

PUBLIC (REDACTED) VERSION

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

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

GameFly, Inc. (“GameFly”) respectfully submits this response to the August 31 opposition of the United States Postal Service to the August 24 motion of GameFly to compel responses to GameFly discovery requests GFL/USPS-3(e), 4(e), 6(a)-(30, (g)-(h), 7, 8, 14(e), 15, 16(f) (g), 20(a)-(d), 21, 28, 29, 31 and 41(c) (“USPS Opposition”). Much of the USPS Opposition consists of claims of undue burden and lack of relevance that are the usual fare of discovery disputes. GameFly will not add to what it has already said on those points. Two matters, however, warrant further comment.¹

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 Opposition at 2-4. This move would be an unprecedented restriction on the broad scope of discovery allowed in

¹ GameFly has filed today a motion for leave to submit this pleading pursuant to Rule 3001.21(b).

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 entitles GameFly to an opportunity 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.

I. THE POSTAL SERVICE HAS OFFERED NO BASIS FOR NARROWING THE “REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE” STANDARD FOR DISCOVERY.

In its August 31 Opposition, the Postal Service asserts that the broad scope of discovery “almost always” pursued by “parties seeking discovery” under the “reasonably calculated to lead to the discovery of admissible evidence” standard should be narrowed in the post-PAEA era, when “complaints are likely to become much more common than under previous law.” USPS Opposition at 2-3. This reading of the discovery rules would repudiate decades of precedent. So far-reaching a change in the discovery standards should not be considered by the Commission in this docket, and in any event would contravene the policies of the discovery rules generally and PAEA in particular.

“Parties seeking discovery” customarily seek and obtain broad discovery under the “reasonably calculated to lead to the discovery of admissible evidence” standard, *id.*, because broad discovery is precisely what the standard is meant to authorize. The provision originated in Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides, *inter alia*, that “[r]elevant information need not be admissible at trial if the discovery appears reasonable calculated to lead to the discovery of admissible evidence.” The Advisory Committee Notes to the 1946 amendment that added Fed. R. Civ. P. 26(b)(1) emphasized that the language was specifically intended to authorize a

broad scope of examination,” including “inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.

Fed. R. Civ. P. Rule 26(b)(1) (Advisory Committee Notes to 1946 Amendment for Subdivision (b)).

Consistent with this policy, federal court decisions construing Fed. R. Civ. P. 26(b)(1) have held repeatedly that this language establishes a broad relevance standard, allowing discovery of any information as long as it is relevant to the claims and defenses put forth by the parties and without regard to the ultimate admissibility of the information sought.² Federal administrative agencies have given a similarly broad construction to discovery rules modeled on the same provision.³

² See, e.g., *Breon v. Coca-Cola Bottling Co.*, 232 F.R.D. 49, 52 (D.Conn. 2005) (explaining that even after the 2000 amendments narrowing the scope of discovery, “[r]elevancy continues to be broadly construed, and a request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense of any party.”) (internal quotations omitted); *Wrangen v. Pa. Lumbermans Mut. Ins. Co.*, 593 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008) (“Even after the 2000 amendments to Rule 26, it is well established that courts must employ a liberal discovery standard in keeping with the spirit and purpose of the discovery rules discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action.”).

³ See, e.g., *San Diego Gas & Electric Co.*, 116 FERC ¶ 61,183 at P 20, n.6 (2006) (“[W]e note that under the [Federal Energy Regulatory] Commission’s rules, the scope of discovery is very broad, and encompasses information that may be inadmissible in a Commission proceeding.”); *California v. British Columbia Power Exchange*, FERC Docket No. EL02-71-017, Order of Presiding Judge Denying Motion for a Common Protective Order and Granting in Part Motions to Compel at P 16 (June 15, 2009) (“It is well established that Rule 402(a) permits broad discovery in order to provide the Commission with a complete record from which it can make an informed decision.”); *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, 2000 STB LEXIS 627 at P 5 (Surface Transportation Board 2000) (“The parties are reminded that discovery can be broad and may be obtained ‘regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding...’ and it is not grounds for objection that non-privileged information sought would itself be inadmissible so long as the request ‘appears reasonably calculated to lead to the discovery of admissible evidence.’”).

