Postal Regulatory Commission
Submitted 6/23/2010 4:24:28 PM
Filing ID: 68583
Accepted 6/23/2010

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

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

ANSWER OF GAMEFLY INC. TO
MOTION OF THE USPS FOR ANOTHER OPPORTUNITY
TO CROSS-EXAMINE AN INSTITUTIONAL GAMEFLY WITNESS
(June 23, 2010)

GameFly, Inc., ("GameFly") respectfully responds to the June 16 motion of the Postal Service for another opportunity to cross-examine GameFly about its direct case.[1] The June 16 motion is the second Postal Service attempt in two weeks to delay these proceedings so that the Postal Service may question GameFly about (1) documents produced by the Postal Service itself and (2) facts that are legally irrelevant, already admitted by GameFly, or beyond GameFly's knowledge.[2] The current motion is as devoid of merit as its predecessor.

The June 16 motion seeks to cross-examine an "institutional" GameFly witness about two different kinds of facts:

(1) Information about the *Postal Service's* own conduct set forth in the binder of documents produced by the Postal Service in discovery and entered into evidence by GameFly during the June 16 hearing.

[1] Motion of the United States Postal Service To Compel GameFly To Designate A Witness To Sponsor Interrogatory Answers And Interpretations Of Postal Service Documents (filed June 16, 2010).

[2] *Compare* Motion of the USPS to Modify Schedule (June 3, 2010); Answer of GameFly Inc. to Motion of USPS To Postpone Hearing (June 8, 2010).

(2) Facts that the Postal Service seeks to establish about *GameFly's* operations and business, apparently to support a claim that GameFly and Netflix are not similarly situated, or that the Postal Service's discrimination between these two customers has a rational basis.

Neither subject entitles the Postal Service to another opportunity for cross-examination. We discuss each in turn.

I. GAMEFLY HAS NO DUTY TO PRODUCE A WITNESS TO SPONSOR THE DOCUMENTARY EVIDENCE OF DISCRIMINATION THAT GAMEFLY OBTAINED IN DISCOVERY FROM THE POSTAL SERVICE ITSELF.

The Postal Service contends that the "due process rights" codified in Rule 3001.30(e)(3) entitle the Postal Service to cross-examine an institutional GameFly witness about (1) the "internal Postal Service communications" produced by the Postal Service in discovery and introduced into evidence by GameFly at the June 16 hearing, and (2) GameFly's April 12 Memorandum interpreting those documents. USPS June 16 Motion at 1-2, 7-12. This request is untimely, and would be unfounded even if timely.

A. The Postal Service's Request Is Untimely.

The Postal Service's request for a GameFly witness to stand cross-examination on the Postal Service's documents is untimely. GameFly made clear in the very first paragraph of its April 12 Memorandum that it intended to

rely on both Mr. Glick's testimony and the Postal Service documents cited in the Memorandum:

> GameFly's case-in-chief consists of (1) a cost study by Sander Glick (GFL-T-1) and (2) stipulations, interrogatory answers, and business records produced by the Postal Service in discovery. This memorandum provides a road map to the latter documents and the legal claims that they support.

Memorandum at 1 ¶ 1. The Postal Service, however, waited more than two months—until the very day of the hearing on GameFly's direct case—to request a GameFly witness to sponsor these Postal Service documents. Even now, the Postal Service has still not specified the particular documents or document-related issues that the Postal Service seeks to cover during cross-examination. Given the clear and repeated warnings from the Commission about the need for expedition, the Postal Service's failure to move until now for a GameFly institutional witness to sponsor the Postal Service documents should be regarded as a waiver. *See* Rule 3001.1 (requiring that the Commission's rules be construed "to secure just and speedy determination of issues"); Rule 3001.30(f) (requiring that the "taking of evidence shall proceed with all reasonable diligence and dispatch)."[3]

B. The Postal Service Has No Right To Cross-Examine GameFly About Documents Produced By The Postal Service Itself.

Even if the Postal Service's request for a GameFly witness to sponsor the Postal Service's discovery responses were timely, the request is utterly

