

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

Reply Brief of DigiStamp Inc.  
(September 30, 2008)

DigiStamp has petitioned the Commission to terminate the EPM program.

The contents of this document, the Reply Brief, are limited to responding to the initial Briefs of the other participants from three weeks ago. I do not repeat DigiStamp's arguments that are in our initial Brief.

Borgers' quotes were taken out of context about the new EPM service not being offered as of January 1, 2006.....	2
Reasons for disagreement with the state representatives about EPM being a solution for trusted electronic business.....	5
DigiStamp clarifies statements about the involvement of NIST to help resolve the public need. ....	6
Postal Service and Epostmark characterizing DigiStamp as the lone critic is not accurate. ....	9
Regarding the Public Representative's question about UPU Standard S43-3, the public already has the capabilities he describes. ....	10
The Public Representative's Question About the Untrustworthiness of the Postal Service's EPM Has Been Answered by the Information Assurance Consortium .....	11

***Borgers' quotes were taken out of context about the new EPM service not being offered as of January 1, 2006.***

Mr. Borgers contends that the USPS EPM service is ineligible for grandfathering under 39 U.S.C. § 404(e)(3) because the EPM service currently offered by the USPS differs in fundamental ways from the service offered to the public on or before January 1, 2006.

The Postal Service Brief does not refute this argument.

The Epostmarks Brief attempts to refute Mr. Borgers' argument with his own words, stating "Even Mr. Borgers has acknowledged at points in his testimony that the EPM service has not changed."<sup>1</sup> Epostmarks provides three quotes from Mr. Borgers' statement. The first quote that Epostmarks attributes to Mr. Borgers was actually (and clearly stated in the original document) a quote from the Postal Service<sup>2</sup>. The other two quotes are taken out of context (underlined below).

Mr. Borgers' statement was:

I don't think the testimony of Mr. Foti is accurate if it implies that Authentidate successfully completed a new certification process that could now be applied to other companies. The attorney was more accurate in his statements. The truth is the new EPM program had faltered, they failed to meet their January stated schedule objectives, and now they needed to approve Authentidate simply to maintain the service operations.<sup>3</sup>

To clarify, in context, my statements point out that the testimony provided by the Postal Service to the Commission is not accurate. In Tom Foti's sworn testimony

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<sup>1</sup> Initial Brief of Epostmarks, Inc. page 10

<sup>2</sup> The quote "The new business model for EPM involves a branding and licensing agreement, which allows for continuation of the service without disruption." This quote is taken from the Postal Service in its filing: Response of the United States Postal Service to Motion of the Public Representative to Compel Filing of Complete List of Nonpostal Services, April 1, 2008, Attachment Two.

<sup>3</sup> Statement of Rick Borgers on Behalf of the DigiStamp Inc., Has the USPS EPM Program Shown A Public Need for the Service and the Private Sector's Inability to Meet That Need? 7/30/2008, page 23 lines 1-6. The underlined words are the out-of-context quotes given by Epostmarks in their Brief.

on June 23, 2008 (page 2), “Electronic Postmarks are produced by companies approved under a certification process”. No company has been certified using this new process. Because the Postal Service was having difficulties creating the new program and the associated business arrangements does not mean it was not new as Epostmark claims; the opposite is apparent, it is a new program that did not exist and needed time to develop. My quotes taken in context say the opposite of what Epostmarks offers in its Brief.

Epostmark’s Brief gives a description of this new EPM service that sounds very different than the EPM service that was described by the Postal Service in Docket No. C2004-2. In October 2006, the Postal Service argued the Commission did not have jurisdiction because the EPM was not used in conjunction with communications<sup>4</sup>.

“Messaging applications, including the return receipt feature within Microsoft Outlook, are less than one percent of all USPS EPM transactions. OCA/USPS-RT-1-25, Tr.1/166. No reasonable attempt to assess and classify the nature of the product can focus exclusively on such a *de minimis* fraction of its usage by actual customers.”<sup>5</sup>

“Such usage constitutes less than one half of one percent of all USPS EPM usage. Tr.1/267, 270. Non-messaging applications have exceeded 99 percent of usage. Tr. 1/166.”<sup>6</sup>

Epostmark’s Brief in a section on Postal Service’s law enforcement authority describes an EPM for the purpose of email communications<sup>7</sup>:

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<sup>4</sup> The background is that the Commission, in Order No. 1424, Docket No. RM2004-1 (Nov. 12, 2004) at 4 ruled “Nevertheless, inclusion of [certain electronic] services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services.” Therefore, to avoid Commission jurisdiction, the Postal Service in 2006 declared that the EPM was not used in conjunction with communications. Today, they declare the opposite for this new EPM service.

