about patents related to the subject before the Commission. I am unclear about the patents and that makes me uncomfortable. The USPS has referred to patents that it holds, but they have not yet listed those in this record.

The United States Patent 20050193075 “Method, apparatus and system for regulating electronic mail”<sup>2</sup> makes claims upon the new certified mail that the USPS, Epostmarks and Goodmail described in Mr. Grossman’s testimony. Epostmarks is the business development arm of the company that holds that patent. One of the inventors of that patent, Daniel B. Curtis, is a former postal executive.

### **3. The public is being misled by claims of special legal backing of their email when combined with the USPS EPM.**

Below is a variety of quotes from Epostmarks’ marketing literature that are very unclear or misleading.

I described in my statement how the USPS had been asked about their legal backing of the EPM service and never answered the questions. That is a stark contrast to Epostmarks’ statements to the public that imply significant criminal enforcement activity by the USPS.

Please consider: Is it the intention of the USPS to expend substantial agency resources to provide “enforcement of email abusers”? If so, have those enforcement activities been properly assigned to EPM? The descriptions below suggest that EPM service is primarily a nonpostal service of the U.S. Postal Inspection Service, is that accurate?

Epostmarks’s description of legal standing from their web site:

**THE ELECTRONIC POSTMARK SOLUTION**  
The Electronic Postmark (EPM) was introduced in 1996 by the U.S. Postal Service as a service offering that provides proof of integrity and authentication for electronic transactions. By using EPMs senders are agreeing to the legitimacy of the email and are bound to

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<sup>2</sup> <http://www.freepatentsonline.com/y2005/0193075.html>

complying with all federal laws, including CAN-SPAM. *If the sender is accused of abusing the EPM privilege or breaking the law, the U.S. Postal Inspection Service will investigate the situation and can revoke the sender's use of EPM and prosecute the sender for any fraudulent use of the service.* (Emphasis added) Compare this to physical mail, where mail fraud is virtually nonexistent due to the legal framework and the vigorous efforts of the U.S. Postal Inspection Service. The use of EPMs paves the way to have the same legal recourse for email fraud as for physical mail fraud

Epostmarks web site.

"Epostmarks, Inc. brings the trust and legal authority of the U.S. Postal Service® to the internet, through the use of the Electronic Postmark® and with the protection of the U.S. Postal Inspection Service. Our goal is simple: to bring the trust of the mailbox to the inbox."

Newspaper quote from Epostmarks's CEO

We bring the trust of your mailbox to your inbox. Everyone, including me, is struggling with electronic communications... and we address that with particular technology... that allows you to send electronic information in a manner by which you can trust. Through a partnership with the U.S. Postal Service, PeerConnect [the prior company name of Epostmarks] clients' e-mails are issued an electronic postmark that guarantees that the information is legitimate. And because the software is under the protection of the Postal Service, if someone does send fraudulent information in an e-mail, he or she can be prosecuted.<sup>3</sup>

#### **4. The Postal Service's licensing of Epostmarks is a new nonpostal service that arises from the new role the Postal Service adopted at the end of July 2007.**

On February 24, 2004, I filed a complaint with the Postal Rate Commission concerning the Postal Service's EPM service. The Commission addressed the issues I raised in Docket No. C2004-2. During that proceeding, an evidentiary record was developed that demonstrated what type of service the Postal Service

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<sup>3</sup> Rochester Insider interview

[http://www.peerconnect.com/news.php?subaction=showfull&id=1114650014&archive=&start\\_from=&ucat=1&](http://www.peerconnect.com/news.php?subaction=showfull&id=1114650014&archive=&start_from=&ucat=1&)

was offering to the public at the time of PAEA enactment. The date of the transcript that I reference is August 15, 2006, which is approximately 7 months later than the critical date of January 1, 2006, that Congress established in the PAEA as the cutoff date for grandfathering existing nonpostal services.