[3] We respond separately in Section II.A, *infra*, to the Postal Service's excuses for waiting until June 16 to seek cross-examination of an institutional GameFly witness concerning GameFly's operations and preferences.

unsupported by Rule 3001.30. The right to cross-examination under Rule 3001.30 is limited to adverse *testimony* or *opinion evidence*. Rule 3001.30(e) gives the Postal Service no right to cross-examine GameFly about *documentary evidence* that GameFly has obtained in discovery *from the Postal Service itself*. Rule 3001.30(e)(1), which the Postal Service fails to mention, states that the right of cross-examination "is limited to *testimony* adverse to the participant conducting the cross-examination." 39 C.F.R. § 3001.30(e)(1) (emphasis added). Similarly, the first sentence of Rule 3001.30(e)(3) (which the Postal Service has selectively paraphrased) indicates that cross-examination is for *opinion* evidence:

> Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions *or other opinion evidence*.

39 U.S.C. § 3001.30(e)(3) (emphasis added).

The documents produced by the Postal Service in discovery and introduced into evidence during the June 16 hearing are not the testimony or opinion evidence of a GameFly witness or declarant. They are *documentary evidence* consisting of communications, studies and business records. Moreover, the documents were created or received in the ordinary course of business *by the Postal Service itself*.

A moment's thought should make clear why a party's right to cross-examination under Rule 3001.30 does not extend to documentary evidence produced by the same party. *First*, cross-examination is unnecessary to verify the authenticity of the documents. Since the Postal Service has the originals of

the documents, it can readily verify without cross-examination that the documents submitted by GameFly are true and accurate copies of the originals.

Second, because the documents constitute admissions by employees and other agents of the Postal Service, or business records collected in the ordinary course of business by the Postal Service or another party, they have an independent credibility not found in opinion testimony created solely for litigation. *See* Fed. R. Evid. 801(d)(2)(D) ("a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay if offered against the party); Fed R. Evid. 803(6); Fed. R. Evid. 803(8); *United States v. Lavalley*, 957 F.2d 1309, 1314 (6th Cir. 1992) (letters from commander of military base were admissible as business records); *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990) (police personnel files were admissible as business records).

Third, if the Postal Service wishes to challenge GameFly's *interpretation* of the documents, the Postal Service is free to do so through its own testimony, pleadings or briefs—as the Postal Service has done on pages 9-12 of its June 16 Motion. GameFly's interpretations of the documents in its April 12 Memorandum (and its post-trial briefs later this year) constitute argument, not evidence. Due process most definitely does not entitle the Postal Service to an "opportunity to cross-examine a GameFly witness" regarding its legal memoranda, briefs, or arguments. *Cf*. Motion at 12. The opportunity to file responsive pleadings and briefs is all that due process requires.

Fourth, it is unreasonable to require GameFly to sponsor documents that it neither created nor contemporaneously received. GameFly witnesses would have no personal knowledge to add to about the documents beyond the words found within the documents themselves. This is hardly surprising: parties that secretly enter into discriminatory arrangements generally do not share their communications with those outside the favored circle. A Commission evidentiary rule that forbade the introduction of documentary evidence unless the proponent of the evidence could offer a sponsoring witness who personally witnessed the creation of the documents would effectively place documentary evidence of secret discrimination beyond regulatory scrutiny.[4]

For reasons of this kind, even the federal courts, which enforce the hearsay rule more strictly than do expert administrative bodies such as the Commission, admit documents like those at issue here without a sponsoring witness under the exceptions to the hearsay rule for party admissions,[5] business

[4] Alternatively, if GameFly were required to satisfy a "sponsoring witness" requirement through the individuals who were personally involved in the creation of the documents, the number of Postal Service employees whom GameFly would need to subpoena to testify would be large. The pseudonym list created by GameFly in response to Presiding Officer's Ruling No. C2009-1/17 at 28 ¶ 4 alone identifies 218 Postal Service employees whose names appear on the documents covered by that ruling. While the same documents typically bear the names of multiple Postal Service senders and recipients, the number of individual Postal Service employees needed to cover all the documents clearly runs into the dozens. Requiring these Postal Service executives, employees and consultants to appear on the witness stand to authenticate the documents could require weeks of hearing time. This would be a time-consuming distraction for the Postal Service, a needless imposition on the Commission, and, for all but the biggest mailers, an insuperable cost barrier to the use of the Commission's complaint remedies.