<sup>5</sup> Reply Brief of the United States Postal Service, Docket No. C2004-2, October 6, 2006, page 27

<sup>6</sup> Reply Brief of the United States Postal Service, Docket No. C2004-2, October 20, 2006, page 8

<sup>7</sup> I would also like to comment that it seems oddly inappropriate to me that Epostmarks and not the Postal Service responds for the record to define the scope, nature and laws that will be enforced by the Postal Inspectors.

“EPM extends the Postal Service’s enforcement powers to EPM-protected email. EPM protected email is a trusted class of service that can be sent only by entities that have been certified for their compliance with the EPM safeguards.”<sup>8</sup>

From that description in the recent Brief, we see again how this new program is fundamentally different. I encourage the Commissioners to visualize how the public interacts with this new EPM service. “... sent only by entities that have been certified...” A member of the public who wants to send a First Class email needs to be certified to participate. Let’s assume there is a new process that somehow makes this relatively simple for the public. First Class email is desirable for a member of the public because it comes with more reliable delivery<sup>9</sup>. Epostmark’s Brief goes on to describe that the Postal Inspectors will police this Internet environment for any bad players.

In the recent September 2008 Postal Service Brief, the USPS describes a complete reversal from their October 2006 Brief; the contrast clearly shows a new EPM service:

“The USPS EPM, despite the criticism of its lone critic in this proceeding, DigiStamp, is designed as an enabling service to meet the Postal Service’s commitment to support **‘the correspondence of the people,’** while providing a platform for a variety of electronic communication applications.” (bold added for emphasis).<sup>10</sup>

The contrast between the Postal Service’s position in Docket No. C2004-2 and its position in this proceeding is stark. The non-communications nature of EPM before January 1, 2006 and its current character as primarily consisting of electronic communications proves that EPM is a fundamentally **new** service and therefore is in violation of Section 404(e)(2) of title 39.

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<sup>8</sup> Initial Brief of Epostmarks, Inc., page 5

<sup>9</sup> Statement of Adam Grossman on Behalf of Epostmarks, Inc., Page 42

<sup>10</sup> Initial Brief of Postal Service, page 88

***Reasons for disagreement with the state representatives about EPM being a solution for trusted electronic business.***

We have heard from two state representatives that the Internet needs to improve upon a “trusted way to do electronic business”<sup>11</sup>. I agree. But, I disagree that the EPM is the solution. My professional background has been in helping to build technology systems. It has been a common occurrence that defining “which problems” need to be fixed is a different topic and skill than “how” to fix the problem. I disagree with the state representatives only about the “how” to fix the problem.

The Internet communications solutions already exist in this marketplace of private industry, standards bodies, public audits, and organizations like NIST (National Institute of Standards and Technology). The Postal Service’s EPM program is not the best solution for the “how” of the “trusted way to do electronic business.”

As the Public Representative suggested in his Brief<sup>12</sup>, maybe the Commission could talk to NIST to better understand this subject area, market, and technology certification methods. For those discussions, I suggest a question: how would the Commission develop a forum to engage the Internet community’s help in defining the issues of public need? More on this below.

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<sup>11</sup> Comments of the honorable state senator of Maryland in this Docket

<sup>12</sup> Initial Brief of the Public Representative, page 33

***DigiStamp clarifies statements about the involvement of NIST to help resolve the public need.***

In my statements, I have referred to the National Institute of Standards and Technology (NIST). I would like to clarify that I was not suggesting that NIST would supply an EPM type of service. Specifically, from the Public Representative's Brief, this is a misunderstanding:

“Second, DigiStamp suggests that another government agency, the National Institute of Standards and Technology (NIST), may be able to meet the public need for an EPM type service in lieu of the Postal Service.”<sup>13</sup>

Today, NIST certifies testing laboratories and methodologies<sup>14</sup>. This is just one player in a complex ecosystem within the technology industry that has evolved over time. I am not suggesting any changes to NIST; they would continue to perform the same role they do today.

Epostmark's confuses my statements about the role that NIST plays in Internet standards in the question they pose in their Brief:

The lone dissenter is DigiStamp witness Borgers. The general thrust of his testimony is that “The private sector not only can meet the need of the public . . . but it is the only sector that can do so.” Borgers at 4, ¶ 3. At the same time, however, Mr. Borgers states “A government agency like the NIST is in a better position to collaborate with industry in the work of setting technology standards/policy and testing the compliance of electronic security applications.” Id. 6, ¶ 2. These claims are contradictory—if the private sector is the only sector that can meet the public need, why would they need the help of a public sector organization?

