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

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

OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO THE MOTION OF GAMEFLY, INC. TO UNSEAL CERTAIN
DOCUMENTS PRODUCED IN DISCOVERY
(October 19, 2009)

On September 25, 2009, GameFly, Inc. filed a motion requesting that the Commission unseal various documents that have been produced by the Postal Service in discovery under protective conditions. See Motion of GameFly, Inc. for Order Directing Interested Parties to Show Cause Why Certain Documents and Information Designated as Proprietary by the Postal Service Should Not be Unsealed (hereinafter "GameFly Motion"). In Presiding Officer's Ruling (POR) No. 7, the Commission, responding to a motion by the Postal Service, set October 19, 2009 as the date by which the Postal Service and other interested parties should respond to GameFly's motion. The Postal Service hereby files its response, explaining why all but a few of the documents that GameFly seeks to make available to the general public should instead only be accessible to parties who agree to adhere to protective conditions limiting the manner in which that information can be used.

Section 504(g)(1) allows the Postal Service to designate materials as confidential in connection with a Commission proceeding if the Postal Service

determines that the material "contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5." The Commission has stated that it will determine whether to make materials filed by the Postal Service publicly available by "balancing the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets," 39 C.F.R. 3007.33(a), and materials implicating third parties publicly available by balancing "the need of the requesting party to have access to participate effectively in a Commission proceeding" against the interests of the Postal Service and other interested parties in keeping the materials nonpublic, based on Rule 26 of the Federal Rules of Civil Procedure, see Order No. 225 at 16-17; Order No. 194 at 27-18.

GameFly has moved that a subset of materials produced by the Postal Service in response to GameFly discovery requests be made public; presumably, this means that these documents would be placed on the Commission's website not later than when GameFly files its direct case. More immediately, it would also mean that discovery requests or other pleadings regarding these documents would become publicly available on the Commission's website. GameFly has also indicated that it will likely seek to unseal further documents pending the outcome of its motion. GameFly Motion at 3 n.2.

## I. THESE MATERIALS ARE APPROPRIATELY CONSIDERED CONFIDENTIAL

With a few exceptions, discussed below, the Postal Service opposes making these materials open to unconstrained public disclosure. First, the Postal

Service considers, in balancing the interests of the parties involved, that access to the following materials, which relate to specific Postal Service customers, should be limited to those who agree to adhere to protective conditions, based on 39 U.S.C. 410(c)(2):

1) Communications from Netflix to the Postal Service, or from the Postal Service to Netflix, and internal Postal Service discussions of those communications (GFL275-78, GFL290, GFL347-348, GFL920, GFL402, GFL430, GFL512, GFL1484, GFL70736, GFL73700);

2) Emails and letters from Blockbuster to the Postal Service, or from the Postal Service to Blockbuster, concerning the service being provided to Blockbuster, and internal emails and other documents relating to the service being provided to Blockbuster (GFL311, GFL312-13, GFL314, GFL315, GFL317, GFL327, GFL328-29, GFL337, GFL340, GFL347-349);

3) A presentation that Netflix gave to the Postal Service on October 30, 2007 setting forth what Netflix considers to be the proper handling of its return DVD mail (GFL73949-61);

4) Internal Postal Service documents, communications, and meeting notes discussing specific disc mailers (GFL1, GFL6, GFL22, GFL30, GFL58, GFL189, GFL272, GFL505-06, GFL509-10, GFL511, GFL1113-20, GFL1158-59, GFL1180, GFL1480);

5) Internal Postal Service emails and other materials discussing specific interactions between the Postal Service and Netflix, Blockbuster, or other parties, including summaries of conversations with those mailers (GFL3-4, GFL72, GFL125-127, GFL295, GFL766-72, GFL1121-22, GFL74290-97, GFL74300-01, GFL77697-98);

6) Internal emails and other materials discussing how a specific customer's mail is being, or should be, processed (GFL6-9, GFL22-23, GFL28, GFL33, GFL101-02, GFL287, GFL738, GFL428, GFL458, GLF474-77, GFL523-24, GFL869, GFL2422-23);

7) Postal Service internal documents, including Headquarters instructions and local SOPs, concerning the processing of Netflix and/or Blockbuster mail (GFL10, GFL12-18, GFL302-03, GFL527-551, GFL553-59, GFL562, GFL460, GFL462, GFL495-96, GFL520-22);

8) A study performed by a Postal Service contractor, Christensen Associates, that analyzed and developed customer-specific processing costs for Netflix and Blockbuster (GFL921-38, GFL1020-1063);