[5] A party's own out-of-court statements and statements that are attributable to a party are not hearsay when they are offered against that party." Fed. R. Evid.

records,[6] and public records and reports[7] (among other exceptions).[8] *A fortiori*, documentary evidence of this kind should be admissible in this administrative proceeding.

Indeed, the Postal Service itself has relied without a sponsoring witness on documentary evidence discovered from adverse parties in similar circumstances. Indeed, the Postal Service has done so in this very case. Except for a limited class of GameFly discovery responses that the Postal Service has chosen to withdraw from designation, the Postal Service has announced its intention to move into the record in the next few weeks the narrative responses, documentary appendices, and library references produced by GameFly in response to virtually every one of the Postal Service's discovery requests. USPS Designation of Written Cross-Examination (June 10, 2010); USPS Supplemental Designation of Written Cross-Examination (June 16, 2010); Tr. 3/66-69 (June 16, 2010 hearing). This mass of material includes hundreds of megabytes, and

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801(d)(2). Party admissions are admissible as substantive evidence of the fact stated. *See*, *e.g*., *Barnes v. Owens-Corning Fiberglas Corp*., 201 F.3d 815, 829 (6th Cir. 2000); *United States v. Jenkins*, 928 F.2d 1175, 1180 (D.C. Cir. 1991). Statements by a party's agent or employee are treated as party admissions if they were made during the agency or employment and they relate to a matter within the scope of the agency or employment. Fed. R. Evid. 801(d)(2)(D).

[6] *See, e.g., United States v. Lavalley*, 957 F.2d 1309, 1314 (6th Cir. 1992) (letters from commander of military base were admissible as business records); *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990) (police personnel files were admissible as business records).

[7] *See* Fed. R. Evid. 803(8).

[8] The Postal Service's suggestion that GameFly's April 12 Memorandum summarizing the documents was "unusual" or somehow illegitimate (USPS Motion at 1-2) is also unfounded. The document is a "trial brief" or "legal memorandum" within the meaning of Rule 3001.30(e)(1). Legal memoranda "on matters at issue" are "welcome at any stage in the proceeding." *Id*.

thousands of pages, of GameFly documents and communications. The Postal Service presumably entered the material to enable its use against GameFly. Yet the Postal Service offered no sponsoring witness for any of the material.

C. The Postal Service Has No Right To Cross-Examine GameFly About Its April 12 Memorandum Or Other Legal Pleadings And Briefs.

The Postal Service's claim that it is entitled to cross-examine GameFly about its April 12 Memorandum summarizing the documents at issue (USPS June 16 Motion at 7-12) is equally wide of the mark. GameFly did not offer the April 12 Memorandum into evidence during the June 16 hearing, and has no intention of doing so in the future. Nor does GameFly intend to offer a sponsoring witness for its post-trial briefs, which GameFly will similarly interpret the Postal Service's documents. As noted above, Rule 3001.30 reserves cross-examination for testimony or opinion evidence. GameFly's April 12 Memorandum and post-hearing briefs are not evidence at all, but *argument*.

The Postal Service is certainly free to argue that GameFly has mischaracterized Postal Service documents or that GameFly's claims, even if accepted as true, fail to state a cause of action under 39 U.S.C. § 403(c). Indeed, the Postal Service has made both kinds of arguments its June 16 Motion. *See* Motion at 2, 7-12. But the parties' competing arguments about the evidence are not themselves evidence, and are not subject to cross-examination.

II. THE POSTAL SERVICE HAS NO RIGHT TO HAVE A GAMEFLY WITNESS APPEAR FOR CROSS-EXAMINATION AGAIN ON THE AFFIRMATIVE DEFENSES THAT THE POSTAL SERVICE SEEKS TO RAISE.

