# PUBLIC (REDACTED) VERSION

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

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

**REJOINDER OF GAMEFLY, INC.,
TO OPPOSITIONS OF THE UNITED STATES POSTAL SERVICE
AND BLOCKBUSTER INC. TO MOTION OF GAMEFLY, INC.,
TO UNSEAL CERTAIN DOCUMENTS AND INFORMATINO
DESIGNATED AS PROPRIETARY BY THE POSTAL SERVICE
(October 26, 2009)**

Pursuant to Presiding Officer's Ruling No. C2009-1/7 at 3, GameFly, Inc. ("GameFly") respectfully submits this rejoinder to the October 19 oppositions of the United States Postal Service ("Postal Service" or "USPS") and Blockbuster Inc. ("Blockbuster") to the September 25 motion of GameFly to unseal certain documents and information designated as proprietary by the Postal Service.[1]

## INTRODUCTION AND SUMMARY

The oppositions of the Postal Service and Blockbuster have an air of unreality. While asking the Commission to keep secret essentially every word of

[1] GameFly originally designated its September 25 motion as a request for a show-cause order. The Postal Service agreed, however, that the circumstances entitled GameFly to an opportunity to reply to any oppositions to the September 25 motion, and Presiding Officer's ruling No. C2009-1/7 has expressly given GameFly leave to reply. This relief renders unnecessary the intermediate procedural step of a Commission show-cause order, and GameFly withdraws its request for such an order.

every document covered by the September 25 motion, the two parties do not begin to offer the showings required by Rule 3007.33(c) and Fed. R. Civ. P. 26(c) for sealing *any* document.

The Postal Service would have the Commission jettison the standards of Rule 3007.33(c) and Fed. R. Civ. P. 26(c) in favor of a more restrictive standard that the Postal Service has cobbled together from the exceptions to the Freedom of Information Act ("FOIA") and a reference in a 2005 House committee report to having the Postal Service "operate in a more business-like manner." Under these supposed standards, it is impossible to imagine what types of information relevant to a discrimination complaint the Postal Service would ever agree should be publicly disclosed. But 39 U.S.C. § 504(g)(3)(B) expressly makes the FOIA exceptions inapplicable in complaint cases and other Commission proceedings. And the language in the 2005 House bill actually dealing with disclosure of allegedly proprietary information in discover was the very provision that ultimately became 39 U.S.C. § 504(g)(3)(B)

Second, neither the Postal Service nor Blockbuster seriously attempt to show that release of the specific documents at issue would cause any material commercial harm to the Postal Service or its customers. Rather, both parties resort to the "most hackneyed defense interposed to requests for public disclosure"—"that some nebulous 'competitive disadvantage' will enure upon disclosure." *Southern California Edison Co. and San Diego Gas and Elec. Co.*, 49 FERC (CCH) ¶ 63,029, 65,127 (1989). The injuries alleged by the Postal Service primarily involve Netflix-related documents. But *Netflix did not file an*

*opposition to GameFly's motion*. This omission waives any claim to protection involving the interests of Netflix. Blockbuster, which did file an opposition, clearly did not even bother to read the documents that it asks the Commission to keep sealed. In any event, a careful review of the specific documents that GameFly seeks to unseal makes clear that none of them would threaten Netflix or Blockbuster with the kind of injury cognizable under Rule 3007.33 and FCRP 26(c). And the "chilling communications" and deliberative privilege theories asserted by the Postal Service on its own behalf are equally without merit.

Third, even if some of the information could be considered commercially sensitive, the interests in public disclosure of these documents well outweigh any harm that would result from their disclosure. GameFly needs to be able to share this information with its client to effectively conduct its case. But perhaps more importantly, the public has a vital interest in ensuring the Postal Service is operating in a non-discriminatory manner in accordance with the PAEA. If the Postal Service is entitled to keep secret any information that is at all related to the service it provides its customers, the public will learn of discriminatory activity only through happenstance, if at all. Such a result is completely inconsistent with the financial transparency required of a government entity operating in competitive markets. The Postal Service and Blockbuster they all but completely ignore these offsetting public concerns.

## ARGUMENT

### I. THE GOVERNING LEGAL STANDARDS

#### A. Rule 3007.33 Requires A Detailed, Document-By-Document Balancing Of The Purported Commercial Injury To The Postal Service Or Third Parties From Disclosure Against The Public Interest In Disclosure.

As GameFly noted in its motion, the Commission's decision on GameFly's motion to unseal is governed by Rule 3007.33. Motion at 3. For information in which the Postal Service claims a proprietary interest, Rule 3007.33(a) requires the Commission to "balance 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 financial markets." 39 C.F.R. § 3007.33(a) (emphasis added).

For information in which a mailer or other third party claims a proprietary interest, Rule 3007.33(b) directs the Commission to "balance the interests of the parties based on Federal Rule of Civil Procedure 26(c)." FRCP 26(c) in turn prescribes a "good cause" balancing test, under which the tribunal must weigh the commercial harm that would result from public disclosure of the information against the countervailing interests of the party requesting the information and the public in disclosure of the information.[2] See Motion at 4-5 (laying out factors

[2] In Order No. 225, the Commission specifically recognized that the FRCP 26 standards would govern the disclosure of documents in discovery and the disclosure of any documents containing third party proprietary information, and it promulgated regulations that incorporate this standard. *See* Order 225 at 6-8 (dismissing comments that the Commission overstepped its authority by incorporating standards from FRCP 26 and indicating that FRCP 26 can be looked to for both procedural and substantive standards); Order 194 at 5 ("The

to be considered under the "good cause" balancing test established in *Arnold v. Penn Dep't of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007)).