9) Internal PowerPoint slides regarding an ongoing Postal Service project examining DVD processing and DVD breakage at several postal facilities (GFL1334-1387);

10) Documents, emails, notes, and other materials prepared by members of an internal Postal Service workgroup that examined two-way DVD mail, including detailed summaries of meetings held by that workgroup (GFL29, GFL58, GFL72, GFL100-02, GFL107, GFL125, GFL136, GFL210-17, GFL761, GFL76-773, GFL805, GFL849-854, GFL1064, GFL1077-78, GFL7148-53, GFL74224, GFL74250-52, GFL74290-302, GFL77696-98);

11) Internal Postal Service PowerPoint presentations discussing the two-way DVD mail industry and possible approaches the Postal Service could take in handling that mail (GFL732-37, GFL844);

12) Internal Postal Service PowerPoint presentation discussing the conduct and design of a cost study for disc mail (GFL464-473);

13) An unredacted version of the November 2007 Inspector General (OIG) Report on Permit Reply Mail; Appendix B sets forth OIG's calculation of the monetary impact of the manual processing of Netflix return pieces, by reference to Netflix volumes (GFL 701);

14) Notes that OIG made of conversations between Postal Service employees and OIG auditors during the preparation of its November 2007 audit on Permit Reply Mail (GFL419-25).

Section 410(c)(2) recognizes the propriety of protecting "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." Courts have held that materials fall within this provision if they are (1) of a commercial nature and (2) of a type not publicly disclosed in good business practice. See generally, Carlson v. Postal Service, 501 F.3d 1123 (9th Cir. 2007). Under this standard, the Postal Service may withhold from public

disclosure information of a commercial nature if large businesses would do the same. Wickwire Gavin, P.C. v. Postal Service, 356 F.3d 588, 592 (4th Cir. 2004).

This provision reflects the fact that the Postal Service provides a commercial service to a wide variety of customers, and in doing so is expected to act in a business-like manner. In fact, the importance of acting in a business-like manner is emphasized in the PAEA. See, e.g., H.R. REP. NO. 109-66, pt. 1, at 43 (2005) (noting that an objective of the PAEA was to "position the Postal Service to operate in a more business-like manner."). In this regard, a provider of services does not, as a matter of good business practice, publicly disclose details of its communications and interactions with its customers relating to their commercial relationship. On the one hand, Postal Service customers should be able to legitimately expect that communications with a critical business partner will not be made public. The potential for such public dissemination would hinder the ability of the Postal Service to maintain full and open relationships with its customers, if the Postal Service, or the customers themselves, are aware that communications between them may become public at some point in the future. For instance, customers may avoid sharing all pertinent facts if there is a chance that such information would later be made public by the Commission. As such, the Postal Service has its own independent interests in ensuring that its communications with specific customers are not subject to unconstrained public disclosure.

Similarly, a service provider does not, as a matter of a good business practice, publicly disclose internal documents or communications that 1) discuss or summarize communications with specific customers, 2) discuss the manner in which it provides a service to a specific customer, or 3) examine ways in which that service can or should be changed. Many of the documents referred to above contain detailed, internal examinations of Blockbuster and Netflix mail, and in several cases set forth the opinions of the postal employee or contractor regarding the propriety of that processing. See, e.g., GFL1, GFL921-38. The prospect that internal communications regarding specific customers may be made public will chill such discussions, and would therefore hinder frank and open exchange among Postal Service employees. In addition, customers who deal with the Postal Service have a legitimate expectation that specific Postal Service documents that examine and discuss their mail, and the services that they are being provided by the Postal Service, will not be disclosed by the Postal Service to the public, and the Postal Service has its own independent interests in this regard, in order to ensure its continued viability as a trusted service provider. For the same reasons, it is not appropriate to make public the internal processing procedures and instructions that are accorded to a specific customer's mail. Finally, it is not good business practice to publicly disclose notes prepared by internal auditors regarding the Postal Service's decisions with respect to a specific customer.

Overall, the unconstrained public disclosure of customer-specific communications, studies, and other documents would negatively affect the ability

of the Postal Service to conduct business and to have full and uninhibited relationships with its customers. This harm to the ability of the Postal Service to engage with its customers, or to discuss or study its customers internally, would be concrete and immediate, if it were now understood that such materials could be routinely posted on the Commission's website should an individualized service complaint implicating a particular customer be docketed. Thus, despite GameFly's arguments to the contrary (GameFly Motion at 13-14), release of customer-specific communications would create a risk of present harm, both to the Postal Service independently, and to Postal Service customers, that the Commission should not disregard.