Mr. Foti filed a statement on behalf of the Postal Service in this proceeding (Docket No. MC2008-1) on June 23, 2008. He outlines two distinct periods in the Postal Service's offering of EPM: the first is from 2001 – 2007; the second period began in August 2007. According to Mr. Foti (at page 2), “[f]rom 2001 to 2007, a partner was aligned to provide the USPS EPM service to commercial entities, as well as public users and internet consumers. Users of this service were regarded as postal customers.” But “[i]n late 2006, the Postal Service published a Request for Information (RFI) to engage the time-date industry in *changing the Electronic Postmark model.*” (Emphasis added). In the post 2006 model, Mr. Foti explained that: “By August 2007, *the former model of a postal-supported service was changed to a licensing model . . . .*” (Emphasis added).

Transcript Volume 1 of Docket No. C2004-2 contains the testimony of Mr. Foti concerning the nature of EPM during the crucial period of 2006, when Congress was formulating its vision of whether the Postal Service should be allowed to participate in nonpostal services. According to Mr. Foti's testimony: “97 percent of all Electronic Postmark® uses, since 2003, have been in conjunction with protecting content integrity of an electronic file - and not in the transmission of a message.” Tr. 1/56 (USPS-RT-1 at page 11). In response to one of my interrogatories, Mr. Foti underscored that: “it is my testimony that, based on our understanding of how customers are using the USPS EPM, the EPM is essentially not being used in the transmission of a message.” Tr. 1/67 (Mr. Foti's answer to interrogatory DS/USPS-RT1-2).

As a factual matter, when Congress enacted the nonpostal provisions of the PAEA, it would have been aware of the type of EPM activities in which the Postal Service had been engaged from 2001-2006 – the protection of content in an

electronic file and, decidedly, *not* in the business of certifying email as Mr. Goodman has discussed. Unquestionably Congress did not envision a Postal Service “tax” on massive distributions of email so as to keep SPAM out of the inboxes of email recipients. At first blush, the Commission might think that taxing emails is a good idea; no one likes to receive SPAM. But there is a large coalition in the private sector that worries that giving certain companies a fast track into the email inbox by paying a “tax” on such emails may deprive many small businesses, under funded nonprofit organizations, and individuals from having their emails make it into the inboxes of recipients who want to receive such messages. I am not taking a position on this question, nor am I urging the Commission to do so. On the contrary, I am urging that the Commission keep the Postal Service out of the net neutrality controversy in the way that Congress intended when it enacted the PAEA. Congress authorized the Commission to *consider* allowing the Postal Service to continue to offer the type of EPM service that it was offering on January 1, 2006. The fundamental changes that the Postal Service made in its “remodeling” of EPM in late July 2007 amount to a new type of nonpostal service that Congress explicitly barred in section 404(e)(1) of the PAEA.

**5. If Congress had intended that the most important electronic communications questions pending today be resolved by the Postal Regulatory Commission, it would have been more explicit in drafting the PAEA.**

For the first time, Microsoft presented its views on EPM to the Commission – in Reply Comments of Maxim Lesur, Worldwide Postal Industry Managing Director For Microsoft Corporation. Speaking for Microsoft, Mr. Lesur supports the Postal Service’s continued offering of EPM.

There are competing technical avenues to achieve the worthwhile objectives espoused by Mr. Lesur, but they have not been discussed in this forum. Undoubtedly the reason for the lack of rigorous debate about the best methods to ensure secure email communications is that the public rightly would not expect such far-reaching decisions to be made by postal experts. These are matters for electronics communications experts.

If Microsoft wants a forum, it should go to Congress to have laws enacted that reflect its views and interests.

On Page 5 of Microsoft's Reply Comments, Scott Charney, Corporate Vice President Trustworthy Computing at Microsoft Corp., in his latest white paper called "Establishing End to End Trust" mentions the role Postal organizations could play in putting mechanisms in place that allow identity claims to be verified. Microsoft sees the Postal Service developing the mechanisms to provide digital credential to citizens. I could not disagree more. First, this is not the correct forum for monumental directional decisions for national digital ID systems. Second, the US Postal Service is not competent in these areas. Third, these proceedings are not structured to vet this subject in a comprehensive evidentiary record. Vitaly important questions like this can only be resolved by means of extensive economic, social, technical, and public policy evidence that can be thoroughly tested with the tools of discovery and oral cross-examination. These tools have not been made available to interested entities in this proceeding.