My purpose in describing NIST was to reveal that there is an industry-based alternative to the EPM program. The technology industry already has certification services, methods, standards, and organizations that are similar to what the USPS proposes to create in their new EPM program. Similarly, I have described how private industry currently audits and certifies the parallel industry

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<sup>13</sup> Initial Brief of the Public Representative, page 32

<sup>14</sup> Brief of DigiStamp, page 9, has additional details on this subject

of “Certificate Authorities”<sup>15</sup>. Private industry with the help of the supporting organizations like NIST achieves the public need for “trusted way to do electronic business.”<sup>16</sup> To the degree that improvement is needed more quickly than the current pace, the Postal Service is not a competent solution designer.

I am urging the Commission to direct the Postal Service to terminate the EPM service. This can be done with full confidence that there are superior private sector time/date stamp products to satisfy the public need. NIST, and other certification authorities, can provide the public with the trust it needs to use time/date stamp products. I note an analogous trust organization that provides assurance to consumers and businesses throughout the world every day – the Underwriters Laboratory (UL). This is the mission statement of the UL:<sup>17</sup>

Underwriters Laboratories Inc. (UL) is an independent product safety certification organization that has been testing products and writing Standards for Safety for over a century. UL evaluates more than 19,000 types of products, components, materials and systems annually with 21 billion UL Marks appearing on 72,000 manufacturers' products each year. UL's worldwide family of companies and network of service providers includes 62 laboratory, testing and certification facilities serving customers in 99 countries.

The UL tag on most electrical devices is a familiar sight that reassures the user that he/she will not be electrocuted when using the device or start a fire in the location where the device is being used. The physical safety and well being of the user is certainly a more important public policy concern even than the transmission of secure electronic communications, yet nations allow this vital oversight of electrical devices to remain in the hands of the private sector. For this reason, I am not sure that even NIST (which does not compete with the private sector companies that provide time/date stamp products) *must* be involved. But, on balance, I think that NIST's involvement contributes to higher quality, more universal standards. If NIST were to be involved, it could act as the

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<sup>15</sup> Brief of DigiStamp, page 9

<sup>16</sup> Comments of the honorable state senator of Maryland in this Docket

<sup>17</sup> <http://www.ul.com/about/>

U.S. Department of Agriculture (USDA) does in ensuring the safety of beef products. Wisely, the U.S. government has chosen not to compete with beef producers and food markets in selling beef to the public. Rather, USDA merely takes on the role of inspecting meat to make sure that public health will not be compromised by the sale of unhygienically produced meat.

The list of vital everyday products (with potential, serious risks) that are used or consumed by individuals and businesses is too long to count – individuals make hundreds of millions of trips in cars everyday that were not manufactured by the U.S. government, but which were tested and approved by the National Highway Traffic Safety Administration. Individuals live and work in buildings that are sometimes dozens, or even more than a hundred floors high, that were not built by the U.S. government, but which were inspected and certified by local government building inspectors. Products developed and improved by the private sector permeate the everyday lives of individuals throughout the world. In most capitalist economies, these products are not manufactured through government entities. The calls for U.S. Postal Service involvement in the time/date stamp industry ring hollow. The private sector amply fulfills the public need, and allowing the Postal Service to compete with the private sector in providing time/date stamp products will have created serious harm for this industry.

I think it is important that the Commission recognizes that it is choosing an “alternative” to achieve this public need. The public has a system to develop reliable solutions. This proposed new EPM program declares by fiat<sup>18</sup> that one particular approach is legally trusted and has federal enforcement authority. That is an “end around” or “short circuit” to the systems created by the Internet community and that is a risky governance move. I think that is why Congress specified no new nonpostal services be attempted by the Postal Service.

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<sup>18</sup> An arbitrary decree or pronouncement, especially by a person or group of persons having absolute authority to enforce it: The king ruled by fiat. (dictionary.com)

***Postal Service and Epostmark characterizing DigiStamp as the lone critic is not accurate.***

Both the Postal Service and Epostmarks describe DigiStamp as the lone critic of the EPM program <sup>19</sup>.

DigiStamp is not the only critic. In DigiStamp's Supplemental Statement<sup>20</sup>, there is a 4-page appendix from public forums where people voiced concerns that are specific to the certified email technology. I encourage the Commission to accept this into record that the public has raised issues about the ramification of two classes of email and how they influence public access to the Internet for the purpose of personal communications.