The cognate provision of the Commission’s discovery rules—“in the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence”—has been codified in the Commission’s rules of practice and procedure since 1971. Docket No. RM71-1, *Rules of Practice and Procedure*, 36 Fed. Reg. 396, 401 (Jan. 12, 1971) (adopting rules 3001.25, 26 and 27). Like other federal adjudicative bodies, the Commission has interpreted these provisions to allow a broad scope of discovery.⁴

During the 35-year period between the promulgation of the discovery rules and the enactment of the Postal Accountability and Enhancement Act in 2006, the Postal Service unsuccessfully argued several times for narrowing the scope of discovery affording under the “reasonably calculated” standard. See Docket No. RM80-1, *Rules of Practice*, Comments of USPS (filed June 23, 1980) (attaching comments on OOC proposals at p. 6) (contending that “irrelevant and unnecessarily detailed interrogatories that go far beyond the needs of the immediate case and requests for the production of vast amounts of irrelevant data” were a “serious source of delay”); Docket No. RM98-3, *General Review of the Rules of Practice*, USPS Initial Comments (Dec. 3, 1998) at 7-10 (proposing numerical limits on discovery requests); Docket No. RM98-3, Order No. 1274 (December 17, 1999) at 12-13 (rejecting proposal).

After the enactment of PAEA, however, even the Postal Service seemed to acknowledge that the matter was settled. In Docket No. RM2008-3, *Rules for*

⁴ See, e.g., Docket No. C2008-3, *Complaint of Capital One Services, Inc.*, Presiding Officer’s Ruling No. C2008-3/14 (Sept. 5, 2008) at 2; *id.*, Presiding Officer’s ruling No. C2008-3/22 (Sept. 19, 2008); Docket No. N2009-1, *Station and Branch Optimization and Consolidation Initiative, 2009*, Presiding Officer’s Ruling No. N2009-1/2 (Sept. 1, 2009).

Complaints, the Postal Service offered no suggestion that the scope of discovery in post-PAEA complaint proceedings should be narrowed. To the contrary, the Postal Service emphasized that “complainants will be able to take advantage of the full panoply of discovery procedures available under the Commission’s Rules in order to construct [a] *prima facie* case.” *Id.*, Reply Comments of the USPS (Oct. 27, 2008), at 12. Consistent with this, the final rules adopted by the Commission specifically authorize complainants to pursue the full range of discovery available under Rules 3001.25-27 and 3001.33 once the Commission has found that the complaint raises material issues of fact or law. Order No. 195 (March 24, 1999) at 43 (adopting Rule 3030.1(b)).

Given this history, the Postal Service’s back-door attempt to modify the Commission’s new complaint rules in this docket should be denied on both procedural and substantive grounds. First, orderly procedure calls for considering fundamental changes in procedural rules to industry-wide rulemakings, not individual adjudications. If the Postal Service concludes, based on experience in this case or other post-PAEA complaint cases, that its position in RM2008-3 was ill-advised and the recently adopted complaint rules need modification, the proper way to raise the issue would be to ask the Commission to reopen RM2008-3 or open a new docket to consider potential rule changes.

Second, and in any event, the substantive arguments offered by the Postal Service for narrowing the scope of discovery are singularly without merit. The word “limited” is not an independent restriction on the “reasonably calculated” standard of Rules 3001.26 and 3001.27; to the contrary, the “reasonably calculated” standard is a

restriction on the meaning of “limited.” See Rules 3001.26(a) and 3001.27(a) (stating that discovery shall be “limited to information which appears *reasonably calculated to lead to the discovery of admissible evidence*”) (emphasis added). And the “interests of expedition” (*id.*) are served, not disserved, by allowing broad discovery:

Written discovery *expedites* the process of determining and setting fair rates and fees, allows for a more complete record, and also reduces (but does not eliminate) the need for oral cross-examination.

Order No. 1274, *supra*, at 12 (emphasis added). It is telling that the supposedly restrictive terms that the Postal Service now seizes upon have been part of the discovery rules since their promulgation in 1971 (see 36 Fed. Reg. at 401), yet the Postal Service is unable to cite any precedent suggesting that those terms operate as restrictions on the “reasonably calculated” standard.