The Postal Service also seeks to have a GameFly witness to cross-examine about certain facts about GameFly that the Postal Service apparently wishes to develop as affirmative defenses: (1) how the theft of GameFly DVDs by Postal Service employees affected the design of GameFly DVD mailers (Motion at 4-5); (2) how GameFly "enters and takes delivery of mail," what GameFly pays to transport its DVDs to and from the Postal Service, and what GameFly would pay if it (hypothetically) entered and received DVDs at 60 or 120 entry points (*id.* at 5-6); and (3) how the "composition and prices of [GameFly's] game DVDs compare with video DVDs" (*id*. at 6-7). The Postal Service argues that cross-examination of a live GameFly witness on these issues is particularly important because GameFly failed to adopt a document retention policy preserving all of its internal documents on these issues. *Id*. at 3-4.

This argument has two major flaws. First, the Postal Service already had a GameFly witness to cross-examine about these issues at the June 16 hearing: Mr. Glick. The Postal Service gave notice that it wishes to question Mr. Glick as an institutional fact witness, not just the sponsor of GFL-T-1; GameFly did not object to this expanded scope of questioning; and Mr. Glick was prepared for questioning along these lines. Except for a handful of questions on two of these issues, the Postal Service did not even bother to ask.

Second, the facts that the Postal Service seeks to establish through a make-up cross-examination session are irrelevant, immaterial, unduly repetitious—or already have been conceded by GameFly.

A. GameFly Produced An Institutional Fact Witness At The June 16 Hearing, And Should Not Be Required To Do So A Second Time.

An immediate and complete answer to the Postal Service's demand for an institutional witness on the Postal Service's affirmative defenses is that GameFly produced such a witness—Sander Glick—but the Postal Service made virtually no attempt to cross-examine him on these issues. Even if the Postal Service were entitled to an institutional GameFly witness to cross-examine on these issues—and the Postal Service was not—it is certainly not entitled to ignore the witness provided and then demand another.

The Postal Service's June 10 Notice of Intent to Conduct Oral Cross-Examination and Designation of Written Cross-Examination ranged far beyond the subjects covered in Mr. Glick's prepared testimony. In addition to "the contentions set forth in Mr. Glick's testimony," the Postal Service reserved the right to cross-examine him on the "Complaint," the rest of GameFly's "direct case against the Postal Service," and "GameFly's answers to Postal Service discovery that have been filed prior to the hearing" (which raised all of the issues that the Postal Service now says require a GameFly institutional witness). USPS Notice of Intent to Conduct Oral Cross-Examination at 1-2.

GameFly did not object to the scope of this cross-examination notice, which effectively transformed Mr. Glick into an institutional fact witness as well as the sponsor of his prefiled testimony. Mr. Glick had participated in many of the meetings with the Postal Service between 2007 and 2009 concerning GameFly's search for a cost-effective means of reducing its DVD breakage, had seen much of the email traffic between the Postal Service and GameFly concerning the same issues, had reviewed GameFly's discovery responses, and had repeatedly discussed with senior GameFly management the operational issues that the Postal Service now contends justify cross-examination of an "institutional" GameFly witness. Mr. Glick had also received and read the Postal Service's June 3 Motion to Modify Schedule, in which the Postal Service also asserted the need to cross-examine GameFly about the putative affirmative defenses discussed here. During the two weeks before the June 16 hearing, Mr. Glick spent much of his time preparing to answer questions relating to these defenses.