In arguing for public disclosure of these materials, GameFly asserts that because the Postal Service is a public entity, there is less of a need to protect customer-specific information in the hands of the Postal Service. Id. at 14.[1] However, GameFly fails to account for the fact that the Postal Service is specifically tasked with acting like a business-like manner, which includes protecting confidential commercial information in the manner of any other large business. This is true not only of customer-specific information regarding mailers who utilize competitive products, but also those who utilize market-

[1] GameFly also argues that a company that requests and obtains "special treatment" from the Postal Service should not be entitled to keep its confidential materials regarding that "special treatment" protected from the public. GameFly Motion at 16. However, even if this was an appropriate basis for publicly disclosing confidential communications between the Postal Service and a customer (which the Postal Service does not believe it is), this argument is fundamentally premature, considering the Commission has not determined whether the Postal Service's processing of Netflix mail is inappropriate under title 39. Communications between the Postal Service and a customer should not be deemed non-confidential simply because a party files a complaint alleging that the customer is receiving what the complainant asserts is impermissible "special treatment."

dominant products, despite GameFly's argument to the contrary (id. at 12). There is no distinction in section 410(c)(2) between market-dominant and competitive products.

Moreover, the confidential and commercial nature of customer-specific information is not lessened simply because that customer uses a market-dominant product. Customers are in many instances either legally or practically required to deal with the Postal Service, due to the Postal Service's monopoly or dominance in a postal market. In addition, such customers generally have competitors themselves, regardless of the level of competitiveness in the particular *postal* product market. Shipping arrangements via the Postal Service comprise an integral part of customers' business models, the public disclosure of which could hamper their ability to compete effectively. Because of the importance that postal customers legitimately assign to the confidentiality of information pertaining to their commercial relationship with the Postal Service, these customers trust the Postal Service to protect that information accordingly. And, the failure of the Postal Service to assure the confidentiality of their materials could affect customers' decisions about whether and to what degree to continue using the mail, as opposed to alternative methods, even with regard to market-dominant products. Thus, confidentiality of customer information is a significant feature of the Postal Service's dealings with many customers, not only those of postal products deemed "competitive" themselves.

The importance of maintaining the confidentiality of information pertaining to specific Postal Service customers is further reinforced by the fact that the

Freedom of Information Act (FOIA) exempts from disclosure business materials submitted by third parties under an expectation of confidentiality. See 5 U.S.C. § 552a(b)(4) (allowing government agencies to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."). In particular, financial or commercial information that a third party voluntarily provides to a government agency is afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." See Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992); see also McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 305 (D.C. Cir. 1999).[2]

Here, many of these materials involve Netflix and Blockbuster communicating with the Postal Service for the purpose of discussing the service being provided to each by the Postal Service, and several of the Postal Service's internal documents include information obtained from those parties. As a result

[2] Information that is required to be submitted to the government, on the other hand, is ordinarily released unless it poses a "likelihood of substantial harm to the competitive positions of the parties from whom it has been obtained." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 771 (D.C. Cir. 1974). The D.C. Circuit has prescribed an objective test in determining whether information is provided voluntarily: "actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions . . . if an agency has no authority to enforce an information request, submissions are not mandatory." Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001). Here, it is clear that the context in which third parties shared the information at issue here was one that bespeaks voluntariness: Netflix and Blockbuster initiated correspondence regarding the specific services being provided by the Postal Service. The companies were under no compulsion to submit any particular information as a mandatory condition for obtaining a benefit such as a government contract. See, e.g., McDonnell Douglas Corp. v. United States Dep't of the Air Force, 215 F. Supp. 2d 200, 205 & n.3 (D.D.C. 2002); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 39 (D.D.C. 1997).

of its voluntary provision, the information at issue would be exempt from mandatory disclosure under the FOIA because it is not something that these companies would customarily release to the public. For example, the Netflix presentation to the Postal Service regarding return mail processing (GFL73949-61) is labeled as confidential, and includes proprietary breakage data; in addition, the PowerPoint slides at GFL1334-1387 include proprietary damage data provided by Netflix, and a summary of the results of a proprietary study on the causes of breakage performed by Netflix. It is difficult to conceive these entities publicly disclosing every request or discussion with the Postal Service about operational matters, or information such as the breakage rates they are experiencing, due to these matters' role in Netflix and Blockbuster's own competitive services. In the end, protection of this information from public disclosure comports entirely with the purpose of the Critical Mass test: encouraging third parties to share confidential information with the government by validating their expectation that the information will remain confidential. See Critical Mass, 975 F.2d at 878 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials, and the ability of the Government to make intelligent, well informed decisions will be impaired.") (quoting Nat'l Parks, 498 F.2d at 768).

