

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**ANSWER OF GAMEFLY, INC.,
TO COMMENTS OF NETFLIX
(September 7, 2010)**

The week before Labor Day is traditionally a time to indulge in a last bit of summer frivolity before returning to school or work in earnest. That is the only plausible explanation for the “Comments” filed by Netflix on August 30. In its Comments, Netflix, which is not a party to this proceeding, bemoans GameFly’s discovery of the Netflix-commissioned studies that are the basis for the testimony of USPS witness Robert Lundahl (USPS-T-4). Comments at 1-2.¹ Netflix also offers a variety of self-serving and inaccurate assertions about the merits of the case. *Id.* at 2. GameFly ordinarily would not reply to such a pleading, which does not actually ask the Commission to do anything. But four points warrant brief comment.

¹ See First Discovery Requests Of Gamefly To USPS Witness Robert Lundahl (August 4, 2010); USPS Objections (August 13, 2010); GameFly Motion to Compel (August 25, 2010); Presiding Officer’s Ruling No. C2009-1/34 (Aug. 26, 2010) (shortening time for USPS response to motion); USPS Response to Motion (August 31, 2010) (agreeing to produce documents); Comments of Netflix (August 30, 2010).

(1) Netflix, for all its hand-wringing about the supposed unfairness of allowing GameFly to obtain discovery of the documents, does not dispute GameFly's right to such discovery under long-established Commission rules and precedent and basic norms of due process. Netflix, a large and sophisticated mailer represented by experienced postal counsel, knows better than that. Netflix is perfectly aware that the Postal Service, by filing Mr. Lundahl's opinion testimony, opened the door to discovery of the studies and analyses underlying the testimony. If the Postal Service filed the testimony without advance notice to Netflix, despite Mr. Lundahl's obligations to Netflix under the nondisclosure agreement between his employer and Netflix, that is an issue among Netflix, the Postal Service and Mr. Lundahl. If Netflix consented in advance for the Postal Service to file the testimony and then try to thwart discovery by hiding behind the nondisclosure agreement, then shame on Netflix.

(2) GameFly will respond to Netflix's claims about the merits of the case in due course, at the times prescribed by the Commission for cross-examination, rebuttal testimony, and post-trial briefs. But the spectacle of Netflix lecturing GameFly about the nondiscrimination it seeks is a bit much. Netflix has built a \$2 billion-a-year business on a deal with the Postal Service that allows the vast majority of Netflix return DVD mailers to bypass automated letter processing at no extra charge. Because the Postal Service refuses to offer comparable terms to GameFly (or any other DVD rental company), GameFly must pay \$1.22 extra in postage per DVD round trip to similarly avoid automated letter processing. No amount of blame-the-victim rhetoric can change these facts.

(3) Netflix’s saber-rattling about taking its business elsewhere if the Commission decides this case in favor of Gamefly is, like Netflix’s grievance about the discovery of Mr. Lundahl’s studies, addressed to the wrong party. The Commission’s duty in this case is to enforce the prohibitions of Title 39 against “undue or unreasonable discrimination among users of the mails” and “undue or unreasonable preferences to any such user.” 39 U.S.C. § 403(c). If the Commission finds that the Postal Service has engaged in undue discrimination, the Commission must order the Postal Service to end the discrimination. If Netflix’s mail is as profitable to the Postal Service as Netflix claims, and as vulnerable to electronic diversion, GameFly is confident that the Postal Service will find a way to end the discrimination without jeopardizing the Postal Service’s business from Netflix.

(4) Finally, the August 30 “Comments,” and any future filings by Netflix in this docket, should be “segregated from the evidentiary record” and excluded from the record for decision as required by Rule 3001.20b(c). The Commission’s rules of practice offered Netflix—like any other entity with an economic stake in the outcome of this case—a hierarchy of options for participation. These options ranged from formal intervention as a party (Rule 3001.20), to limited participation as a nonparty (Rule 3001.20a), to “informal expression of views” by a person who has declined to become either a party or a limited participator (Rule 3001.20b). Party status would have entitled Netflix to submit testimony and appeal from an adverse final decision, but also would have carried greater responsibilities (including the duty to respond to discovery and face cross-examination). *Id.*

Netflix, while monitoring this case closely from the beginning, chose not to intervene. Netflix therefore is not a “party to this proceeding” under Rule 3001.20 or even a limited participator under Rule 3001.20a. By avoiding party status, Netflix has shielded itself from discovery by GameFly—including, for example, discovery of communications and other documents in Netflix’s possession concerning the private understandings between the Postal Service and Netflix about the special terms of service offered to Netflix. Netflix’s decision to remain a non-party was a permissible tactical choice. But GameFly’s due process rights under 39 C.F.R. §§ 3001.20b(c), .25-.28, .30 and .31 (among other Commission rules) do not allow Netflix, after avoiding discovery and the other normal obligations of a party, to weigh into the formal record for decision (as defined in 39 C.F.R § 3001.5(k)) with pleadings that are adverse to GameFly.

Respectfully submitted,

David M. Levy
Matthew D. Field
Alexandra Megaris
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

Counsel for GameFly, Inc.

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