During actual cross-examination on June 16, however, the Postal Service almost completely ignored these topics. Postal Service counsel asked Mr. Glick a handful of questions about the reasons for GameFly's decision to mail its DVDs as flats rather than letters (Tr. 3/107-108), the Postal Service's failure to offer GameFly a commitment to provide manual processing at automation letter rates on the same terms offered to Netflix (Sealed Tr. 4/653-655), and the roles of DVD breakage and theft in determining GameFly's choice of a rate category for its DVD mailers (Sealed Tr. 4/655-657). After Mr. Glick answered the first few questions in each line of questioning, however, the Postal Service abandoned that line and moved on to other subjects. And the Postal Service asked Mr. Glick

no questions at all about the remaining subjects that the Postal Service now says demand an institutional GameFly witness: how GameFly "enters and takes delivery of mail," what GameFly pays to transport its DVDs to and from the Postal Service, what GameFly would pay if it (hypothetically) entered and received DVDs at 60 or 120 entry points, and how the "composition and prices of [GameFly's] game DVDs compare with video DVDs."

Rule 3001.30(f) directs that the taking of evidence "shall proceed with all reasonable diligence and dispatch," and authorizes the Commission and the presiding officer to limit cross-examination to "avoid . . . unduly repetitious testimony." The Postal Service, having failed to exercise further its opportunity to cross-examine the institutional witness that GameFly tendered, should not be allowed to subject GameFly to further delay and expense by reopening the hearings for a makeup session.[9]

B. The Issues That The Postal Service Would Like A Second Chance To Cross-Examine GameFly About Are Irrelevant, Immaterial And Unduly Repetitious.

Further cross-examination of a GameFly witness would be unwarranted even if (contrary to fact) the Postal Service had not already been given an opportunity to cross-examine an institutional GameFly witness about GameFly-related matters identified in the June 16 motion. Rule 3001.30(f)(3)—which the

[9] The Postal Service gains nothing from the fact that GameFly's "most recent" discovery responses were not filed until June 9 (Motion at 12). A full week elapsed between June 9 and the June 16 hearing. That the interval was not longer was a foreseeable consequence of the Postal Service's failure to initiate discovery until three weeks after April 12, the date on which GameFly filed its direct case.

Postal Service neglects to mention—authorizes "the Commission or the presiding officer [to] limit appropriately . . . the cross-examination of a witness to that required for a full and true disclosure of the facts necessary for the disposition of the proceeding and to avoid irrelevant, immaterial, or unduly repetitious testimony." 39 U.S.C. § 3001.30(f)(3) (emphasis added). The issues that the Postal Service invokes as potential grounds for further questioning of an institutional GameFly witness are "irrelevant, immaterial," and "[un]necessary for the disposition of this proceeding" under this rule. First, many of the propositions that the Postal Service says it wants to establish through cross-examination have already been conceded by GameFly. Second (and more important), none of the propositions disputed by GameFly involves a material issue of fact, because none would amount to a valid defense to GameFly's discrimination claim *even if true*.

1. The legal elements of a discrimination case

As GameFly has explained in three separate pleadings since April, the basic elements of and defenses to a discrimination claim under Section 403(c)(3) are well established.[10] While the Postal Service has studiously ignored these legal standards, they set limits on what facts are relevant.

Functional equivalence between two mailers. First, the complainant must establish that the service used by the complainant is "like"—*i.e*., "similarly

[10] GameFly Memorandum (April 12, 2010) at 47-52, 48-49, 63-66; GameFly Answer to USPS Motion to Compel (June 3, 2010) at 2-10; GameFly Answer to USPS Motion to Postpone Hearing (June 8, 2010) at 8-17.

situated" or "functionally equivalent" to—the service used by other ratepayer(s). *Experimental Rate and Service Changes to Implement Negotiated Service Agreement With Capital One*, MC2002-2 PRC Op. & Rec. Decis. (May 15, 2003) ("*Capital One NSA*") ¶¶ 7011-7023; Docket No. MC79-3, *Red Tag Proceeding, 1979*, PRC Op. & Rec. Decis. (May 16, 1980) at 11-12, 19; *see also MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at P 169 (2007); *Transwestern Pipeline Co.*, 36 FERC ¶ 61,175 at 61,433 (1986); *see also Sea-Land Service, Inc.. v. I.C.C.*, 738 F.2d 1311, 1317 (D.C. Cir. 1984).

