

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001**

**COMPLAINT OF GAMEFLY, INC**

**Docket No. C2009-1**

**COMMENTS OF NETFLIX  
ON GAMEFLY, INC., MOTION TO COMPEL**

On August 25, 2010 GameFly, Inc. (GameFly) filed a Motion to compel the Postal Service to answer discovery requesting information from USPS Witness Robert Lundahl (USPS T-4) which information was proprietary to Netflix, and covered by a non-disclosure agreement or in the alternative to strike Lundahl's testimony. After reviewing GameFly's Motion to Compel, and at the Postal Service's request, Netflix has agreed that Witness Lundahl may disclose under seal the confidential information requested.

Netflix has agreed to release Witness Lundahl and his employer ATR from contractual agreements with Netflix only because of its desire that the PRC have all the information that it believes is necessary for its decision in this case. Nonetheless, Netflix feels compelled to express several concerns regarding this proceeding.

First, with respect to Gamefly's motion to compel, Netflix believes that GameFly's requests for confidential information of Netflix are principally an attempt by Gamefly to gain for free the benefit of research paid for by Netflix. Either that, or GameFly's requests are a legal pretense to block expert testimony by demanding exposure of commercially sensitive information from Netflix. Netflix is not a party to this proceeding, nor has it been accused by GameFly of engaging in any discriminatory action, nor is it a direct competitor of GameFly. Yet, Netflix now finds that, unless it releases commercially sensitive and proprietary information concerning studies paid for by Netflix (having nothing to do with Netflix's relations to the Postal Service) it will be put in the

position of appearing to thwart the presentation of material evidence to assist the Commission in resolving the issues in this case.

Secondly, and more importantly, this case is not about discriminatory treatment but instead an attempt by Gamefly to manipulate the Postal Service, through the PRC, into offering it favorable mailing rates. The fact that the USPS has offered to accord the exact treatment to GameFly at First Class one-ounce rates which it provides to Netflix (Tr. V- 950-951) bears out this point. Instead, GameFly demands that it, unique among all mailers, be allowed to continue to mail extra ounce First Class material at single piece rates. We think this is untenable: Gamefly does not want nondiscriminatory treatment; Gamefly wants its own special treatment. Instead of investing the time and resources that Netflix has in reducing its costs by lowering breakage of DVDs mailed through the USPS<sup>1</sup>, Gamefly, through this proceeding, is attempting to get the PRC to reduce postage costs for them so that they can get the economic equivalent of what Netflix has achieved on its breakage reduction, without investing the time or energy themselves.

Lastly, Netflix wants to highlight its concern regarding the potential actions the PRC may take in resolving this matter. Netflix cannot but express the sense that it may become the proverbial innocent bystander who is accidentally shot during a botched bank robbery. GameFly's attempts to seek redress for supposed "discrimination" if satisfied by this Commission in a manner that impacts Netflix's operations, could jeopardize what Netflix has been told is the most profitable mailing arrangement enjoyed by the Postal Service, and exacerbate the Postal Services' already dire financial situation. Such a decision would likely result in reduced DVD shipment growth from Netflix as well as accelerate the ultimate decline of DVD shipments as Netflix would shift more resource to the digital delivery of content.

Presiding Officer's Ruling No. C2009-1/34 has required that responses to the GameFly Motion should be filed by August 31, 2010, and that hearings will proceed on schedule. We have been assured that Witness Lundahl's company is proceeding with

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<sup>1</sup> GameFly has conceded it has done no research or testing, as has Netflix, in order to reduce breakage. (Tr. V – 721, 722, 740, 889 and USPS-T-4, pp9, 11)

all expedition to produce the requested information so as not to cause delay in these proceedings.

Respectfully submitted,

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