

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

Review of Nonpostal Services

Docket No. MC2008-1

Brief of Digistamp

Background

This proceeding was inaugurated on December 20, 2007, by Commission Order No. 50.¹ The case arises from section 404(e) (title 39) of the PAEA, in which Congress delegated the responsibility to the Postal Regulatory Commission to determine whether to allow legacy nonpostal services to continue to be provided to the public. The nonpostal service that Digistamp addresses in this brief is the Postal Service's Electronic Postmark (EPM).

At the outset of this proceeding, the Postal Service took the position that EPM was a revenue-producing activity not subject to section 404(e). Later, the Postal Service agreed that EPM was a nonpostal service and was subject to section 404(e).² Consequently, whether EPM is a nonpostal service is not at issue in this case.

¹ Notice and Order Concerning Review of Nonpostal Services.

² In Order No. 74, Order Granting Motion to Compel and Revising the Procedural Schedule, April 29, 2008, the Commission decided that EPM and other services were nonpostal services subject to section 404(e) review. Following issuance of the Order, the Postal Service dropped its attempt to challenge the nonpostal character of EPM.

Digistamp filed two pieces of testimony by its principal, Rick Borgers. Mr. Borgers argues vehemently that EPM fails both parts of the test enacted by Congress – the public suffers, not benefits from the Postal Service’s activity in the timestamp industry; and the private sector can not only provide time/date stamp products better than the Postal Service, the Postal Service’s presence in the industry has seriously depressed all economic activity in this market. Potential entrants into this market, both large and small, are deterred by the presence of a \$75 billion behemoth; and it’s not as if the Postal Service is doing a good job in this sector. Although it sucks up all of the oxygen in the time/date stamp market, it lacks the technical expertise to take on the role of “regulator” that it decided to adopt in the latter half of 2007, long after the date established by Congress for the Postal Service to maintain the status quo for legacy nonpostal services.

I. THE POSTAL SERVICE HAS FAILED TO MEET ITS BURDEN OF PROOF IN THIS PROCEEDING

In section 404(e) of title 39, Congress has placed the burden of proof squarely on the Postal Service. If the Postal Service wants to continue to offer EPM to the public, it must convince the Commission, by a preponderance of credible, probative evidence, that there is a public need for EPM that the private sector cannot satisfy. The following legal treatise explains the burden that must be met by the Postal Service:

The term “burden of proof” often contemplates what the litigating proponent must establish in order to persuade the trier of the facts of the validity of his claim or affirmative defense and, at times, is referred to as the “burden of persuasion” [I]t is a burden derived from substantive law which becomes an active factor in the context of litigation when all of the evidence has been submitted.

It is imperative to note that the burden of proof remains fixed throughout the litigation on the proponent, who must sustain his burden of persuasion in a qualitative manner, specifically with credible evidence.

4 Stein, Mitchell, Mezines, Administrative Law §24.01 at 24-5 through 24-9 (1991).

The lack of effort and enthusiasm by the Postal Service to try to convince the Commission that EPM should be continued is so marked that the Commission must take note of it. Support for EPM, such as it is, is found in the Statement of Mr. Foti, filed June 23, 2008. Mr. Foti devotes only two pages to the subject of EPM. Of those two pages, one and a half pages are merely descriptive. The Postal Service's entire defense of EPM is presented in an anemic 15 lines of Mr. Foti's statement. Even more striking is that the Postal Service's response to a scathing criticism of EPM by Digistamp's Rick Borgers was deafening silence by the Postal Service. The Postal Service demonstrates so little interest in EPM that it did not even take the trouble to reply to Mr. Borgers' condemnation of the service. Consequently, Mr. Borgers' comprehensive, thorough explanation of the harm that EPM does to the public and the time/date stamp industry stands un rebutted by the Postal Service. Digistamp respectfully asks the Commission to direct the Postal Service to desist in offering EPM to the public on the ground of its failure to prove its case by a preponderance of the evidence, and an even more acute failure to make even a prima facie case in support of EPM.

II. EPM AS CURRENTLY OFFERED BY THE POSTAL SERVICE IS IN VIOLATION OF THE PAEA

Section 404(e)(2) of title 39 provides that:

Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection.