Rule 3007.33 and FRCP 26(c) impose several specific burdens on a party seeking to block public disclosure of information produced to the Postal Service in discovery.

*First*, the party seeking to keep information under seal must show that the public disclosure of information would threaten the USPS or a third party with material commercial injury, not just embarrassment. Rule 3007.33(a) explicitly imposes this requirement for information filed by the Postal Service, and Rule 3007.33(b), by incorporating the good cause standard of FRCP 26(c), implicitly imposes the same requirement for information in which a third party claims a proprietary commercial interest.

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general parameters for disclosure and conversely protection of confidentiality of non-public information during the discovery process under section 504(g)(3)(B) must be gleaned from the Federal case law pertaining to Federal Rule of Civil Procedure 26."); 39 C.F.R. § 3007.1(b) (defining non-public materials to include information "claimed to be protectable under Federal Rule of Civil Procedure 26(c) by a third party with a proprietary interest in the materials"); Order No. 225 at 1 n.1 and 11 (same); 39 C.F.R. § 3007.33(b) ("In determining whether to publicly disclose non-public materials in which the Commission determines a third party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c)."). *Cf.* 39 C.F.R. §§3007.42 (relying on Rule 26(c) standards for determining access to protected materials); Order No. 225 at 16 (explaining that the standard of § 3007.42 is "similar to balancing done in Federal civil litigation under Federal Rule of Civil Procedure 26(c)"); 39 C.F.R. §§ 3007.52 (relying on Rule 26(c) standards for determining access to protected materials); 3007.60 (empowering Commission to limit access to protected materials in conformance with powers typically exercised by courts under rule 26(c)).

*Second*, the requisite showing of commercial injury must be made specifically for *each* document that the Postal Service or a third party wishes to shield from public scrutiny. Rule 3007.21(c) requires the Postal Service's application for non-public treatment to "include a specific and detailed statement setting forth" a variety of information. As explained in Order No. 225, the "rule requires the Postal Service to identify the materials it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary, and any other factors relevant to the application for non-public treatment." Order No. 225 at 12. In particular, Rule 3007.21(c)(4) requires the "[p]articular identification of the nature and extent of commercial harm alleged and the likelihood of such harm." *Cf*. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (A party seeking protection of information under FRCP 26 "must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.")

The Commission's prior rulings in this case have underscored the importance of a specific showing of harm. In granting the Postal Service's motion for a 17-day extension of the seven-day period ordinarily allowed for responding to motions to unseal, the Presiding Officer specifically directed the USPS to make the showing required by Rule 21 "for *each document* it contends must remain sealed." Presiding Officer's Ruling No. C2009-1/7 (Oct. 7, 2009)

at 2 n. 6 (emphasis added). The Presiding Officer further directed the Postal Service to "provide notice to each third party with a proprietary interest in *any of the documents at* issue" so that those parties could make the request showing for any documents that they wished to keep sealed. *Id*. at 3 n. 7 (emphasis added). "The Postal Service should notify third parties also that any objections should be filed with the Commission by October 19, 2009, or *they will be deemed to be waived*." *Id.* (emphasis added).

*Third*, even if the Postal Service and third parties identify specific commercial harms that will result from disclosure of specific documents, the Commission must balance those harms against the public interest in disclosure of the information. *See* Rule 3007.33; FRCP 26(c); GameFly Motion at 5-7.

Blockbuster acknowledges that the standards of FRCP 26(c) are controlling:

> In determining whether to publicly disclose non-public materials in which a third party has a proprietary interest, the Commission is required to balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

Blockbuster Opp. at 2, ¶ 4. Although this formulation oversimplifies the actual standard of FRCP 26(c),[3] Blockbuster at least acknowledges that, regardless of the Postal Service's initial designation, the Commission is charged with balancing the interests of disclosure and confidentiality.

[3] Blockbuster Opp. at 2, ¶ 4 ("This balancing test weighs one party's interest in unsealing the documents against the other party's interest in keeping them confidential.")

### B. The More Restrictive Standards For Disclosure Advanced By The Postal Service Are Contrary To Law.

The Postal Service advances very different, and far more restrictive, standards for unsealing material under Rule 3007.33. According to the Postal Service, sealed materials may be unsealed only if (1) no exception to the Freedom of Information Act ("FOIA") would cover the material, and (2) public disclosure would be consistent with "good business practice."[4] These supposed standards are Postal Service inventions. We discuss each in turn.

#### 1. The exceptions to the Freedom of Information Act created by 39 U.S.C. § 410(c).

The Postal Service justifies the continued secrecy for the documents at issue primarily on the basis of 39 U.S.C. § 410(c)(2). Section 410(c)(2) creates exceptions to the mandatory disclosure provisions of the FOIA for information possessed by the Postal Service that is (1) "of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good practice would not be publicly disclosed," or (2) consists of "reports and memoranda of consultants or independent contractors except to the extent that they would be required to be disclosed if prepared within the Postal Service." *See* USPS Opposition at 2-3, 6, 10 (citing 39 U.S.C. §§ 401(c)(2) and (5) and 5 U.S.C. § 552(b)(5)). This FOIA-based theory is the linchpin of the Postal Service's arguments for continued secrecy. The Postal Service cites the

[4] Although the Postal Service acknowledges that Rule 3007.33 incorporates the balancing tests of 39 U.S.C. § 504(g)(3)(A) and FRCP 26(c), USPS Opp. at 2, the Postal Service's Opposition never again mentions—let alone attempts to apply—these standards.