Microsoft fails to understand the Postal Service's "core competencies". There is a strong difference between delivering physical mail and developing the Internet secure digital communications infrastructure. There is a complete mismatch of the technical expertise needed to develop the secure digital communications infrastructure and the Postal Service's expertise in sorting and delivering letters and packages.

## **Declaration**

I, Rick Borgers, declare under penalty of perjury that this statement is true and correct to the best of my knowledge, information and belief.

Respectfully submitted,

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## ***Appendix A***

AOL initially announced the Goodmail certified email system as a new technique support in 2006. During that time period much debate was recorded as to the public value of this solution.

I would like to call the Commission's attention the public responded to some to the Internet blog entries below with follow-on articles and **thousands of public comments**; comments were in the complete range of pro, con, thoughtful and concerned citizens expressing their perspectives. These proceedings before the Commission are not structured to engage the public on this subject. But, the comments below may help the commission with the context of these discussions.

Testimony of Danny O'Brien Electronic Frontier Foundation before the Senate Select Committee on E-Commerce California Legislature on the matter of the Goodmail/AOL CertifiedEmail proposal April 3rd, 2006

Many standards and businesses other than Goodmail are working to provide both authentication and certification services, either currently or in the future.<sup>1</sup> The best ongoing reaction to these problems, we believe, lies in a vibrant and competitive market for solutions -- not only among certification and authentication services like Goodmail, but also in competition with alternative solutions. Like many Internet issues, it may transpire that the best fixes lie not in a commercially provided goods or services, but in collaboratively developed standards and open source software that anyone may use and improve for free.

Our concern is that the structure of the Goodmail deal with AOL, and later with other ISPs and mailbox providers will distort and limit this market, setting bad examples for future entrants, and exclude other solutions (including efficient and ubiquitous free solutions) from acceptance by gateholder mailbox providers.

We see the primary impediment for a functioning market to be Goodmail's agreement to share its per-email revenue with AOL. Removing this revenue share would permit all the potential technological benefits of Goodmail to accrue to end-users, while maintain a fair and corruption-free future market. Current established certification alternatives to Goodmail include Habeas and Bonded Sender. E-mail authentication can be provided by open standards such as DomainKeys, or S/MIME and PGP

signatures. 2 Only last week, MIT hosted an Anti-Spam Conference where many players introduced new techniques that could be adopted by senders, mailbox providers, and end-users:

[http://www.spamconference.org/2006\\_accepted\\_papers.html](http://www.spamconference.org/2006_accepted_papers.html)

AOL went on to argue that Microsoft had pioneered the concept of "certified email" with its Hotmail "Bonded Sender" service in May 2004. The ISP also argued that corporations would be charged for the service, not consumers, and said it would not eliminate its other antispam protections to ensure that consumers were protected from uncertified email.

Fifty businesses, non-profit organizations and online advocacy groups have formed an unlikely alliance to protest an AOL proposal to offer a certified e-mail system, which the coalition likens to an e-mail taxation scheme that would allow senders to bypass spam filters.

Federal Trade Commission, Proceedings of the "Spam Summit, next generation of threats and solutions" July 12, 2007 Mr. Ken Hirschman VP and General Counsel of Goodmail describes that his company, Goodmail, has partnered with Epostmarks and states that

"there are those that believe, you know, right here in D.C., the U.S. Postal Service thinks there's a great market for putting the blue eagle icon right in email messages".

In a New York Times Op-ed of March 17, 2006 Esther Dyson describes the value of the certified mail approach.