In section 404(e), Congress amply demonstrates its great dissatisfaction with the Postal Service's forays into nonpostal services. Thus, it placed strict limits on the possible continuation of Postal Service nonpostal service activities. The only nonpostal services that potentially could be offered in the future were those that "were offered as of January 1, 2006." EPM in its current form is a new nonpostal service that was launched in August 2007. It was not offered as of January 1, 2006.

Rick Borgers underscored the material differences between EPM before August 2007 and EPM after August 2007:³

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).

³ Supplemental Statement of Rick Borgers on behalf of DigiStamp Inc., August 20, 2008, at 8.

In his Supplemental Statement, Mr. Borgers also proved that the type of service that Epostmarks wants to offer under the new licensing model is very different from the type of EPM service Congress was aware of at the time it enacted the PAEA and included the “January 1, 2006” restriction (in 39 U.S.C. section 404(e)(2)). Mr. Borgers stated:

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.

Digistamp respectfully asks the Commission to find that the new EPM service offered by the Postal Service as a licensor and regulator is in violation of 39 U.S.C. section 404(e)(2) and that the Commission direct the Postal Service to terminate the service immediately.

III. ALLOWING EPM TO CONTINUE IS INIMICAL TO THE PUBLIC GOOD

One of the two principal issues that Congress directed the Commission to investigate is set forth in 39 U.S.C. section 404(e)(3)(A) – Is there a public need for EPM? Mr. Borgers has answered that question forcefully in his initial and supplemental statements. The answer he gives is not only “No,” but “HECK NO”!

Mr. Borgers has stated that the presence of a \$75 billion governmental agency in the time/date stamp industry has thwarted innovation and evolution of the market. A theme that is woven throughout the Rebuttal Statement of Mr. Grossman (a principal of Epostmarks) is that the time/date stamp industry strongly depends on Postal Service involvement to flourish. Nothing could be further from the truth.

The time/date stamp industry would certainly have much greater market penetration today if the Postal Service had not been involved. The presence of the Postal Service is a drag on progress. Small startup companies like Digistamp cannot find investors who are willing to risk backing them when the sleeping giant – the Postal Service – the Postal Service – has expressed its intent and may finally awaken at any moment and spend the tens of millions of dollars on its EPM service to finally do it correctly, immediately crushing small competitors in its path.

Furthermore, the Postal Service has presented a false picture concerning the security of EPM. In Mr. Grossman’s Rebuttal Statement (at 4), he suggests that the Postal Inspection Service will play a role in investigating (possibly prosecuting) cases of fraud involving EPM. At its website, Epostmarks also states that, “Epostmarks has partnered with the Postal Service to apply special legal protections* to email through the

use of the Electronic Postmark, making your inbox as safe as your mailbox.” Slide 7 at <http://www.epostmarks.com/info/PostmarkedEmail%20Benefits%20Overview/index.html>

The record that Digistamp developed in Docket No. C2004-2 and in this proceeding strongly indicate otherwise. Digistamp filed a Complaint⁴ concerning the Postal Service’s e-mail activities in Docket No. C2004-2. Paragraph 9 of the complaint pointed out that, as of that date, the Postal Service claimed at its EPM website that anyone victimized by the use of EPM to perpetrate a “fraud” or “swindle” could count on the Postal Service to furnish “legal protections,” specifically under 18 U.S.C. section 1341. Paragraph 9 is reproduced below:

According to the Postal Service, purchasers obtain legal protections by choosing a USPS electronic postmark. These include the protection provided to purchasers under 18 U.S.C. §1341 “Frauds and swindles.” See <http://www.usps.com/electronicpostmark/benefits.htm>

Section 1341 provides in part that: “Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in *any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service* ...shall be fined under this title or imprisoned not more than five years, or both.” (emphasis added)

After Digistamp raised this issue in its Complaint, the Postal Service lost no time in removing this statement from its website. In fact, by the time the Postal Service filed its Answer to my Complaint, on April 26, 2004, the Postal Service pointedly stated:

The first sentence of this paragraph is admitted. The Postal Service further admits that, at the time the Complaint was filed, the cited website included the quoted reference to 18 U.S.C. § 1341. That reference, however, appeared only because of inadvertent oversight in the review process for the content of the website. On March 1, 2004, the reference to that section was removed from the website, and the Postal Service therefore denies any continuing relevance of 18 U.S.C. § 1341 to this matter.

⁴ February 25, 2004.