FOIA exceptions repeatedly in its Opposition.[5] Moreover, virtually all of the reported cases cited by the Postal Service are FOIA cases.[6]

The Postal Service's reliance on 39 U.S.C. § 410(c)(2), FOIA, and the judicial precedent under FOIA is completely misplaced. While these authorities might provide support for the Postal Service's refusal to release the subject

[5] *See* USPS Opposition at 8-9 ("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 . . . exempts from disclosure business materials submitted by third parties under an expectation of confidentiality."); id. at 10 ("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; "protection of this information from public disclosure comports entirely with the purpose of the *Critical Mass* [a FOIA case] test); id. at 11 ("This interest is manifested in 5 U.S.C. 522(b)(5) [FOIA], which protects from public disclosure materials that reflect an agency's deliberative process").

[6] Among the cases construing FOIA cited by the Postal Service as support for its position are *Carlson v. USPS*, 504 F.3d 1123 (9th Cir. 2007) (holding information such as final collection times at post offices was not "commercial information" and could be obtained through a FOIA request despite section 410(c)(2)); *Wickwire Gavin, P.C. v. USPS*, 356 F.3d 588, 592 (4th Cir. 2004) (holding certain spreadsheets exempt for FOIA disclosure by virtue of section 410(c)(2)); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (resolving dispute over availability of documents under FOIA); *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999) (holding commercial information improperly released under FOIA); *Nat'l Parks & Cons. Ass'n v. Morton*, 498 F.2d 765, 771 (D.C. Cir. 1974) (resolving FOIA dispute over access to information about concessions in National Parks); *Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin*., 244 F.3d 144, 149 (D.C. Cir. 2001) (determining availability of alleged trade secrets under FOIA); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 39 (D.D.C. 1997) (reviewing decision to release contract pursuant to FOIA); *Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (dispute over availability of agency memoranda pursuant to FOIA); *Access Reports v. Dept. of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991) (dispute over availability of agency memoranda pursuant to FOIA); *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975) (determining availability of documents related renegotiation proceedings under FOIA); *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (discussing availability of predecisional memoranda pursuant to FOIA).

documents pursuant to a FOIA request submitted by GameFly, they have nothing whatsoever to say about the balancing test the Commission must apply in resolving this motion. Although 39 U.S.C. § 504(g)(2) bars disclosure in certain contexts of information produced by the Postal Service to the Commission that is covered by 39 §§ 410(c) and 5 U.S.C. § 552(b) (the FOIA exceptions), these restrictions on public disclosure *do not apply to material discovered in complaint cases and other Commission proceedings*. 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) specifically states that Section 504(g)(2) "shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title." Rather, the "appropriate" level of "confidentiality" to be given information produced in discovery and "furnished to any party" shall be determined according to Commission "regulations based on rule 26(c) of the Federal Rules of Civil Procedure." 39 U.S.C. § 504(g)(3)(B).[7]

The Postal Service's misplaced reliance on the FOIA standards undermines the Postal Service's entire analysis, for the standard of public disclosure under Rule 26(c) is more liberal than under FOIA. Section 504(g)(3)(B) thus "operates to provide a mechanism for the Commission to create greater transparency (and hence less protection than FOIA provides),

[7] The Commission recognized, even before the enactment of 39 U.S.C. § 504(g)(3)(B), that "section 410(c)(2) is inapplicable to formal proceedings before the Commission." Presiding Officer's Ruling No. R2001-1/17, Docket No. R2001-1, at 14 (Dec. 7, 2001). The Commission reiterated this distinction in issuing the final confidentiality rules in Order No. 225. In response to a proposal by the Public Representative, the Commission declined to "agree that it is appropriate to overlap the Freedom of Information Act requests and requests for access or disclosure under the confidentiality rules." Order 225 at 10.

for matters relevant to the financial transparency and regulatory responsibilities of the Postal Regulatory Commission." Docket No. RM2008-1, *Regulations to Establish Procedures for According Appropriate Confidentiality*, Order 194 (March 20, 2009) at 11. *Accord*, *Washington Post v. Dept. of Health and Human Services*, 690 F.2d 252, 258 (D.C. Cir. 1982) ("It is well established that information that is exempt from disclosure to the general public under FOIA may nevertheless be subject to discovery."); *Pleasant Hill Bank. v. United States*, 58 F.R.D. 97, 99-101 (W.D. Mo. 1973) (explaining in detail the different confidentiality standards applied under various FOIA exemptions and the Federal Rules of Civil Procedure, holding information discoverable that would not have been available pursuant to a FOIA request, and concluding that "the disclosure exemptions of the [FOIA] were not intended to and do not create or show by their own force a privilege within the meaning of Rule 26(b) (1) disqualifying a Government document from discovery.") In short, FRCP 26—and by extension the Commission rules—allow the disclosure of far more information than would be available under FOIA.[8]

[8] Even if—contrary to law—GameFly's motion to unseal were decided under the more general disclosure provisions of 39 U.S.C. 504(g)(3)(A), which do not specifically refer to documents produced in discovery, the Commission's decision still would be guided by a balancing test independent of the criteria the Postal Service might use to designate material as confidential. Section 504(g)(3)(A) specifically requires that in "determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service" as confidential under section 410(c) or FOIA exceptions, "the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets." As with review of materials requested in discovery, the Commission has the authority to order the disclosure of documents that the Postal Service has identified as confidential.