I agree that pretty soon sending most e-mail will cost money, but I think that's only right. It costs money to guarantee quality and safety. Moreover, I think the market will work, and that it will not shut out deserving senders, if we only let it work freely. In fact, I hope Goodmail succeeds, and that it has lots of competition.

From: <http://www.nytimes.com/2006/03/17/opinion/17dyson.html>

Mar 29, 2006 on Slashdot from the if-you-only-read-one-article-today dept., Bennett Haselton wrote the description below and started a discussion of several hundred public comments

AOL created quite a stir in February when they announced that senders would soon be able to bypass the company's junk mail filters by paying a quarter-penny per message to a company called Goodmail, which would split the revenue with AOL. EFF and MoveOn.org argued, in an open letter posted at DearAOL.com and co-signed by many groups including Peacefire, that once the big players were able to bypass AOL's mail filters for a fee, there would be less pressure on AOL to fix problems with non-paying senders being blocked, and that the quarter-penny would become a de facto "e-mail tax" for newsletter publishers if other ISPs followed suit.

At the N-TEN conference last Thursday in Seattle, I had the chance to talk to Charles Stiles, the AOL postmaster, and Richard Gingras, the CEO of Goodmail, after a panel discussion about Goodmail's system, where they clarified some issues. First, if you pay for a GoodMail stamp, your mail not only bypasses AOL's junk mail filters, it also gets displayed to the user with a blue ribbon indicating "This mail has been certified" -- which is a promise to the user that GoodMail has actually done a "background check" on the organization and found them to be a "good actor". (So it's mainly useful for banks, as a way of saying "This is not a phishing attack", and for charities, as a way of saying "We are a legitimate charity".) Stiles said that AOL will continue offering a free whitelisting program for people to bypass the filters, where anyone can apply to join the whitelist (even though this can be easily abused by spammers as well, but AOL offers it anyway because most spammers don't bother). If you're on the whitelist, you don't get the little blue "Certified Email" ribbon, but you do get past the junk mail filters.

So, what's everyone so worried about, if anyone can bypass the filters for free? Well, one problem is that this is where Hotmail used to be, before they started requiring senders to pay a fee to bypass their filters. At one time, if your newsletter was being wrongly blocked by Hotmail, you could fill out a questionnaire with some verification information, and they would add you to the whitelist, which is what we once did to get the Peacefire newsletter un-blocked. However, once Hotmail started using Bonded Sender, a third-party company that requires you to post a \$2,000 bond in order to get on their whitelist, Hotmail revoked the free whitelisting that had been given out in the past. If your newsletter is being blocked by Hotmail's filters, no matter how many people vouch for you as a non-spammer, the only way to make sure you get past the filters is to pay the \$2,000 to Bonded Sender. (I refused to pay the fee, and of the last seven messages that I sent to our press list, all of them got labeled by Hotmail as "Junk Mail".)

Charles from AOL seemed sincere in saying that AOL's free whitelisting won't go away. But he can't promise or guarantee anything, and someday

it'll be someone else's decision. And other ISPs, most of which do not have free whitelists, will be tempted to use GoodMail as a de facto whitelist, such that senders that don't pay will have a greater chance of being blocked.

But I think there's a bigger problem underlying all of this. It's not about specific problems with GoodMail's or AOL's or Hotmail's system. The problem is that many advocates of these systems say that any flaws will get sorted out automatically by "the market" -- and in this case I think that is simply wrong. And in fact the people on Thursday's panel can't really believe it either, because one thing we all agreed on was that Bonded Sender sucks. But has the marketplace punished Hotmail for using it? Have people left in droves because non-Bonded-Sender e-mail gets blocked? No, because if they never see it getting blocked they don't know what happens. Free markets only solve problems that are actually visible to the user.

Remainder of the article at:

<http://it.slashdot.org/article.pl?sid=06/03/29/1411221>

For a variety of testimony on this subject of Certified Email, the link below will perform a Goggle search on the subject for further information:

<http://www.google.com/search?hl=en&q=goodmail+testimony+certified+mail>