The only claims that the Postal Service makes at present for special legal protections is found at its EPM website, where it is stated:

Legal Strength

In addition to federal and state legislative frameworks (Electronic Signature in Global and National Commerce Act [ESIGN, 2000], Government Paperwork Elimination Act [GPEA, 1998], Uniform Electronic Transaction Act [UETA, 1999]) which have been in existence for several years now to encourage people to form and sign contracts and agreements electronically.

<http://www.authentidate.com/index.php/content/view/28/86/>

Enforcement of the fraud and swindle statute is conspicuously absent from the Postal Service's claim concerning "Legal Strength."

IV. THE PRIVATE SECTOR FULLY SATISFIES THE PUBLIC'S NEED FOR TIME STAMP SERVICES AND, FREED FROM THE CONSTRAINTS PLACED BY THE POSTAL SERVICE'S PRESENCE IN THIS MARKET, WILL INNOVATE AND DEVELOP TRUSTED SERVICES THAT ARE FAR SUPERIOR TO EPM

Mr. Grossman states (at 3) that, "The unique value of the EPM lies elsewhere: in the ability to provide a trusted online environment where the public can feel safe and protected." Mr. Grossman ignores the fact that economic and communications activities throughout the United States, and globally, function with astonishing efficiency and success without any government involvement. In the area of communications, the constant exchange of emails among friends, relatives, and business associates takes place by the billions every day. Private, confidential, and valuable information is shared with great confidence by members of the public. These individuals place great trust in their internet service providers, not the government, to transmit their messages quickly,

reliably, and safely. The same is true of telephone communications – again, billions of calls are placed everyday, with the public trusting that their calls are safe and private. Are these callers placing their trust in the government when they make such calls? No, trust is placed in private sector telecommunications companies like Verizon and Sprint.

E-commerce is growing explosively today. Amazon.com is a \$15 billion/year enterprise, with millions of customers providing valuable personal data to Amazon and trusting that this data will be transmitted safely, reliably, and confidentially. Amazon, of course, is just one of a vast number of companies that sell to customers over the internet and telephone. Not only is the U.S. Postal Service not needed in this immense commercial network, the federal government as a whole plays no role. The public does not need to “trust” or rely on a governmental entity in order to feel safe.

Mr. Borgers explained how primarily private entities established the trustworthiness of time/date stamps in his Initial Statement (at 6):

Private industry already has certification services, methods, standards and organizations that are similar to what the USPS proposes to create in their new USPS EPM program. For example, for the role of public “Certificate Authorities” was developed by the work of the Internet Engineering Task Force (IETF), National Institute of Standards and Technology (NIST) and private industry.

The private sector already has methods for audits and certification authorities in the ecommerce market. Given all the work done by private industry to develop audit and certification procedures, the Postal Service is not needed in this market. If the Postal Service were finally removed from the time/date stamp market, other large private entities would step in as repositories of trust. For example, Verisign could engender public trust of digital time stamps. Currently, Verisign plays a vital public role

as a “Certificate Authority.”⁵ Certification Authorities (CAs) build trust in e-commerce in a secure online environment. VeriSign is but one example of the set of companies comprised of leading CAs like Entrust and Digital Signature Trust, GlobalSign and others.

Enabling the Certificate Authority is a set of *private industry groups* that support the audit and certification process. The American Institute of Certified Public Accountants designed and support the WebTrust standards for Certification Authorities. Alternatively, some (private sector) trust organizations utilize the SAS 70 audit⁶ as the basis of third party validation. Their objective is to perform an independent examination of VeriSign's practices, controls and procedures to audit compliance with standards. The auditors have been professional services firms such as KPMG LLP, Ernst & Young and a few others.

Independent testing labs are “trusted” based upon review and certification by a private company that is accredited by NIST⁷ or as a Common Criteria Testing Laboratory.⁸ The Laboratory Accreditation Program and the methods of private industry describe above are building the trust base necessary for e-commerce to reach its full potential.

⁵ A common use certificate authorities is to issue SSL certificates to Internet eCommerce vendors to authenticate their identity... you use an SSL connection every time you enter your credit card or bank account information as an assurance that your data travels over the Internet in an encrypted envelope to be read by only the intended recipient. See: http://en.wikipedia.org/wiki/Certificate_authority

⁶ Statement on Auditing Standards No. 70: Service Organizations, commonly abbreviated as SAS 70, is an auditing statement issued by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA), officially titled “Reports on the Processing of Transactions by Service Organizations”. SAS 70 defines the professional standards used by a service auditor to assess the internal controls of a service organization and issue a service auditor’s report.

