

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Dan G. Blair; and
Tony L. Hammond

Complaint of GameFly, Inc.

Docket No. C2009-1

ORDER GRANTING, IN PART,
JOINT MOTION FOR PROTECTIVE CONDITIONS

(Issued August 21, 2009)

I. INTRODUCTION

GameFly, Inc. and the United States Postal Service (Movants) jointly request that the Presiding Officer adopt “generic protective conditions for use in this docket.”¹ The generic protective conditions, attached to the Joint Motion as “Protective Conditions in Docket No. C2009-1,” are modeled after protective conditions adopted in a prior proceeding. For the reasons discussed below, the Joint Motion is granted in part. In all other respects, it is denied.

¹ Joint Motion of the United States Postal Service and GameFly, Inc. for the Establishment of Protective Conditions, July 22, 2009, at 1 (Joint Motion). The Presiding Officer certified the issue of the Joint Motion to the Commission. See P.O. Ruling 2009-1/2, August 20, 2009. Because the Joint Motion raises issues with important policy implications, the Commission accepts certification.

II. BACKGROUND

Movants assert that the proposed protective conditions are based on similar provisions adopted in Docket No. C2008-3, an earlier complaint proceeding. *Id.*, citing Presiding Officer's Ruling C2008-3/46, May 14, 2009. They propose "several changes" to the prior protective conditions, identifying three specific changes. These changes concern party representatives' access to materials and disclosure of confidential information provided by a third party. Movants indicate that the proposed generic conditions establish a set of "rules concerning access to, and use of, information that is designated by a party as confidential in this proceeding." *Id.* at 1.

In Order No. 225, the Commission adopted rules, pursuant to 39 U.S.C. 504(g) establishing procedures for according appropriate confidentiality for non-public materials filed with the Commission.² Among other things, the new rules govern the submission of non-public materials under seal (39 CFR 3007.10), require parties claiming materials are exempt from disclosure to submit an application for non-public treatment (rules 3007.20-.22), and provide procedures for terminating non-public status (rules 3007.31 and 3007.41). Illustrative protective conditions were appended to the new rules for optional use by parties in proceedings before the Commission. See 39 CFR part 3007, Appendix A.

The new rules governing the submission of non-public materials became effective July 29, 2009. See 74 FR 30938 (June 29, 2009).

² Docket No. RM2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009 (Order No. 225). As used in the rules, the term "non-public materials means any document, information, or thing filed with the Commission and claimed exempt from disclosure under applicable sections of the United States Code by the Postal Service or protected from disclosure under Federal Rule of Civil Procedure 26(c) by a third party with a proprietary interest...." The Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3218 (2006), contemplated that the Commission would adopt rules on confidential information, and, in Order No. 225, the Commission fulfilled that responsibility.

III. COMMISSION ANALYSIS

As a preliminary matter, the Commission appreciates Movants' efforts to fashion an acceptable agreement. Having closely reviewed the proposed protective conditions, however, the Commission concludes that the proposed conditions cannot be adopted fully.

The proposed protective conditions are largely patterned on past practice. The passage of the PAEA and, more recently, the implementation of the new rules governing appropriate confidentiality procedures make reliance on past practice problematic. The difficulty with the proposed protective conditions is twofold.

First, the proposed protective conditions are overly broad, departing from those adopted in Docket No. C2008-3 in a critical, but unmentioned, respect. Ordinarily, protective conditions are designed to limit access to non-public materials filed with the Commission. Unlike the provisions adopted in Docket No. C2008-3, the proposed protective conditions limit access to materials "designated as protected material by the participant producing the materials."³ Thus, access is not limited just to non-public materials filed with the Commission.

The Commission is generally indifferent to protective conditions the parties may wish to attach to informal discovery efforts between them or pursuant to Commission rules that do not require the submission of substantive responses with the Commission. Stated otherwise, parties may agree to be bound to customized protective conditions as between themselves when employing informal discovery (39 CFR 3001.25(b)) and for those specific forms of discovery that do not require disclosure of the shared content to the Commission. See 39 CFR 3001.27 and 3001.33 relating to document requests and depositions, respectively.

The Commission, however, is not indifferent regarding non-public materials filed with it. In that event, any party filing non-public materials with the Commission must file

³ Joint Motion, Protective Conditions in Docket No. C2009-1, at 1.

an application for non-public treatment. See 39 CFR 3007.20 and 3007.22. The proposed protective conditions would not require that showing, and, moreover, as discussed below, would impose an outdated burden of proof standard on any participant challenging the confidential treatment of such documents.

Second, the proposed protective conditions are fundamentally at odds with the Commission's recently effective rules governing the treatment of confidential materials. See Order No. 225. The adoption of the protective conditions in Docket No. C2008-3 was entirely appropriate as a stopgap measure given both the significant amount of materials being filed under seal and the recognition that the new rules had not yet been published. The latter condition no longer obtains. The Joint Motion was filed July 22, 2009, a week before the new rules became effective.

Aside from extending protective conditions to any materials designated by either Movant as "protected material," the proposed protective conditions retain a pre-PAEA burden of proof standard (*Id.*, at ¶ 14) that is inconsistent with 39 U.S.C. 504(g) and the Commission's new rules. See 39 CFR 3007.33. Movants opted not to subscribe to the new rules, suggesting no rationale why they should be ignored. The proposed protective conditions are contrary to the new rules, which are now in effect. Other than as discussed above, the new rules will apply in this proceeding.

In sum, while Movants may bind one another, they may not bind non-signatory third parties or limit the Commission's options regarding the treatment of non-public materials. Therefore, the Commission grants the Joint Motion to the extent the proposed protective conditions relate to protected materials made available to or exchanged between one another. In all other respects the Joint Motion is denied and the Commission's rules governing the treatment of non-public materials shall apply.

It is Ordered:

The Joint Motion of the United States Postal Service and GameFly, Inc. for the Establishment of Protective Conditions, filed July 22, 2009, is granted, in part, as set forth in the body of this Order. In all other respects, it is denied.

By the Commission.

Judith M. Grady
Acting Secretary