

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

Complaint of GameFly, Inc.

Docket No. C2009-1

COMMENTS OF THE PUBLIC REPRESENTATIVE
ON MOTION OF GAMEFLY INC. TO UNSEAL CERTAIN
DOCUMENTS PRODUCED IN DISCOVERY
(November 3, 2009)

In Docket No. C2009-1, the initial discovery process has been impeded by a series of motions concerning the non-public status of Postal Service documents responsive to discovery. The documents contain a wide range of topics that include the following: communications between the Postal Service and round-trip disc mailers, internal Postal Service communications and memorandums concerning the treatment of round trip-disc mailers, cost studies of round-trip disc mailers, presentations by mailers concerning round-trip disc treatment and costs, and notes on the 2007 round-trip disc OIG Report.

The Postal Service has claimed that all of the disputed documents should remain under seal, arguing that “large businesses would do the same.”¹ However, this broad claim does not meet the requirement of Commission rules concerning confidentiality. Rule § 3007.21 clearly states, “Whenever the Postal Service files non-public materials with the Commission, it must submit an application for non-public treatment that clearly identifies all non-public materials and describes the circumstances causing them to be submitted to the Commission.” In the instant docket, the Postal Service has not met this burden. In contrast, the Rejoinder of Gamefly (October 26, 2009), Appendix A described the lack of merits for protective treatment for each disputed document. The wide range of materials, both internal to the Postal Service and with external entities, is not of homogeneous nature or content. One terse statement by the Postal Service does not constitute a basis for non-public treatment for each of the wide variety of documents. The Commission should direct the Postal Service to address each individual document, in following with the Commission rules of practice.

¹ Opposition of the Postal Service to the Motion of Gamefly Inc. to Unseal Certain Documents Produced in Discovery (October 19, 2009). Page 5

Given the delays in initial discovery that have already occurred, the Commission may look for alternative solutions to allow discovery and the filing of Gamefly's direct case to continue with limited interruption in the short term. Discovery is taking two paths, one where Gamefly inquires on public subjects and one where it inquires on non-public subjects. So long as the Postal Service is responding in good faith, which it appears to be, discovery can continue successfully. The problem, as Gamefly points out, is that the legal representatives of Gamefly cannot share the discovery documents generated under seal with the operational experts at Gamefly under the current protective conditions.

The Public Representative posits the following. One, the Postal Service and Gamefly representation should come to an agreement concerning material under seal that can be reviewed by Gamefly operational personnel for the purpose of filing initial testimony. The Commission may seek more information concerning which documents will lead to admissible (and relevant) evidence. Two, the Postal Service (and third parties) should be required to follow the letter of rule § 3007.21 (or § 3007.22) for any document they request to keep under seal. Third, the Commission should make a clear determination concerning how the vintage of the documents affects non-public treatment. Fourth, the Commission should make a clear determination concerning how comparable publicly available information affects non-public treatment. Fifth, the Commission should assess the cumulative effect of evidence when evaluating the necessity to unseal individual, repetitive documents.

Respectfully submitted,

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