DigiStamp, in testimony, described additional critics in a quote from PC Magazine<sup>21</sup>:

“...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.”

Another dissenter, I think, is Congress. Congress wanted the Postal Service to stick to its core mission and quit mucking in e-commerce ventures.

Epostmark's Brief at page 8 makes associated claims about broad consensus:

“Unsurprisingly, the comments of other parties in this proceeding reveal a broad consensus that the private sector cannot meet the public need for the EPM.”

It is relevant to recognize that the companies that did comment in this Docket (except Microsoft) are, to some degree, each involved in the business of

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<sup>19</sup> Initial Brief of Postal Service, page 88, “despite the criticism of its lone critic in this proceeding” and Initial Brief of Epostmarks, page 9, “The lone dissenter is Digistamp”

<sup>20</sup> Supplemental Statement of Rick Borgers on behalf of DigiStamp Inc. (August 20, 2008) Appendix

<sup>21</sup> Supplemental Statement of Rick Borgers on behalf of DigiStamp Inc. (August 20, 2008), page 4

supplying bulk email services. I don't think that this particular forum supports a conclusion of "broad consensus."

The Commission has hundreds of public comments on Internet blogs – can the Commission accept these open forum communications as a form by which the public interacts with their government?

***Regarding the Public Representative's question about UPU Standard S43-3, the public already has the capabilities he describes.***

There is a question raised by the Public Representative's Brief on page 32:

"Microsoft testifies that its technology, in compliance UPU Standard S43-3 will allow users to exchange legally binding, sensitive documents and digitally sign them from one country to another country. The Commission may find that it will harm the public for the United States, due to a lack of authority of its current Postal Operator, to be unable to participate in that arena of the international postal network."

Generally, an inherent quality of the Internet is that it ignores traditional borders. Today, the public, using the Internet, can perform secure communications "from one country to another."

"Certified email" is what the proponents of this program describe as current public need for the EPM program. But, certified email exists today, without the use of the EPM; and those current solutions include, as the Public Representative stated, the ability to "exchange legally binding, sensitive documents and digitally sign them from one country to another country." The current certified email system from companies like Goodmail do not have the special federal backing. Goodmail's services cross international boundaries.

The Goodmail certified email system has competition<sup>22</sup>. The industry and market are healthy without the EPM program.

The practical and actual usage of UPU S43-3 standard is speculative; that fact has not been disputed in these proceedings.

A potential future outcome is no reason to send the Postal Service on this adventure prematurely. Where is the evidence that the public needs the EPM service to fill a current public need? I think the word "current" is appropriate related to the current matter before the Commission.

***The Public Representative's Question About the Untrustworthiness of the Postal Service's EPM Has Been Answered by the Information Assurance Consortium***

The Information Assurance Consortium (IAC) submitted a letter to the Commission on September 29, 2008. In it, the IAC warned the Commission of the risk of allowing the Postal Service to continue offering EPM to the public (page 2): The IAC, having evaluated the program for the EPM as described by the USPS, identified elements which, in the conclusions drawn from our analysis could jeopardize the US market for trusted time stamping for all vendors and could expose individual citizens to significant risk.

The risks that are flagged by the IAC are the result of untrained, technically unqualified Postal Service employees assigned to manage EPM:

In our dealings with the USPS, they made it clear that the USPS did not have in its employment individuals with technical expertise in trusted time stamping methods or solutions. Further, the USPS representatives indicated that there was no intention and were no plans to hire technically qualified personnel. To our knowledge, this condition has not changed.

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<sup>22</sup> An introductory list was provided by DigiStamp supplement on page 12 "E-mail authentication can be provided by open standards such as DomainKeys, or S/MIME and PGP signatures. Several commercial vendors compete, examples: <http://www.rpost.com> <http://www.zixcorp.com> <http://www.tumbleweed.com>

The USPS acknowledge that they had not achieved their internal goals or objectives for adoption of the EPM and that they did not have the knowledge or expertise to market EPM branded trusted time stamps.

In addition to grave concerns about the Postal Service's ability to furnish secure, tamper-proof products, the Public Representative noted the dispute in the record concerning whether the Postal Service intends (or even has the legal authority) to use federal criminal statutes in instances in which individuals have tampered with EPM. He voiced his concern: "It is important to the public that the Postal Service maintain the high level of public trust and confidence associated with its brand name and trademarks."<sup>23</sup>

Respectfully submitted,

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<sup>23</sup> Initial Brief of the Public Representative, September 10, 2008, at 32.