

PRESIDING OFFICER'S
RULING NO. C2009-1/22

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
MODIFYING PROCEDURAL SCHEDULE

(Issued June 9, 2010)

On June 3, 2010, the United States Postal Service (Postal Service) filed a motion requesting rescheduling of the hearing on the direct case of Gamefly, Inc. (GameFly) previously scheduled to begin on Thursday, June 17, 2010.¹ On June 8, 2010, GameFly filed an answer opposing the Postal Service Motion.² For the reasons that follow, the hearing date for GameFly's direct case is changed to Wednesday, June 16, 2010, at 2:30 p.m. in the Commission's hearing room.

Background. The June 17, 2010 hearing date for GameFly's direct case was established by my May 7, 2010 ruling.³ That ruling was issued following a scheduling conference held two days earlier on May 5, 2010. At the scheduling conference, I and other Commissioners advised the parties of the need to avoid further unnecessary delays and to proceed to decision with reasonable diligence and dispatch. Tr. 2/18-20 and 54-55.

¹ Motion of the United States Postal Service to Modify Schedule, June 3, 2010 (Motion).

² Answer of GameFly Inc. to Motion of USPS to Postpone Hearing, June 8, 2010 (Answer).

³ Presiding Officer's Ruling Establishing Procedural Schedule, May 7, 2010 (P.O. Ruling C2009-1/20).

The requested schedule modification. The Postal Service asserts three grounds for modifying the June 17, 2010 hearing date: the pendency of outstanding discovery requests; the alleged need to cross-examine an unidentified GameFly institutional witness; and certain Postal Service staffing conflicts. The Postal Service requests that the hearing on GameFly's direct case, including cross-examination on GameFly's institutional discovery responses, be rescheduled for the week of June 28, 2010. Motion at 4. Alternatively, the Postal Service suggests that the hearing on GameFly's direct case be rescheduled for June 14, 15, or 16, 2010. *Id.* at 4-5. Should this latter alternative be accepted, the Postal Service notes the likelihood that it will move for an additional future hearing date in order to deal with an institutional GameFly witness. In that latter connection, the Postal Service states that it will be difficult for it to determine the need for cross-examination of an institutional GameFly witness if the hearing on GameFly's direct case is held on June 17, 2010, as currently scheduled, or earlier as proposed by the Postal Service as an alternative scheduling date. *Id.* at 5.

In its Answer, GameFly opposes the Postal Service's request to have the hearing rescheduled for the week of June 28, 2010. GameFly does, however, state its willingness to move up the date for the hearing on its direct case to June 15 or 16, 2010. Answer at 3.

Discussion. GameFly's complaint was filed in this docket a little more than one year ago.⁴ This case must move forward. Whether or not it prevails, GameFly is entitled to a decision on its claims. The Commission is committed to a prompt resolution of the issues presented by the parties without undue delay. At the same time, the Commission recognizes its obligation to ensure that the Postal Service is given a fair opportunity to defend against GameFly's allegations. With those considerations in

⁴ Complaint of GameFly, Inc., April 23, 2009 (Complaint).

mind, I turn to a discussion of the grounds offered by the Postal Service for modifying the hearing date for GameFly's direct case.

The first ground offered by the Postal Service is that its discovery requests, a number of which have been objected to by GameFly, are still outstanding. Motion at 1. GameFly addresses the current status of discovery, in part, by arguing that any time crunch is the Postal Service's own creation. Answer at 7.

The adequacy of this ground as a justification for modification of the hearing date must begin with consideration of the current status of the Postal Service's discovery efforts. By the time the Postal Service filed its Motion on June 3, 2010, the Postal Service had filed a motion to compel responses to certain of its first two discovery requests and GameFly had filed an answer in opposition.⁵ My ruling on the Postal Service's Motion will be issued by tomorrow. In that ruling, I will establish the date by which GameFly must produce any additional responses to the Postal Service's discovery requests.

The only other Postal Service discovery requests outstanding at this time are the Postal Service's May 26, 2010 discovery requests⁶ and its May 26, 2010 request for admissions.⁷ Objections by GameFly to those requests were due by June 7, 2010. See 18 CFR 3001.26(c) and 3001.28(c). No objections were filed. Accordingly, answers to the Postal Service's Third Discovery Requests and Second Request for Admissions are due by June 9, 2010. See 18 CFR 3001.26(b) and 3001.28(b).

⁵ See Motion of the United States Postal Service to Compel Responses to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, and 60, May 28, 2010 (Motion to Compel); see also Answer of GameFly Inc. to Motion of USPS to Compel Answers to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54, and 60, June 3, 2010 (Answer to Motion to Compel). The Postal Service's Motion to reschedule the June 17, 2010 hearing was filed approximately one hour after GameFly filed its Answer to the Motion to Compel.

