

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**STATUS MEMORANDUM OF THE UNITED STATES POSTAL SERVICE IN
RESPONSE TO PRESIDING OFFICER'S RULING NO. C2009-1/15**
(February 8, 2010)

On December 14, 2009, GameFly, Inc. ("GameFly") filed a motion requesting that the Commission schedule a status conference and award damages and other relief to GameFly (the "Motion").¹ After considering the Postal Service's Reply in Opposition to the Motion², the Presiding Officer issued its ruling on the Motion³, taking the Motion under advisement and directing the Postal Service and GameFly to file statements by February 8, 2010.

The Postal Service has made extensive progress in responding to GameFly's remaining discovery requests. Of GameFly's over seven hundred discovery requests, including subparts, only 20 remain unanswered. The Postal Service has made significant progress in responding to those and anticipates their completion within one month of this filing. The attached appendix shows the recent progress made by the Postal Service.

¹ See Motion of GameFly, Inc. to Schedule Status Conference, December 14, 2009. All citations in this document are to filings in Docket No. C2009-1, unless otherwise noted.

² See Reply of the United States Postal Service in Opposition to Motion of GameFly, Inc., to Schedule Status Conference, December 22, 2009.

³ See Presiding Officer's Ruling on Motion of GameFly, Inc. to Schedule Status Conference, January 13, 2010.

The remaining interrogatories, along with the information requested in Presiding Officer's Ruling No. C2009-1/15⁴, are listed below.

GFL/USPS-117

(a) Postal Service attorneys have reviewed the document, discussed it with Business Mail Acceptance and attempted to contact employees at the Suburban Maryland P&DC. While classification decisions made at the entry point for mail that have rate implications are routine, so also are appeals of those decisions. The Postal Service has found no reason why the particular transactions reflected in the foundation for these questions is in any way remarkable, it has not been able to identify individuals with knowledge of or records reflecting details of these transactions.

(b) If the Postal Service is able to respond affirmatively, it must locate an employee with knowledge of the document and 2003 procedures at the Suburban Maryland P&DC.

(c) Counsel has almost, but not quite, concluded that finding an employee with the requisite knowledge is impossible; one new line of inquiry has recently been initiated. Hence the earliest possible response date would be February 10, 2010, but it is also possible that no current employee of the Postal Service has the appropriate knowledge.

A response one way or the other should be available within 10 business days.

(d) The Postal Service will commit to completing its answer by March 9, 2010.

⁴ The categories of information requested in Presiding Officer's Ruling No. C2009-1/15 are: (a) a description of what has been done to date to complete the answer; (b) a clarification of what needs to be done to complete the answer; (c) identification of the earliest date by which the activity described in (b) could be done; and (d) confirmation of the date the date the Postal Service will commit to have completed its answer or response.

GFL/USPS-129(c)-(d)

As discussed in recent interrogatory responses, Netflix business model includes two features: plant verified drop shipment (VBDS) and widespread multiple Caller Service pick up of mail. These two foundations for its business model explain how and why Netflix is able to minimize the time and distance of its outgoing and returning mailpieces to about 50 miles. While the Postal Service assists in setting up such procedures as it does for any mailer, it has done nothing beyond those accommodations that speeds Netflix mail through the mail processing system. This interrogatory seeks to identify other measures that the Postal Service may have undertaken. To date, no substantiation of such other accommodation has been found, but as GameFly surely would prefer, the Postal Service continues its thorough review to confirm that no other accommodation exists. Interrogatory GFL/USPS-129 is an interrogatory whose responses have been delayed because of this extended search. It is highly likely that no affirmative answer to this interrogatory will be possible.

(a) Postal Service attorneys have reviewed the document and discussed it with all functional areas who might be involved.

(b) To complete its response to this interrogatory, the Postal Service is undertaking one last review to make sure nothing has been missed; the expectation is that no additional information will be revealed. A response one way or the other should be available within 10 business days.

(c) It is possible that the Postal Service could identify the required information on February 10, 2010, but it is also possible that it could take longer to identify the information.

(d) The Postal Service will commit to completing its response by March 9, 2010.

GFL/USPS-155

See the comment regarding GFL/USPS-129, since it also applies here. In addition, the Round Trip Workgroup was an informal group that attempted to identify a single solution for round trip DVD mailers, a discussion that continues today. Finding any information about that group beyond what is found in the documents that GameFly has in its possession has been a frustrating effort. But continued attempts, especially given the fact that this interrogatory is not the only one outstanding, reflect Postal Service efforts in conducting a thorough and careful inquiry into each interrogatory.

(a) Postal Service attorneys have contacted Postal Service employees involved with round-trip disk mail.

(b) To complete this interrogatory, the Postal Service is attempting to collect additional information related to round-trip disk mail.

(c) It is possible that the Postal Service could identify the required information, or reach a firm conclusion as to its non-existence, on February 10, 2010, but it is also possible that it could take a week or longer.

(d) The Postal Service will commit to completing its answer by March 9, 2010.