Finally, the Postal Service may not shirk its obligations under the discovery rules on the theory that the Postal Service has better things to do with its time than respond to discovery in “individualized service complaints in which one mailer is seeking the processing accorded to another mailer,” USPS Opposition at 3-4. The categories of First-Class Mail used by DVD mailers like GameFly are market dominant. 39 U.S.C. § 3621(a); 39 C.F.R. § 3020.12(a), App. A (list of market dominant products). Users of First-Class Mail are entitled to seek relief from undue discrimination or preferences by filing complaints with the Commission. 39 U.S.C. § 3662(a) (incorporating 39 U.S.C. § 403(c)). Until Congress repeals these provisions, the Postal Service has regulatory obligations to its customers—including the obligation to respond fully to discovery in complaint proceedings that raise material issues of fact. As the Commission noted in

rejecting an earlier attempt by the Postal Service to restrict its obligations to respond to discovery in rate cases:

The Postal Service functions as a national monopoly, with the Private Express Statute applicable to the vast majority of mail. Mailers thus are required by law to pay whatever rates are set, and clearly possess a vested interest in the process of determining these rates.

Order No. 1274, *supra*, at 12.

If anything, PAEA warrants an *expanded* breadth of discovery in complaint cases. The scope of pre-implementation review of proposed price changes is severely limited by the 45-day window established by Congress. 39 U.S.C. § 3622(d)(1)(C); 39 C.F.R. § 3010.13(a)(5) (limiting the comment period to 20 days); *id.*, § 3010.13(b) (limiting the scope of issues that parties may raise); *id.*, § 3010.13(c) (limiting the scope of issues that the Commission will consider). And the “expedited nature” of annual compliance review proceedings under 39 U.S.C. § 3653 likewise limits the scope of the issues that parties may raise and the Commission may adjudicate in those proceedings. Docket No. RM2009-3, Order No. 182 (March 16, 2009) at 3 (first paragraph); U.S.C. § 3653(b) (imposing 90-day deadline for Commission decision). These restrictions leave complaint cases under 39 U.S.C. § 3662 as the primary mechanism for mailers to seek relief from undue discrimination in the post-PAEA world. As the Postal Service itself acknowledges, “complaints are likely to become much more common than under previous law.” USPS Opposition at 3. This is no time to choke off discovery in complaint cases.

II. THE DOCUMENTS PRODUCED BY THE POSTAL SERVICE IN DISCOVERY LATE LAST WEEK UNDERSCORE THE IMPORTANCE OF DISCOVERY INTO WHETHER THE MANUAL HANDLING RECEIVED BY NETFLIX AT MACHINABLE LETTER RATES IS PART OF A BROADER PATTERN OF DISCRIMINATION IN FAVOR OF NETFLIX AND AGAINST SMALLER-VOLUME DVD RENTAL COMPANIES SUCH AS GAMEFLY.

The disputes between the Postal Service over whether to allow discovery of (1) information about forms of preference to Netflix other than manual processing (Motion to Compel at 4-9; USPS Opposition at 4-8) and (2) information about the treatment of other smaller-volume DVD rental companies (Motion to Compel at 9 (second full paragraph); USPS Opposition at 9-11) must be considered in an updated factual context. Late last week, GameFly began review of the first major installment of documents produced by the Postal Service in discovery. The documents confirm that the customized manual processing given to Netflix return mailers is part of a broad pattern of preferences given to Netflix at the expense of smaller-volume DVD mailers. As detailed below, these preferences are even more pervasive than what the Office of Inspector General reported in November 2007.

GameFly emphasizes that its review of the recently produced documents is still very preliminary and incomplete, and that determining the full context of the documents will require further analysis and follow-up discovery. Moreover, the documents are obviously not yet evidence, and it is premature for the Commission to draw any definitive conclusions from the documents until the Postal Service has had an opportunity to respond to GameFly's claims about them. For purposes of discovery, however, the nature and extent of the discrimination indicated by the documents appears serious enough to foreclose any claim that inquiry into preferences for Netflix

beyond “operational issues,” and information on smaller-volume DVD mailers other than GameFly, are merely “fishing expeditions” based solely on “nebulous suspicion.” Cf. USPS Opposition at 4-5.

The remainder of this pleading consists of a high-level summary of what GameFly has learned from the documents reviewed to date. Copies of the documents cited or quoted here are attached to this pleading. Bates number citations refer to the Bates numbers that GameFly has placed in the lower right-hand corner of each cited document.

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CONCLUSION

For the reasons stated above and in GameFly's August 24 motion to compel, the motion to compel should be granted.

Respectfully submitted,

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