⁶ Third Discovery Requests of the United States Postal Service to GameFly, Inc. (USPS/GFL-63 through-83), May 26, 2010 (Third Discovery Requests).

⁷ Second Request for Admissions of the United States Postal Service to GameFly, Inc., May 26, 2010 (Second Request for Admissions).

These events are consistent with the schedule established by P.O. Ruling C2009-1/20. I am not persuaded that this requires a modification of the June 17, 2010 hearing date to the week of June 28, 2010 in order to permit preparation for cross-examination of GameFly's direct case.⁸

The second ground offered by the Postal Service for modifying the hearing date is the possibility that the Postal Service may need to identify and cross-examine a so-called institutional witness. Motion at 4. To date, the Postal Service has not identified a specific need for an institutional witness. Unless and until it identifies such a witness, there appears to be no way to know whether a rescheduling of the June 17, 2010 hearing would serve a useful or necessary purpose with respect to this possibility.⁹ This ground, too, is an inadequate basis for modifying the current hearing schedule to the week of June 28, 2010.

Finally, the Postal Service indicates that it has encountered scheduling conflicts that make rescheduling of the June 17, 2010 hearing necessary. The first such scheduling conflict involves the pending wedding of lead counsel during the weeks of June 14 and 21, 2010. While this conflict is real, there is no indication that lead counsel's wedding plans were not known as of May 5, 2010, the date of the last scheduling conference. Nor is any reason given for not identifying these plans as a

⁸ The Postal Service states that even if it has a week to review and analyze a substantial number of GameFly discovery responses, it may have a need to ask follow-up discovery. Motion at 3. The Presiding Officer would note that some of the outstanding Postal Service discovery requests to be answered by June 9, 2010 are themselves follow-up requests. See, e.g., USPS/GFL-47. There is no reason why the *possibility* of follow-up requests would justify a change in the June 17, 2010 hearing date. Nor will the current ruling preclude the Postal Service from obtaining further information needed to prepare its direct case, which is currently due to be filed by July 7, 2010. See P.O. Ruling C2009-1/20, Attachment.

⁹ GameFly devotes a considerable portion of its Answer to an attack on the Postal Service's suggestion that it may seek to have an institutional GameFly witness produced for cross-examination. Answer at 4-20. Unless and until the Postal Service formally requests the appearance of a specific GameFly institutional witness, arguments over whether such a witness is needed are premature.

factor that should have been considered in establishing the hearing date or any of the other procedural dates that were being discussed at the scheduling conference.¹⁰

With respect to the Postal Service's co-counsel, it is alleged that his responsibilities in Docket No. N2010-1 and in a Federal court proceeding currently pending in California "will conflict with the current hearing date." Motion at 1, n.1. Once again, no mention was made at the May 5, 2010 scheduling conference of the possibility that co-counsel's responsibilities in these other cases might coincide with the known schedule limitations of lead counsel to make the weeks of June 14 and 21, 2010 problematic for participation in the GameFly complaint proceeding.

Given the fact that this proceeding has been pending for over one year and in the absence of a more detailed explanation of the nature of the alleged scheduling conflicts of co-counsel and the reasons why those conflicts will prevent the Postal Service from being effectively represented in this proceeding, GameFly should not be penalized for what appears to be the failure of the Postal Service to bring these scheduling matters to the attention of the Presiding Officer and the participants in a more timely manner. This ground, too, fails to justify a delay of the hearing on GameFly's direct case to the week of June 28, 2010.

While a delay of the hearing on GameFly's direct case to the week of June 28, 2010 has not been justified, a change of the hearing date from June 17, 2010 to June 16, 2010 is acceptable. This alternative was proposed by the Postal Service and is not opposed by GameFly. Motion at 4-5 and Answer at 3. Accordingly, this change is approved.

¹⁰ Nor, for that matter, was conflict between counsel's wedding plans and the hearing date brought to the Presiding Officer's attention when P.O. Ruling C2009-1/20 was issued two days later on May 7, 2010. It was not until one month later when the Postal Service filed its Motion that the conflict was disclosed.

RULING

1. The Motion of the Postal Service to reschedule the hearing on GameFly's direct case to the week of June 28, 2010, is denied.
2. The alternative request of the Postal Service to reschedule the hearing on GameFly's direct case on June 16, 2010, is granted. The hearing shall commence at 2:30 p.m. in the Commission's hearing room.

Dan G. Blair
Presiding Officer