### 2. A phrase in a 2005 House committee report on H.R. 22

The Postal Service's reliance a general statement in a 2005 legislative committee report that a precursor bill to the PAEA was intended to "position the Postal Service to operate in a more business-like manner" (USPS Opp. at 5) is equally wide of the mark. The language quoted by the Postal Service was merely a general philosophical observation about the goals of the bill as a whole, not a description of the specific provisions of the bill governing protective conditions. The actual operative language of the bill concerning discovery was essentially *identical* to 39 U.S.C. § 504(g)(3)(B):

> (B) Paragraph (2) shall not prevent information from being furnished under any process of discovery established under this title in connection with a proceeding under this title. The Commission shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for any information furnished under the preceding sentence.

H.R. 22, § 504(g)(3)(B) (April 28, 2005) (reproduced in H.R. Rep. No. 109-66, part 1, at 25).

The relevant summary of that provision in the committee report cited by the Postal Service further affirms that confidentiality decisions by the Commission, notwithstanding the general aspiration that the Postal Service be operated in a more "business-like manner," nonetheless would be governed by FRCP 26(c):

> The amendment further provides for the possibility of discovery of such information by interested parties and requires the Commission to adopt rules to protect the confidentiality of such information similar to the rules that govern protective orders issued by the federal courts under the Federal Rules of Civil Procedure.

H.R. Rep. No. 109-66, pt. 1 at 66. Under basic canons of statutory construction, these specific provisions should prevail over the general aspiration that the Postal Service to operate like a commercial entity. *Kepner v. United States*, 195 U.S. 100, 125 (1904) ("It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling.") Moreover, the plain language of the statute prevails over any inconsistencies, real or imaginary, in the legislative history. *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987) ("In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive . . . . [w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." (internal quotations omitted)).

## II. THE POSTAL SERVICE AND BLOCKBUSTER HAVE OFFERED NO EVIDENCE OF COMMERCIAL INJURY TO ANY PERSON THAT WOULD JUSTIFY CONTINUED SECRECY FOR ANY OF THE DOCUMENTS AT ISSUE.

### A. Information About Netflix

The short and dispositive answer to any objections to unsealing information about Netflix is that Netflix did not oppose GameFly's Motion. Netflix's failure to file a timely opposition waived any objection to disclosure of the Netflix-related information covered by GameFly's motion. The Commission's standards and procedures for protection of third-party information clearly contemplate that, while the Postal Service shall have the initial burden of notifying third parties that a request has been made for access or public

disclosure of third party documents, the party with ultimate responsibility for seeking to establish or maintain protection for third-party information is the third party itself. *See* Order No. 194, *supra*, at 20 (second paragraph). And the Commission reiterated the obligation of third parties to defend their own interests in this docket: "The Postal Service should notify third parties also that any objections should be filed with the Commission by October 19, 2009, or *they will be deemed to be waived*." Presiding Officer's Ruling No. C2009-1/7 (Oct. 7, 2009) at 3 n. 7 (emphasis added).

Netflix's failure to file an opposition to GameFly's motion to unseal was not for lack of notice. On September 9, Netflix designated both Tim May, an outside attorney, and David Hyman, the company's general counsel, as reviewing representatives under the protective order.[9] Messrs. May and Hyman became authorized viewing representatives on October 2.[10] On or before October 5, 2009, one of GameFly's attorneys, David Levy, delivered copies of GameFly's September 25 motion to unseal, along with a complete and unredacted set of the documents to be unsealed, to Mr. May. Mr. May's assistant acknowledged in writing that the documents were received. And the Postal Service presumably complied with Presiding Officer's Ruling No. C2009-1/7 by providing similar notice to Netflix's counsel on or shortly after October 7, the date on which the Ruling was issued.

[9] Netflix Inc.'s Motion for Access, etc. (Sept. 9, 2009).

[10] Presiding Officer's Ruling No. C2009-1/4, issued September 25, 2009,

Netflix's failure to oppose GameFly's motion to unseal also forecloses as a matter of law any derivative objection by the Postal Service on behalf of Netflix. The Postal Service has no independent standing to object to public disclosure of third party information when the third party has knowingly chosen not to object on its own behalf. The principle that the right to litigate a claim should be prosecuted to parties with a genuine stake having the claim prevail is a bedrock principal of our adversarial system.[11] Moreover, Netflix's failure to oppose the motion, even if insufficient to operate as an absolute legal bar to any derivative Postal Service objections on behalf of Netflix, would certainly deprive such objections of any credibility or weight. Netflix knows better than the Postal Service where Netflix's interests lie.[12]

The foregoing analysis alone disposes of the Postal Service's objections with respect to most of the documents covered by GameFly's motion. In the majority of the documents cited by the Postal Service in support of its opposition,

[11] *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972) ("Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker v. Carr*, 369 U.S. 186, 204, . . . as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'").

[12] The Commission need not decide in this case whether some third parties are so small and dispersed that their interests in preventing disclosure of would appropriately be asserted by the Postal Service or the Public Representative. Both Netflix and Blockbuster are very large and sophisticated businesses, and are represented by sophisticated counsel. Both companies are fully capable of identifying and defending their own interests in this matter.

the only information that is purportedly sensitive is information about the Postal Service's dealings with Netflix. *See* Appendix A, *infra*.

Finally, even if (contrary to fact) the question of injury to Netflix were properly before the Commission, disclosure of the Netflix-related information would not cause any cognizable injury. The details of what the documents reveal are spelled out in Appendix A, *infra*, which we necessarily have filed under seal. The remainder of this section provides a brief summary.

