

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

COMPLAINT OF GAMEFLY, INC.)
) Docket No. C2009-1
)

**MOTION OF GAMEFLY, INC.,
FOR LEAVE TO FILE RESPONSE TO
OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO GAMEFLY, INC. MOTION TO COMPEL
(September 3, 2009)**

Pursuant to Rule 3001.21(b), GameFly, Inc, (“GameFly”) respectfully requests leave to file its accompanying Response to United States Postal Service’s (“USPS”) August 31, 2009 Opposition to GameFly’s August 24, 2009 Motion to Compel. Although the Commission’s rules do not authorize a response to a reply as a matter of right, Rule 21(b) allows the Commission or presiding officer to accept such a pleading as a matter of discretion in appropriate cases.¹ Good cause exists for allowing GameFly to file such a response here.

First, the Postal Service asks that the Commission adopt in “this and future complaint proceedings” a standard of relevance that is narrower than the standard customarily applied under the “reasonably calculated to lead to admissible evidence” standard of Rules 3001.25(a), 26(a) and 27(a). USPS

¹ See , e.g., Presiding Officer’s Ruling No. MC2004-3/2 at 5 n. 17 (granting Bank One motion for leave to file reply to reply); Presiding Officer’s Ruling No. R2001-1/20 at 6 n. 9 (granting OCA request for leave to file reply to reply); Presiding Officer’s Ruling No. R97-1/20 at 10 ¶ 6 (granting motion of Nashua Photo Inc. *et al.* for leave to file reply to reply); Presiding Officer’s Ruling No. MC96-3/13 at 6 n. 3 (same).

Opposition at 2-4. This move would be an unprecedented restriction on the broad scope of discovery allowed in Commission proceedings since 1971, and in the proceedings of federal courts and other federal agencies since the 1940s. Moreover, the Postal Service's proposal to narrow the scope of discovery is directly at odds with the Postal Service's position in Docket No. RM2008-3, *Rules for Complaints*, where the Postal Service recognized that the "full panoply" of discovery under Rules 3001.25 through 27 should be available in post-PAEA complaint cases. Under the circumstances, fairness to GameFly, and the Commission's interest in making a fully informed decision on this issue, warrant an opportunity for GameFly to respond to the Postal Service's new posture.

Second, information disclosed by the Postal Service within the past few days has dramatically changed the factual context of these discovery disputes. Late last week, GameFly gained access to the first major installment of documents responsive to GameFly's July 31 discovery requests. The documents indicate that the manual processing given to Netflix DVD return mailers is only part of an elaborate and costly mail processing practice that provides both high levels of service and low damage to Netflix mail pieces at no incremental cost to Netflix. This process has been withheld from smaller-volume DVD rental companies. The documents underscore the need for a full understanding of where the manual processing received by Netflix at no extra charge fits in the broader scheme of preferences offered to Netflix, and where Netflix, Blockbuster and GameFly fit in the continuum of discriminatory treatment given to other, smaller-volume DVD rental companies. *Compare* USPS Opposition at 6 (objecting to discovery into discrimination involving other aspects of service).

Because the documents were not made accessible to GameFly until after it filed its August 24 motion to compel, fairness entitles GameFly to an opportunity to apprise the Commission of the newly-disclosed information now.

For the foregoing reasons, GameFly respectfully requests that the Commission accept GameFly's Response to the United States Postal Service's August 31, 2009 Response to GameFly, Inc.'s Motion to Compel.

Respectfully submitted,

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September 3, 2009