In addition to the fact that the Postal Service would not, as a matter of good business practice, publicly disclose its internal communications, studies, and deliberations regarding specific customers, such internal deliberations should be further protected because of the Postal Service's legitimate interest in

preserving its ability to engage in full and uninhibited internal discussions regarding its provision of service. This interest is manifested in 5 U.S.C. 552(b)(5), which protects from public disclosure materials that reflect an agency's deliberative process. See, e.g., Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Access Reports v. Dep't of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

The purpose of the deliberative process privilege is to protect the decision-making process in federal agencies by facilitating the frank and open exchange of ideas in the formulation of policy. Sears, Roebuck & Co., 421 U.S. at 154. Materials that fall within this privilege are "predecisional," in that they are "prepared in order to assist an agency decision-maker in arriving at [a] decision," Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168, 184 (1975), including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer," Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). In addition, such materials are "deliberative," in that they reflect the "give-and-take" of the decision-making process. See Access Reports, 926 F.2d at 1195. In this regard, the "key question" is whether disclosure would "discourage candid discussion within the agency." Id. at 1195-96. The Commission has recognized that that the Postal Service's interest in preserving its ability to engage in full and complete internal deliberations, without such deliberations being disclosed to the public, is a legitimate interest under section 504. See Order No. 194 at 11.

Access to many of the materials set forth above at pages 3-4 should be subject to protective conditions, because they constitute mental impressions, advice, opinions, recommendations, and subjective analyses by Postal Service employees concerning disc mail, and specific disc mail customers. For example, GFL761 and GFL74300 summarize conversations within and among senior Postal Service management regarding potential approaches to the handling of DVD mail; GFL732-37 and GFL844-45 set forth a presentation given to Postal Service management that discusses in detail the two-way disc mail industry, and potential short-term and long-term strategies the Postal Service could take regarding the handling of that mail; GFL849-854 discuss the parameters and benefits of a proposed pricing and classification proposal for DVD mail; GFL1 and GFL474-77 reflect opinions by Postal Service employees regarding issues they perceived with the handling of two-way DVD mail; and GFL464-473 provides the opinion of particular Postal Service employees regarding the conduct and design of a cost study to support the Postal Service's deliberations regarding disc mail. Such materials, reflecting internal give-and-take regarding the proper approaches to take with respect to two-way disc mail, and specific two-way disc mail customers, should be protected from public disclosure. Each is pre-decisional, in that they originated during deliberations by the Postal Service as to the possible approaches to take regarding two-way disc mail, and each is deliberative, because they reflect suggestions and recommendations on those possible courses of actions.

In addition, many of these documents (in particular, those referenced at #10 on page 4 above) were prepared by a workgroup whose task was to examine the disc mail industry, analyze proper approaches to handling that mail, and recommend changes to senior management. This includes detailed minutes from meetings held by this group, as well as draft documents (e.g., GFL107-109, GFL210-218). These should be protected from public disclosure not only because of their pre-decisional and deliberative nature, but also because that workgroup was specifically tasked with exploring the need for, and developing, a potential rate and classification case under chapter 36 of title 39. The protection of such material is specifically provided for in section 410(c)(4), which exempts from public disclosure "information prepared for use in connection with proceedings under chapter 36 of this title." This provision reflects the fact that the Postal Service's ability to develop cases for filing with the Commission, by engaging in the intra-agency deliberative exchanges and analyses necessary to prepare such cases, would be significantly hindered if internal materials prepared by the Postal Service during the development of a case were subject to subsequent public disclosure. This is true even when a decision is ultimately made not to file such a case.

Finally, GameFly's motion also seeks to unseal an additional category of documents that has not yet been discussed. These are letters from Postal Service Engineering to specific postal customers setting forth test results for their two-way DVD mailers (GFL373-74, GFL7278-79, GFL7285-87, GFL7292-95). While these are customer-specific communications detailing the results of

confidential tests performed by the Postal Service, the Postal Service does not object to the unsealing of these documents, because redaction of the names of the customers, as proposed by GameFly at Appendix A of its Motion, would reasonably appear to shield their identity.[3] However, the Postal Service also proposes that the Commission redact the "Description" portion of each letter, to better conceal the identity of the parties to whose envelopes each letter refers.