The cases applying Rule 26(c) and similar standards in administrative rate cases draw a distinction between a private parties' product-specific costs, revenues, customer lists, confidential intellectual property, and other proprietary information whose disclosure could give an unfair competitive advantage to rival firms, and more general descriptive information whose disclosure would not give any rival a competitive advantage. The former is generally kept under seal; the latter is generally made public.

A leading decision by the Federal Energy Regulatory Commission ("FERC") is illustrative. In *Young Refining Corp.* Docket No. RA78-2, 1980 FERC LEXIS 62 at *49-50 (1980), the FERC characterized the following information about a ratepayer as confidential:

> [F]inancial statements; detailed information concerning the terms and profits realized from various processing agreements; sources and status of credit; officers' salaries and distributions to stockholders; refined product inventories; [and] information on the firm's products and market.

By contrast, the FERC declined to protect "general statements . . . describing the alleged financial impact" certain decisions would have on the ratepayer. *Id.* at *50. While "detailed financial data supporting these allegations should be treated as confidential, the general descriptive statements should be disclosed." *Id*; *see also* Order on Request for Confidential Treatment and Directing to Show Cause, *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004) (ordering disclosure of "the provisions of Bay Gas's contracts with its shippers" including "the name of the shipper . . . the length of each contract, and, for transportation service, the contract rate"); *Southern California Edison Company and San Diego Gas and Electric Company*, 49 F.E.R.C. ¶ 63,029 at 65,129 (declining to protect "Edison's consideration of mergers or takeovers of other entities" on the grounds that "[t]he Presiding Judge is unable to discern from a reading and a rereading of the 4 pages of testimony involved how public disclosure of that content could possibly result in a substantial competitive harm to Edison."); *In the Matter of MSNBC Interactive News, LLC; On request for Inspection of Records*, 23 FCC Rcd 14518 at 14526 n. 64 (Federal Communications Commission 2008) (protecting information that would "describe companies' *exact* market conditions" and allow "competitors to target particular geographic areas for special service or marketing efforts." (emphasis added; internal quotations omitted)).

In preparing its motion to unseal, GameFly was careful to exclude the first category of documents in the *Young Refining* typology. Thus, GameFly did not ask to unseal any documents containing location-specific volumes, recent costs, or financial data underlying Netflix decisions. While some of the documents may

contain general statements about such matters, the statements are sufficiently general that their public disclosure would be unlikely to lead to commercial harm. Rather, what the documents reveal is that Netflix was making vigorous and persistent efforts to get the highest quality of service from the Postal Service at the lowest possible cost. These efforts, however, are no more than one would expect *any* DVD rental company—or, indeed, any rational, profit-maximizing business of any kind. While the Postal Service's failure to respond to Netflix's requests in a nondiscriminatory fashion was unlawful (and evidently embarrassing to the Postal Service), Netflix's requests themselves show only that Netflix was looking out for its self-interest. The documents discussing these requests do not contain competitively valuable non-public information regarding Netflix's commercial interests or business strategies. Publicly revealing that Netflix acted in its own self-interest would not cause competitive harm to Netflix, as most businesses assume that their rivals act out of self-interest.

Moreover, much of the purportedly sensitive information contained in these documents has already been publicly disclosed, either specifically or in general terms:

- DVDs enclosed in lightweight mailers, when processed on Postal Service processing equipment, can experience breakage. Joint Statement of Undisputed and Disputed Facts (July 20, 2009) at ¶ 27.

- Netflix, Inc. ("Netflix") engages in the DVD rental by mail business. Netflix offers its subscribers movies rather than video games. *Id*. ¶ 64.

- Netflix uses a two-way DVD mailer. The outer face of the mailer is addressed to the subscriber. To use the mailer for the return trip, the subscriber tears off the outer face to reveal an inner face addressed to Netflix. *Id*. ¶ 65.

- Netflix distributes its DVDs to subscribers by First-Class Mail. *Id*. ¶ 66.

- Netflix mails its DVDs to subscribers at the presorted letter rates within First-Class Mail. *Id*. ¶ 67.

- Netflix pays the postage for these mailings at the time of mailing. *Id*. ¶ 68.

- Subscribers return the DVDs to Netflix in preaddressed reply mailers via First-Class Mail Permit Reply Mail ("PRM"). *Id*. ¶ 69.

- Round-trip DVDs are returned to Netflix as one-ounce letters at a rate of 44 cents in postage, i.e., the one-ounce single-piece letter rate. *Id*. ¶ 70.

- Netflix pays the postage for these return mailings. *Id*. ¶ 71.

- According to information on Netflix's website, it currently has 58 distribution centers. *Id*. ¶ 72.

- In 2002, Netflix submitted samples of its DVD mailpieces for testing by the Postal Service's Engineering Department. *Id*. ¶ 73.

- On or about June 11, 2002, the Postal Service's Engineering Department evaluated the Netflix DVD mailpieces. *Id*. ¶ 74.

- The Postal Service contends that its Engineering Department concluded on June 11, 2002, that the outbound Netflix DVD mailpieces were processed without problems, but that processing problems were encountered on the inbound Netflix DVD mailpiece. According to the Postal Service, the letter concluded that the mailer was not automation-compatible. *Id*. ¶ 75.

- On or about June 17, 2002, Netflix sent an email to Anita Bizzotto, then Chief Marketing Officer of the Postal Service, and George Laws, Manager Letter Mail Technology, asking for a review of the conclusions of the Engineering Department. *Id*. ¶ 77.