GFL/USPS-156

See the comment introducing discussion of GFL/USPS-129 and 155, supra, as both sets of comments apply here, as well. The Postal Service expects that the ultimate response to this question will not provide much new substance. But the Postal Service must also get agreement to that effect from all functional areas since, discussion regarding round trip DVD mailers continues, notwithstanding the instant docket.

- (a) Postal Service attorneys have contacted Postal Service employees involved with round-trip disk mail.
- (b) To complete this interrogatory, the Postal Service must collect additional information related to round-trip disk mail.
- (c) It is possible that the Postal Service could identify the required information on February 10, 2010, but it is also possible that it could take a week or longer to identify the information.
- (d) The Postal Service will commit to completing its answer by March 9, 2010.

The volume, breadth and detail of GameFly's discovery requests, and the cross-functional coordination and consultation required to create and review answers amidst the press of other business, provide a reasonable justification for the Postal Service's delay in completing its responses to the over seven hundred discovery requests filed by GameFly. Especially for the latest discovery responses, complication also flows from volatility within the Postal Service's staffing of respective functional areas. The progress achieved by the Postal Service demonstrates that the Postal Service and GameFly have worked together successfully to resolve discovery issues without the Commission's involvement. This should allow the Commission to allocate its resources to other important and pressing matters.

V. CONCLUSION

Given the Postal Service's progress in responding to GameFly's discovery requests, the Postal Service respectfully requests that the Commission deny GameFly's Motion and allow the Postal Service and GameFly to resolve discovery issues without the involvement of the Commission.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing and Product
Support

Kenneth N. Hollies
James M. Mecone

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-8917; Fax -6187
February 8, 2010

**APPENDIX UPDATE: STATUS OF THE POSTAL SERVICE RESPONSES TO
DISCOVERY REQUESTS GAMEFLY CONTENDS ARE PENDING**

Discovery Request Number	Postal Service Progress 12/22/2009	Postal Service Progress 2/8/2010
3(e)	The Postal Service filed its response on December 22, 2009.	N/A
11		The Postal Service filed its response on January 29, 2010.
16(e)	GameFly contends that in POR C2009-1/5 the Presiding Officer ordered the Postal Service to respond to GFL/USPS-16(e). But, POR C2009-1/5 does not address GFL/USPS-16(e) or rule on the Postal Service's August 10, 2009 objection to GFL/USPS-16(e) based on relevance and undue burden. Moreover, GameFly did not move to compel a response to GFL/USPS-16(e). Accordingly, the Postal Service's objection to GFL/USPS-16(e) stands, and no further response to GFL/USPS-16(e) is required.	N/A
16(g)	The Postal Service filed its response on December 22, 2009.	N/A
21	The Postal Service filed its response on October 22, 2009, in compliance with POR C2009-1/5, showing that Blockbuster and GameFly return mailpieces are handled overwhelmingly in, respectively, the letters and flats mailstreams.	N/A
28	No response required. Presiding Officer's Ruling No. C2009-1/5 directs the Postal Service to respond to this Request only if it	N/A

**APPENDIX UPDATE: STATUS OF THE POSTAL SERVICE RESPONSES TO
DISCOVERY REQUESTS GAMEFLY CONTENTS ARE PENDING**

Discovery Request Number	Postal Service Progress 12/22/2009	Postal Service Progress 2/8/2010
	contests whether “some facilities ... have [dedicated] mail slots,” which it does not, despite their existence being contrary to policy.	
31	No response required – same as GFL/USPS-28.	N/A
84	No response required. The Postal Service chooses not rebut the presumptions described in Presiding Officer’s Ruling No. C2009-1/10.	N/A
85	No response is required. The Postal Service chooses not rebut the presumptions described in Presiding Officer’s Ruling No. C2009-1/10.	N/A
99-100, 117, 129	Interrogatories GFL/USPS-99-100 follow upon the response to GFL/USPS-8, about the Business Mail Acceptance assignment of an individual to Netflix. GFL/USPS-117 [REDACTED] GFL/USPS-129 [REDACTED]	The Postal Service filed its response to 99-100 and 129(a)-(b) on February 8, 2010. Responses to the remaining parts are expected to be negative, but some final checking is being undertaken.
122(i)-(j)	[REDACTED]	The Postal Service filed its response on February 2, 2010.
148-49, 155-56	Interrogatories GFL/USPS-148 and -149 inquire about Bates document GFL 0001158, handwritten notes reflecting discussion dated September 29, 2003, while GFL/USPS-155 and -156 focus on an agenda from March 14, and another from September 12, both in 2005. These interrogatories ask	The Postal Service filed its response to 148-149 on February 5, 2010.

**APPENDIX UPDATE: STATUS OF THE POSTAL SERVICE RESPONSES TO
DISCOVERY REQUESTS GAMEFLY CONTENTS ARE PENDING**

Discovery Request Number	Postal Service Progress 12/22/2009	Postal Service Progress 2/8/2010
	relatively straightforward questions. The Postal Service expects that answers will be available shortly.	
221-24	These responses are currently being reviewed.	The Postal Service filed its response on January 15, 2010.