## II. THE POSTAL SERVICE'S APPROACH OF ALLOWING ACCESS TO THESE MATERIALS TO THOSE WHO AGREE TO ADHERE TO PROTECTIVE CONDITIONS REPRESENTS A REASONABLE AND BALANCED SOLUTION THAT ACCOMMODATES THE INTERESTS OF ALL PARTIES

The scope of protection sought by the Postal Service, and the nature of this proceeding, are also relevant in considering GameFly's motion. In particular, the Postal Service has not sought to prevent these materials from being disclosed to GameFly pursuant to its discovery requests, but has simply sought to limit unconstrained access to, and disclosure of, these materials. As such, these materials have been produced to GameFly, and are available for GameFly to utilize in the preparation of its case. Furthermore, these materials are also available to other individuals who have a legitimate interest in this proceeding. As such, these materials are fully available for litigants to use in articulating their positions, and to the Commission for use in evaluating the legal claims being pressed.

At the same time, it is unnecessary and inappropriate for these documents to be made publicly available for any and all persons to see, who have not

[3] In contrast, simply redacting the names of Netflix and Blockbuster from the materials discussed above would not meaningfully serve to protect the provenance of those communications.

agreed to protective conditions, in light of the legitimate interests of the Postal Service in maintaining their confidentiality. While GameFly alleges that public disclosure is needed so that the "public can[ ] evaluate" the merits of its contentions (GameFly Motion at 15), the interests of the public are specifically protected by the fact that the Commission has designated a Public Representative, who has access to these materials. In addition, any members of the public with a legitimate interest in the case, such as would perceive a need to weigh in on GameFly's allegations, are eligible to intervene in the case and view the materials under appropriate protective conditions. It may be presumed that any parties that have not done so do not have sufficient interest.

In addition, GameFly argues that the application of protective conditions to these materials has negatively affected its ability to litigate this case. Id. at 17-18. However, GameFly has hired professional counsel and consultants, well-versed in Commission practice, and who have full access to these materials, to represent its interests. Furthermore, it does not appear necessary that employees of GameFly involved in competitive decision-making must have full access to these specific materials so that they can provide strategic direction to its representatives regarding the conduct of GameFly's case.

In addition to the limited scope of protection being sought for these materials by the Postal Service, the Commission should also take into account the nature of this proceeding. Protection of this material against disclosure to persons who have not agreed to abide by protective conditions recognizes the basic fact that many complaints predicated on section 403(c), like this one, will

oftentimes be highly individualized claims that implicate only a few business mailers. Such individualized cases do not affect broader concerns as to the finances of the Postal Service. See 39 U.S.C. 504(g)(3)(A) (noting that the Commission must "balance the nature and extent of likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets"); see also Order No. 194 at 6 n.3. Moreover, materials that involve the handling of mail of a few business mailers do not concern widely disseminated information about the general postal infrastructure that is used to provide services to the public at large. See Carlson, 501 F.3d at 1128 (holding that section 410(c)(2) does not apply to information regarding Post Office locations and operating hours). As such, concerns about ensuring unconstrained transparency to the general public are not as compelling here as in other types of proceedings before the Commission.[4]

Broad public disclosure of these customer-specific or deliberative materials is simply unnecessary to accommodate the full and fair litigation of individualized section 403(c) complaints that delve deeply into the operations of a few customers. Protecting these materials through the use of protective

[4] Furthermore, this proceeding is fundamentally different from the case cited by GameFly in its motion, United States v. Ky. Utilities Co., 124 F.R.D. 146 (E.D. Ky. 1989), a decision that was reversed on appeal (see United States v. Ky. Utilities Co., 927 F.2d 252 (6th Cir. 1991), in which the court ruled that the interests of a Kentucky newspaper in accessing materials produced in discovery in a case alleging that a segment of the general public in Kentucky was paying higher electric rates as a direct result of the antitrust activities of an electric utility outweighed what it characterized as a "nebulous and conclusory showing" by the parties asserting that the documents should remain confidential. Here, the interests in public disclosure are not compelling, and the Postal Service has concretely demonstrated its statutory obligation to treat these materials in a confidential fashion.

conditions that limit access to, and use of, such information is a reasonable middle-ground approach to complaint cases such as this proceeding; it preserves the Postal Service's legitimate interests in maintaining the confidentiality of customer-specific documentation, and of its internal deliberations, while allowing complainants and other parties (including the Public Representative) access to those materials for purposes of Commission litigation. As such, the balance of the interests involved weigh in favor of precluding unfettered public access to these materials.

Respectfully submitted,

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