- By letter dated June 24, 2002, Sherry Freda, then Manager of Mailing Standards of the Postal Service (and a subordinate of Ms. Bizzotto), advised Netflix that (a) the outbound Netflix DVD mailer was automation-compatible, and (b) the return DVD mailer was "machinable," although "not completely automation-compatible." *Id*. ¶ 78.

- Postal Service processing operations in the field often manually cull Netflix return DVD mailers from the automated letters mailstream for manual processing. Some portion of Netflix return mail is processed in the automation mailstream. *Id*. ¶ 79.

- The Postal Service does not require Netflix to pay a nonmachinable surcharge. *Id*. ¶ 82.

- A report by the Postal Service's Office of Inspector General in November 2007 found that Postal Service employees "manually process approximately 70 percent of the approved First-Class [Mail] two-way DVD return mailpieces from one DVD rental company because these mailpieces sustain damage, jam equipment and cause missorts during automated processing." USPS Office of Inspector General, Audit Report No. MS-AR-08-001, *Review of Postal Service First-Class Permit Reply Mail* (November 8, 2007), cover letter from Tammy L. Whitcomb, Deputy Assistant Inspector General for Revenue and Systems, at 1; *accord*, OIG Report at 4 & n. 3. *Id*. ¶ 83.

- The unnamed DVD rental company to which the OIG report referred was Netflix. *Id*. ¶ 84.

- The Postal Service acknowledges that manual culling of Netflix return DVD mailers has continued since the issuance of the OIG Report. *Id*. ¶ 87.

- Area and District officials of the Postal Service are aware of these decisions to manually process Netflix return mailers. *Id*. ¶ 88.

- Headquarters officials of the Postal Service have been aware that the manual culling and processing of Netflix return DVD mailers has often occurred since November 2007. See also paragraph 79. *Id*. ¶ 90.

- The amount of manual culling and processing of Netflix mail is at least as large as was found in the OIG Report. USPS Objections (August 10, 2009) at 6.

- Netflix pays neither flats prices nor a second-ounce charge. As a result, the postage per piece incurred by Netflix for Permit Reply Mail is less than half the two-ounce flats postage incurred by GameFly ($1.05 as compared to $0.44). Joint Statement of Undisputed and Disputed Facts (July 20, 2009) at ¶ 91.

- Since 2007, Postal Service Engineering has concluded that seven two-way DVD mailers submitted by several companies other than Netflix were operationally nonmachinable. These mailers were of similar size,

weight, and construction to the Netflix two-way DVD mailer determined by Postal Service Mailing Standards in 2002 to be machinable. *Id*. ¶ 92.

- The Postal Service, "through functions such as the Business Service Representatives (BSNs), interact constantly with Netflix (and other commercial mailers, including GameFly) on a variety of mundane, day-to-day topics that bear on the service performed by the Postal service on individual Netflix mailers. USPS Objections (August 10, 2009) at 3.

If this information supportive of these conclusions was once sensitive, it no longer deserves protection.

### B. Information About Blockbuster

Blockbuster has also waived any objection to disclosure. Although Blockbuster, unlike Netflix, did file an opposition to GameFly's motion, Blockbuster's opposition never goes beyond the broadest of generalities. Indeed, Blockbuster's counsel apparently did not even bother to look at the Blockbuster-related documents that GameFly proposes to disclose. Instead, Blockbuster appears to have based its opposition entirely on a generalized summary of the documents prepared by the Postal Service *See* Blockbuster Opp. at 2 ¶ 3 ("The Postal Service *has notified Blockbuster* that GameFly seeks to unseal the following documents . . .") (emphasis added). For instance, as detailed further in the Appendix, it would be difficult to pinpoint any information in the documents withheld by the Postal Service that discusses Blockbuster's "operational goals," other than the unexceptionable fact that Blockbuster seeks to expand its business. *See* Blockbuster Opp. at 2. Similarly, the "[c]onfidential information about Blockbuster's plans for distribution centers," even if such

information could be considered confidential,[13] dates from 2006 and does not reflect Blockbuster's plans today, in late 2009. Id., *see* GFL312. And while the documents do include meeting notes, these notes do not discuss any particulars of "Blockbuster's business practices"; they reference only the design of the Blockbuster DVD mailer. *See* GFL189; GFL1115.

Blockbuster's failure even to look at the documents that it now claims are too sensitive to unseal did not result from a lack of notice or opportunity. On the afternoon of September 25, David Levy, an attorney for GameFly, sent an email to Naomi Edwards, Blockbuster's Program Manager, Supply Chain Operations—and the individual identified by Postal Service counsel as the appropriate contact—alerting her to the filing of GameFly's motion to unseal earlier the same afternoon. Three days later, on September 28, Bryan P. Stevenson, Blockbuster's Vice President, Associate General Counsel–Litigation, responded by email thanking GameFly's counsel for providing notice of the motion. Blockbuster's motion is co-signed by an attorney at Vinson & Elkins LLP, a large outside law firm that easily could have designated an attorney to serve as Blockbuster's reviewing representative.

As detailed in Appendix A, *infra*, the Blockbuster-related documents that GameFly has moved to unseal do not contain the type of commercially sensitive information the Commission's rules were designed to protect. Like the Netflix documents, they consist at most of general statements regarding Blockbuster's

[13] In fact, Blockbuster has routinely issued on its own initiative public announcements of the opening of new Blockbuster distribution centers. See, *e.g.*, www.acmetech.com/shopping/movies/blockbuster_distribution_centers.php.

business, or they indicate that Blockbuster, like Netflix, rationally sought the most advantageous processing possible from the Postal Service. This information is not competitively sensitive, and it is not entitled to protection.