⁷ <http://ts.nist.gov/Standards/Accreditation/index.cfm>

⁸ http://en.wikipedia.org/wiki/Common_Criteria_Testing_Laboratory

The European Union added an insurance requirement to the audit and certification. For the 27 member states of the European Union, Directive 1999/93/EC on a Community Framework for Electronic Signatures (EU Signature Directive) provides an in-depth legal framework for electronic signatures and their validity inside and between EU countries. It creates several categories of electronic signatures including “Qualified time stamps”. *The European approach did not call for backing by the national postal services.* It does specify that a private industry provider must “maintain sufficient financial resources to operate in conformity with the requirements laid down in the Directive, in particular to bear the risk of liability for damages, for example, by obtaining appropriate insurance.”

Why would VeriSign depend upon the Postal Server to create customer trust? Comparing an existing, parallel industry of Certificate Authorities, VeriSign and others effectively create public trust using private industry defined audits and certification methods. States have passed legislation that limits the recognition of Certificate Authorities to those that have been certified by the private industry methods described above.

If it were necessary for the federal government to be involved in EPM (it is not), the Postal Service would be a poor choice for the job. As Mr. Borgers has explained in detail, the U.S. Postal Service lacks the technical expertise to set itself up as licensor and regulator of digital time stamps.⁹ Although it has worked on a certification process

⁹ In his Initial Statement (at 4), Mr. Borgers stated:

The e-mails that I am filing for the Commission’s review show the slow, stumbling, confused, bureaucratic ineptitude of the Postal Service in trying to offer this type of

for EPM licensees for over a year, there is still no process in place.¹⁰ Mr. Grossman's three-year nightmare working with the Postal Service reinforces the criticism Mr. Borgers made in his Statements in this case – it seems to require nearly 70 meetings, more than 200 phone calls, and nearly 400 emails¹¹ to begin to develop a business arrangement with the Postal Service that can lead to licensing under EPM, and that is

service. The Postal Service has said repeatedly in this proceeding that it intended to offer a new service in which it would act as licensee, certifier, and regulator of private sector companies that offer time/date stamp products.

You will see the great expenditure of energy, time, and money that I invested to become one of these certified licensees. But I was unable to do so because the Postal Service lacks the technical expertise in-house to establish such certifications standards. The Postal Service sets deadlines to establish standards and then fails to meet its own deadlines because of a lack of technical expertise. It appears that the Postal Service wants to farm out the certification process to a technically skilled consultant, but claims it lacks the funds to do so. The Postal Service is such a behemoth in the time/date stamp field that it sucks up all of the oxygen and leaves small time/date stamp companies like DigiStamp barely able to survive. The Postal Service's presence in the time/date stamp industry places a stranglehold on the progress and innovation that is waiting to be unleashed in this field.

¹⁰ Initial Statement of Mr. Borgers at 13:

The new USPS EPM program has not yet developed a "certification process". The truth is that there is no "certification process". Specifically, Foti's testimony: "Electronic Postmarks are produced by companies approved under a certification process, then authorized to use Postal Service licensed technology, intellectual property and patents. ... Postal Service approved time-date stamp providers are required to meet certified standards prior to receiving a USPS license".

My company has been working with the USPS for more than a year towards this "certification." Virtually no progress has been made (see attached e-mail correspondence). Essentially, there is no "certification process", no "licensed technology", no "intellectual property", no "certified standards" ...

Mr. Grossman stated that he has worked with the Postal Service for three years in an effort to become certified and that process is still not complete. If Epostmarks is successful, it will become only the second EPM licensee. Initial Statement of Adam Grossman at 3. It appears that the Postal Service has been willing to proceed with certification at a relatively quick pace only for Authentidate. Rebuttal Statement of Adam Grossman at 13. That is probably because it did not want to stop providing service to customers. Mr. Borgers spent a fruitless and frustrating year and a half trying to understand the Postal Service's certification development plan, but the Postal Service constantly pushed its self-imposed deadline further and further into the future.

¹¹ Rebuttal Statement of Adam Grossman at 12.

for a business that already has established ties to the Postal Service.¹² In the private sector, having to expend such a level of effort to establish a business agreement on so simple a matter (according to Mr. Grossman)¹³ is unheard of. Even most government agencies function better than Mr. Grossman's description of what kind of effort must be expended to do business with the Postal Service.