Contrary to the Postal Service's suggestion, functional equivalence does not require that the operational circumstances of two similarly situated mailers be "the same" or identical. *Compare* Motion at 5-6 with *Capital One NSA* at ¶ 7015. "Minor," "incidental" or "immaterial" differences between two customers' mail do not make them unlike. *Capital One NSA* at ¶¶ 7015-7021; *MCI*, 917 F.2d at 39. Thus, for example, it is immaterial to the question of functional equivalence or substantial similarity whether two ratepayers are the same size, generate the same amount of mail, impose the identical operating requirements on the Postal Service, cost the Postal Service the same to serve, or have the same competitive options. *Capital One NSA* at ¶¶ 7020-7021, 7023.

The record contains ample evidence which, if credited by the Commission, establishes that the mail service used by GameFly is indisputably "like," "functionally equivalent to" and "similarly situated to" the mail service used by Netflix notwithstanding any differences in the value of the DVDs or the average

length of haul between distribution center and subscriber. Both companies use First-Class Mail to ship DVDs in mailers to and from subscribers. Both companies' DVDs are small and light enough to be mailed in lightweight mailers as one-ounce letters if the Postal Service processes the pieces in a non-destructive fashion (i.e., either manually or with automated flats processing). And both companies' DVDs suffer from unacceptably high breakage rates if subjected to automated letter processing when mailed back from subscribers. GameFly Memorandum (April 12, 2010) at 8-13 (citing representative documents produced by USPS in discovery).

Disparity in rates or terms of service offered to two functionally equivalent mailers. Second, the complainant must show that the Postal Service is *discriminating* against the complainant by offering a lower price or better terms and conditions of service to a similarly situated ratepayer, but not to the complainant. *See*, *e.g.*, Docket No. MC79-3, *Red Tag Proceeding, 1979*, PRC Op. & Rec. Decis. (May 16, 1980) at 11; *American Trucking Associations v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 367, 406 (1967); *Davis v. Cornwall*, 264 U.S. 560 (1924); *Chicago & A.R.R. v. Kirby*, 225 U.S. 155 (1912); *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*, 383 F.2d. 466, 475 (5th Cir. 1967); *MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990). The record also contains substantial evidence which, if credited by the Commission, satisfies these elements. *See*, *e.g.*, Sealed Tr. 4/653-655 (Glick); Joint Statement at ¶ 79 ("Postal Service processing operations in the field often manually cull Netflix return DVD mailers from the automated letters mailstream for manual processing."); Answers of USPS to GFL/USPS-18, 63.

Affirmative defenses. Proof of the above two elements establishes a prima facie case of discrimination, and shifts to the Postal Service the burden of showing that the discrimination is reasonable. It is here that differences between two similarly situated mailers may play a role. Appropriate proof that the discrimination is rationally related to differences in the Postal Service's costs of service or (in some circumstances) the mailers' elasticities of demand can support a finding that the discrimination is reasonable and lawful. *See*, *e.g.*, *MCI* at 39.

A threshold prerequisite for such a defense, however, is publication of the eligibility conditions for the preferred rate or service in a tariff-like publication such as the Mail Classification Schedule. Publication is a basic requirement of common carrier regulation and a fundamental protection against discrimination. Every regulatory agency with jurisdiction over common carriers, including this Commission, has held this filing requirement to be a necessary condition of the lawfulness of any rate charged or service provided by a common carrier.[11] The

[11] *See Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan*, Opinion and Recommended Decision, Docket No. MC2005-3 at 38-39 (May 10, 2006) (specifically pointing to the public availability of the terms and conditions of the NSA and the ability of other mailers to obtain service on substantially the same conditions as support for holding the NSA nondiscriminatory); Docket No. RM2003-5, *Rules Applicable to Baseline And Functionally Equivalent Negotiated Service Agreements*, Order No. 1391 at 23 (Feb. 11, 2004) ("Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings . . . . The Commission will adhere to its preference, and presumption, that the contents of the actual contract shall be made publicly available."); *UPS Worldwide Forwarding v. United States Postal Service*, 66 F.3d 621, 635 (3d Cir. 1995) ("The regulation promulgating the ICM program requires the Postal Service to 'make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions. . . . To facilitate that process, the regulation mandates that the Postal Service *publish detailed information* about each ICM