### C. Information About Other Third Parties

To avoid the need for smaller DVD rental companies and other third parties who are only tangentially involved in this litigation to respond to the September 25 motion, GameFly has proposed to redact the names and other information identifying those parties, except for one envelope manufacturer that voluntarily consented to disclosure of documents about it. Accordingly, the motion does not affect the interests of other mailers.

With respect to letters from Postal Service Engineering to specific customers discussing results of tests performed on the customers' DVD mailers, the Postal Service has agreed to unseal these letters on the condition that the customer names are redacted. USPS Opp. at 13-14. USPS has proposed that the "Description" portion of each of the letters be redacted as well, however, to further conceal the customers' identities. Id. at 14. GameFly does not believe such additional redaction is necessary, especially since the descriptions of the various mailers are so similar as to make it nearly impossible to discern the identify of a customer from the descriptions alone. Nevertheless, in the interests of resolving this issue, GameFly will consent to the redaction of the "Description" portion of the letters.

### D. The Postal Service's Proprietary Interests

As explained above, the interests of Netflix, Blockbuster and other customers who are mentioned in the documents at issue cannot support the Postal Service's opposition to the motion to unseal. Netflix did not file an objection to the release of this information, and Blockbuster's objections are perfunctory. Moreover, the information in question is not commercially sensitive and does not meet the standard for protection created by Rule 3007.33(b) and FRCP 26(c).

Perhaps recognizing that the interests of Netflix and Blockbuster are insufficient to support continued secrecy for the documents at issue, the Postal Service also asserts two proprietary interests of its own: (1) that disclosure of documents about Netflix and Blockbuster would deter *other* customers from dealing candidly with the USPS in the future; and (2) that disclosure of documents would chill future USPS decision-making by disclosing predecisional deliberations. Both these claims fail. We discuss each one in turn.

#### 1. Alleged chilling of future candor by mailers

Invoking its asserted mandate to "act in a business-like manner," the Postal Service claims that it cannot "publicly disclose details of its communications and interactions with its customers relating to their commercial relationship" without jeopardizing the willingness of mailers to communicate with the Postal Service in the future. Opposition at 5. This argument is a bootstrap. The only two actual customers whose "communications and interactions" with the Postal Service would be made public by GameFly's motion are Netflix and

Blockbuster. The former did not object at all to the motion; the latter did so only perfunctorily. The public disclosure of information about these two parties will reveal nothing to other customers about the Commission's willingness to protect legitimate interests in confidential treatment of third-party information that are actually and properly asserted.

Second, and more generally, while the Postal Service may aspire to operate in a "business-like manner," the Postal Service is not an ordinary private business, and its customers do not have the same expectation of secrecy that customers of private businesses may have. The Postal Service has a legal monopoly under the Private Express Statutes over the delivery of letter mail; and a corollary of that monopoly is common carrier regulation, including the antidiscrimination provision of 39 U.S.C. § 403(c). In particular, it is well established that when a common carrier is alleged to have granted undue preferences to a customer, the carrier cannot hide behind its business needs to protect communications with its shippers from disclosure.

A recent FERC decision is instructive. Regulations under the Outer Continental Shelf Lands Act are designed to "ensure that natural gas moves on an open and nondiscriminatory basis through facilities located on the Outer Continental Shelf." *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas and Facilities on the Outer Continental Shelf*, Order on Request for Confidential Treatment, 96 FERC ¶ 61,296 at 62,095 (2001). In that case, the FERC ruled that "information contained in [reports under the regulations] will not be protected from public disclosure if such

information is necessary to determine whether OCS gas service providers are operating in accord with" the act. *Id.* The FERC emphasized the importance of publicly releasing information "regarding conditions of service available to OCS shippers" to "allow shippers, competitors, and the Commission to monitor the OCS for instances of discrimination and the exercise of market power." *Id.* at 62, 096. Thus, even though the service providers likely had business reasons for maintaining the secrecy of their service agreements with particular shippers, FERC recognized that the greater public good of ensuring shippers were not treated in a discriminatory fashion required the public disclosure of these arrangements. *See also* Order on Request for Confidential Treatment and Directing to Show Cause, *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004) ("Commission policy generally favors disclosure of individual jurisdictional contract information in order to ensure that the pipeline's contracting practices are not unduly discriminatory, and no undue preferences are granted to any customer.")

This principle applies even more strongly when the carrier is a government establishment like the Postal Service rather than a private corporation. *See Hartford v. Chase*, 733 F. Supp. 533, 536 n. 5 (D. Conn. 1990) ("Where the parties are private, the right to rely on confidentiality in their dealings is more compelling than where a government agency is involved, as the public has a countering interest in, and thus the claim of access to the conduct of public business by a governmental agency.").

Consistent with these principles, the Commission's rules, including Rule 3007.33(b), should already put mailers on notice that information submitted to the Postal Service may be disclosed to the public in subsequent litigation. *See* Rule 3007.33(b). Moreover, it is telling that the Commission has mandated full disclosure of the terms of Negotiated Service Agreements—information that is likely to have far greater commercial value to competitors than the documents and information at issue here. In rejecting arguments that NSA terms should be kept confidential to avoid chilling business communications and transactions between the Postal Service and potential NSA partners, the Commission explained:

> *The general rule at the Commission has been and remains that requests for protective conditions must meet a high burden.* [footnote omitted] Reminding participants of the general rule serves several purposes. Drafting an agreement in a fashion that does not require protective conditions is procedurally expedient. It does not require the additional step of requesting protective conditions, interested parties do not have to apply to view the material, and the overall proceeding is facilitated by being able to openly discuss, reference, and write about the subject material. *Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings.* Public disclosure also provides mailers with the information necessary to decide whether they wish to seek similar agreements with the Postal Service. The Commission will adhere to its preference, and presumption, that the contents of the actual contract shall be made publicly available. The application of protective conditions remains an option, but the negative effects of applying protective conditions must be recognized.