The difficulties that Mr. Grossman and Digistamp have encountered prove the point Mr. Borgers has been making. The Postal Service operates in an extraordinarily unbusinesslike, technically and financially inept, culture that gets in the way of progress and innovation in the time stamp industry. If the Commission allows the Postal Service to remain such a large, well funded competitor in the time stamp industry, and paves the way for the Postal Service to become such a dominant force in the certified email industry, the American public will be seriously harmed. By contrast, if the large obstruction – the Postal Service – is removed from the industry, it will likely grow into a much more important, more omnipresent, lucrative part of the U.S. and world economy. Consumers and businesses alike will benefit from innovations spurred by thriving competition. Competition cannot flourish in this atmosphere, where the Postal Service sucks up all of the oxygen.

Mr. Grossman argues that Digistamp and EPM are not competing in the same market segment.¹⁴ He reaches this conclusion, however, based on a mischaracterization of the price disparity between the two services. Using the volume-pricing summary that Mr. Grossman provided in his Appendix A, it describes that for the

¹² Id. at 11.

¹³ Id. at 2 - 3.

¹⁴ Rebuttal Statement of Adam Grossman at 6.

initial volumes of up to 10,000 transactions the price difference is about 50% higher for Authentidate as compared to DigiStamp. Those volume levels -- of 1 to 10,000 transactions per year -- define the bulk of DigiStamp's customer base and profit margins. Those volume levels would also include the general public which often purchases less than 100 per year. We compete in the same market at about 40 cents as compared to 70 cents.

At the 1,000,000+ transactions volume range, yes, prices between Authentidate and DigiStamp are dramatically different. The reason is that DigiStamp also offers a "purchase the hardware" solution for about \$30,000; this gives the customer all the transactions that can be created by that time stamp hardware device. DigiStamp's pricing model for its Internet-based service is lower at those higher volumes to encourage more customers to use shared Internet service where practical. There are very few customers of third-party digital time stamps at the 1,000,000+ transactions per year volumes in the time/date stamp industry. DigiStamp competes differently than the USPS in this segment, but DigiStamp still competes for the same customers.

Mr. Grossman states that¹⁵ "To date, over 100 technical standards have been developed by the UPU." Viewed with the correct perspective, it is apparent that the UPU exists in an ecosystem of Internet standards. In addition to UPU's standards, there are many effective standards bodies and thousands of published standards. Few rise to the level of "accepted" standards in the natural vetting process. Standards are not like laws, where the public must abide by all of them. Creating "accepted" standards is an organic process that cannot exist under the control of government. That process

¹⁵ Rebuttal Statement of Adam Grossman at 8.

has been and continues to be essential to the evolution of human advances that are enabled by what is generically called the Internet. The UPU EPM standard, in particular, has not really taken-off. It is not used by the public, nor chosen by industry. That is the subject of these proceedings, does the public need the USPS EPM program? Members of the public are not, and should not be, concerned if the particular UPU EPM standard is not implemented in the market. The fact that some standards will never become “accepted” is part of the process and the public benefits from this process anyway. Why would the PRC want to extinguish the natural process and push this particular standard to become “accepted”?

The UPU EPM standard does not prohibit the implementation of the standard by private industry. It would have been old-world-thinking if the UPU had stipulated a National Post as one of the compliance requirements. There are new ways of doing business and in that new world there has not been a predefined role for the USPS. Digistamp respectfully suggests that the Commission embrace that fact and that the best course for the public interest is not to intervene in this area at this time.

Conclusion

Digistamp still contends as it did in Docket 2004-2,¹⁶ “If the USPS is allowed to offer digital time stamps, we can foresee the USPS extending a strategy to skim profits from the work of private industry; all based on the marketing jingle ‘backed by the federal government’ claim it already uses. This will drive private industry from the market, since we do not have the USPS multi-billion-dollar brand or the thousands of outlets (Post Offices) that the USPS can exploit. The consequent loss of competition

¹⁶ Direct Testimony of Rick Borgers, on Behalf of Digistamp, Inc. (April 17, 2006), at 14.

will insure higher prices for time stamps, decreased innovation, and loss of tax revenue to local, state, and federal governments.”

Respectfully submitted,

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