

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,
TO EXTEND PROCEDURAL SCHEDULE
(September 1, 2009)**

GameFly, Inc. ("GameFly") respectfully moves for a one-month extension of the procedural schedule previously agreed to by GameFly and the Postal Service, and adopted by the Commission in Presiding Officer's Ruling No. C2009-1/1 (July 30, 2009). A one-month extension would extend the cutoff date for initial discovery until Monday, October 5, and the filing date for GameFly's case-in-chief until Monday, November 2. The Postal Service has authorized us to state that it does not oppose the requested extension.

In further support thereof, GameFly respectfully states as follows:

(1) When GameFly and the Postal Service jointly proposed the current procedural schedule, the parties also agreed that both deadlines would be "subject to adjustment if it turns out that they leave [GameFly] inadequate time to prepare our case despite reasonable aggressiveness and diligence in prosecuting discovery." Prehearing Conf. Tr. 1/8-9 (July 23, 2009) (statement of GameFly counsel); *accord, id.* at 9, lines 11-17 (statement of Postal Service counsel). The Commission adopted these caveats one week later in Presiding Officer's Ruling No. C2009-1/1 (July 30, 2009).

(2) The anticipated circumstances warranting an extension of time have come to pass. GameFly submitted its initial discovery requests to the Postal Service on July 31, the very next day after the issuance of Presiding Officer's Ruling No. C2009-1/1.¹ The 65 questions in that set constituted virtually all of the initial discovery planned by GameFly. The Postal Service's responses to the discovery requests, however, have been incomplete, and obtaining possession of the responses has been slow.

(3) Responses to the July 31 discovery requests were due on August 14. See Rules 3001.26(b) and 3001.27(b). The Postal Service filed neither answers nor objections, however, to a number of questions by the August 14 deadline. Moreover, despite the Postal Service's promise to answer these overdue items "as soon as possible,"² the Postal Service has yet to provide any answers whatsoever to questions 9, 11, 45, 46, 57 and 51(c)—none of which were the subject of Postal Service objections.³

(4) For many of the questions that the Postal Service has answered, the answers are still incomplete. The Postal Service has informed GameFly that a number of documents (e.g., Standard Operating Procedures ("SOPs") promulgated by Area offices, as well as a large volume of email correspondence) still remain to be produced.

¹ First Discovery Requests of GameFly, Inc., to the United States Postal Service (GFL/USPS-1 through -65) (filed July 31, 2009).

² Responses of the USPS to GameFly Discovery Requests (August 14, 2009) at 1.

³ The Postal Service did object on August 10 to a number of other questions in the July 31 discovery requests. The parties resolved a few of the objections through negotiations. GameFly filed a motion to compel responses to the remaining questions on August 24, 2009. The Postal Service filed its opposition to the motion on August 31, 2009.

When this production will occur, and the volume of documents that remain outstanding, are unknown to GameFly.

(5) Apart from the handful of documents attached to the Postal Service's responses, none of the documents nominally made available to GameFly on August 14 were actually turned over to GameFly until last week. The Postal Service's "production" of documents on August 14 consisted of a statement that "[r]esponsive information is available for inspection by reviewing parties upon the promulgation of protective conditions, and certification by reviewing parties of adherence to those conditions."⁴ The Commission approved protective conditions one week later. Order No. 284 (issued August 21, 2009). GameFly submitted certifications of its reviewing representatives under the protective conditions on Friday, August 21, and Monday, August 24. Two of GameFly's representatives reviewed the documents at Postal Service headquarters on Tuesday, August 25.

(6) The hard-copy material made available by the Postal Service for inspection on August 25 consisted of less than a thousand pages of documents. GameFly requested a copy of the entire set. The Postal Service delivered a copy of the set two days later—approximately one full month after GameFly requested the documents.⁵

(7) On August 25, the Postal Service also produced to GameFly's representatives five CD-ROMs of electronic files (primarily in Word, PowerPoint, Excel,

⁴ See Responses of the USPS to GameFly discovery requests 1(c)-(d), 2-6, 12-13, 20(c), 24, 25(c), 26-27, 35-38, 41-43, 48, 50.

⁵ The Postal Service belatedly asserted attorney-client privilege for three documents that GameFly had reviewed on site.

pdf or Outlook format). The electronic files consisted of approximately 3,000 pages of memoranda, correspondence and other non-Excel documents, along with approximately 75,000 pages of Excel worksheets. To make the process of reviewing the 3,000 pages of non-Excel material manageable for analysis, counsel for GameFly printed those pages and organized them, along with the approximately 1,000 pages of documents produced in hard copy form, into notebook binders. This process was completed by Friday, August 28 – only three days after GameFly gained physical possession of the files, but nearly a full month after requesting them.

(7) The documents produced by the Postal Service are full of information that appears to be relevant, probative, and quite at odds with the Postal Service’s claims to the Commission in this case. Review of the documents, however, has been impeded by the Postal Service’s failure to comply with Instruction 4 to GameFly’s discovery requests. Instruction 4 states:

Please specify the data request to which each document applies. If a document or narrative response applies to more than one request, please provide a cross reference.

Despite failing to object to this instruction,⁶ the Postal Service has not complied with it. The Postal Service produced the requested documents essentially in bulk, with no index or cross reference to particular discovery requests—indeed, with no organizing principle beyond such broad categories as “Engineering,” “Operations,” “Marketing,” “Christensen Associates” or “OIG Report.” The lack of the requested cross reference vastly

⁶ Although the Postal Service initially asserted a generalized objection to the instructions to GameFly’s discovery requests, discussions with Postal Service counsel revealed that the objection concerned Instruction 3. GameFly agreed to narrow Instruction 3, and the Postal Service withdrew its objection.

increases the difficulty of determining what documents the Postal Service is relying on to support the particular claims and defenses it has asserted in this case. This in turn will greatly slow the drafting of follow-up questions, and preparation of GameFly's case-in-chief.⁷

CONCLUSION

For the reasons stated above, GameFly requests that the Presiding Officer extend by one month the existing procedural deadlines in this case.

Respectfully submitted,

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September 1, 2009

⁷ GameFly discovered the lack of any cross reference between the documents and GameFly's discovery requests late last week. GameFly is currently preparing a motion to compel the Postal Service to create such a cross reference.