Docket No. RM2003-5, *Rules Applicable to Baseline And Functionally Equivalent Negotiated Service Agreements*, Order No. 1391 (Feb. 11, 2004) at 23 (emphasis added).

These principles indicate that the Postal Service's "continued candor" rationale for maintaining the confidentiality of the subject documents fails as a matter of law. When the question is one of undue preferences granted to a customer by a common carrier, the terms of service provided to customers must be publicly available. In this case, that would include the handling of Netflix's mail within the Postal Service's facilities, and documents relating to that handling must be made public.

**[BEGIN PROTECTED MATERIAL]**

**[END PROTECTED MATERIAL]** These issues should not be covered up by invoking deliberative process privilege.

### 2. Deliberative process privilege

The Postal Service's second rational for protecting what it characterizes as "its internal communications, studies, and deliberations regarding specific customers" is that the Postal Service has a "legitimate interest in full and uninhibited internal discussion regarding its provision of service." USPS Opposition at 10-11. The Postal Service derives this asserted interest from "5 U.S.C. 552(b)(5), which protects from public disclosure materials that reflect an agency's deliberative process." *Id*. at 11. This argument suffers from several flaws.

First, the deliberative process privilege, when applicable, operates as a bar to discovery of the information at all, not as a ground for allowing discovery but keeping the information under seal.[14] But the information at issue already has been produced, without the Postal Service having asserted the deliberative process privilege as an objection to discovery. Accordingly, the privilege has been waived.

The second, and fatal, flaw is more fundamental. "Simply put, when there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) (citing *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)). *See also id*. ("Since the government's alleged misconduct in making these

[14] The deliberative process privilege is also an exception to disclosure under FOIA. As discussed above, the Rule 3007.33 standards do not incorporate the FOIA exceptions.

determinations is the basis of this lawsuit, the deliberative process privilege may yield"); *Adair v. Winter*, 451 F. Supp. 2d 202, 209 (D.D.C. 2006) ("When there is any reason to believe that government misconduct has occurred . . . the deliberative-process privilege disappears altogether."); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997)("[T]he privilege disappears altogether when there is any reason to believe government misconduct occurred.").

Government misconduct, in the form of discrimination by the Postal Service, is at the heart of this case. Under well-established precedent, the Postal Service cannot abuse the deliberative process privilege to shield its illegal actions from public view.

## III. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY COMMERCIAL HARM THAT MIGHT RESULT FROM DISCLOSURE OF THE DOCUMENTS AT ISSUE

As previously noted, the asserted interests of the Postal Service and Blockbuster in preventing disclosure must be weighed against the significant public interests in favor of disclosure. The oppositions of the Postal Service and Blockbuster do not seriously address these interests.

*First*, Commission proceedings are public, and the presumption is that documents filed in those proceedings are public as well. Parties seeking to withhold information from the public face a significant burden in establishing the need for protection. See Presiding Officer's Ruling No. C99-1/16, *Complaint on Post E.C.S.*, Docket No. C99-1 at 4 ("As the Commission has recognized in past controversies, in accordance with long-established principles governing

discovery in civil litigation, evidentiary privileges are exceptions to the general rule that proceedings must be conducted in public view.").

Public hearings and public evidence are particularly important in administrative proceedings. While "the litigants and affected parties" in court cases "are almost invariably private litigants and, thus, the impact of those proceeds are largely felt by those private parties," agency "proceedings impact on the public sector . . . . in camera reviews and determinations at regulatory agencies such as this Commission are antithetical to the paramount desideratum of the public's right to know not merely what was the judgment of the ultimate decisional body, but more importantly, what was the content of the evidence upon which it reached that judgment"). *Southern California Edison Company and San Diego Gas and Electric Company*, 49 F.E.R.C. ¶ 63,029 at 65,127 (1989).

*Second*, the restrictions against discrimination or granting undue preferences by the Postal Service are fundamental to the PAEA specifically and the regulation of all common carriers generally. As expressed by congress in the PAEA, the public has an interest in ensuring that all similarly situated mailers are treated equally by the Postal Service. As a regulated monopoly, the Postal Service is subject to higher scrutiny than an ordinary commercial entity. The Postal Service is a public institution, and there is a natural public interest in allegations of wrongdoing by any public entity. The PAEA recognizes this interest in its effort to maintain the "financial transparency of a government entity competing in competitive markets." 39 U.S.C. § 504(g)(3)(A).

The appointment of a Public Representative[15] in this case does not obviate this issue. Permitting the Public Representative to view the materials at issue does not serve the same interests as allowing full public disclosure. Simply because the Public Representative is allowed to view the material does not mean that the Commission is conducting its proceedings in public view. Under the Postal Service's theory, the existence of the Public Advocate would eliminate any basis for requiring public disclosure of any materials filed in a Commission proceeding, regardless of their subject matter. Rule 3007.33 clearly rejects this position.

## CONCLUSION

For the reasons stated above and in GameFly's September 25 motion, the Commission should grant unseal the subject documents and information.

Respectfully submitted,

David M. Levy
Matthew D. Field
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

*Counsel for GameFly, Inc.*

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[15] *See* USPS Opposition at 15.

**[PROPRIETARY APPENDIX REDACTED]**