Postal Service's claim that the filed rate doctrine is limited to formal contract rates (Motion at 14) is completely unfounded: the filed rate doctrine reflects a broad public policy against secret preferences that dates back to the origin of the Interstate Commerce Act. *See*, *e.g.*, *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-224 (1998) (citing precedent supporting "filed rate doctrine"); *American Trucking Associations v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 367, 406 (1967) ("secret rebates, special rates to favored shippers, and discriminations . . . led to enactment of the Interstate Commerce Act in 1887"); *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U.S. 94, 97 (1915) ("Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext."); *American Warehousemen's Ass'n v. Ill. Cent. R. Co.*, 7 I.C.C. 556, 590, 591 (1898); David Boies and Paul R. Verkuil, *Public Control of Business* 15-24, 254-56 (1977); Solon J. Buck, *The Granger Movement* 11-14, 34 (1913).

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agreement. . . . We believe the publication of this information will permit competitors and mailers alike to verify that the Postal Service is complying with its mandate not to grant 'undue or unreasonable' discrimination or preferences") (emphasis added); *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-224 (1998) (citing precedent supporting "filed rate doctrine"); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317-1318 & n.12 (D.C. Cir. 1984) (quoting *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 196-97 (1913)) ("The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged."); *American Warehousemen's Ass'n v. Ill. Cent. R. Co.*, 7 I.C.C. 556, 590, 591 (1898); *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004) ("[Federal Energy Regulatory] 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.).

Application of these legal standards to the factual issues for which the Postal Service seeks further cross-examination makes clear that none of the issues are legally material, and none warrant further cross-examination. We discuss each in turn.

2. How GameFly Has Responded To The Theft Of Its DVDs by Postal Service Employees

GameFly's "business decisions" taken in response to the theft and loss of GameFly DVDs by Postal Service employees (Motion at 4-5) do not create material issues of disputed fact. The Postal Service has conceded, as it must, that a nontrivial number of GameFly DVDs are stolen or lost in transit by Postal Service employees. *See* Joint Statement of Undisputed and Disputed Facts (July 20, 2009) at 11 ¶¶56-59 (establishing that "GameFly DVD mailers have experienced loss in transit," that Postal Service and Office of Inspector General "investigations have led to the arrest of a number of Postal Service employees and contractors for alleged theft of GameFly DVDs," and that "enforcement initiatives have reduced, but not eliminated, losses from theft"). And GameFly has stipulated that this theft was the reason that GameFly changed the primary color of its mailpiece from orange to white. *See* Compelled Answer of GameFly to USPS/GFL-5; Answer of GameFly to USPS/GFL-7. The Postal Service can offer any argument, valid or invalid, it wishes to draw from these facts without further cross-examination of a GameFly witness.

Perhaps the Postal Service is seeking evidence that GameFly would not use manual processing even if the Postal Service offered it because manual

processing would lead to unacceptable increases in the rate of DVD theft by Postal Service employees. (In plain English: "If you force us to stop discriminating against you, we'll steal you blind.") But the Postal Service gains nothing from this defense.

First, whether GameFly chooses to use manual letter processing if offered by the Postal Service on non-discriminatory terms is a decision for GameFly to make, not the Postal Service. The Postal Service may not deprive GameFly of a nondiscriminatory option by unilaterally decreeing that manual letter processing is not in GameFly's best interest.

Second, a discriminatory theft rate would be as much a violation of 39 U.S.C. § 403(c) as a discriminatory breakage rate. If the Postal Service cannot offer manual processing to GameFly without unacceptable increases in the rate of theft, the Postal Service must find another way to eliminate its existing discrimination against GameFly (e.g., by offering mailers like GameFly a reduced rate for automated *flats* processing).

Finally, the issue is a red herring. Postal Service officials have stated repeatedly that they *cannot* offer Netflix-level manual culling and manual processing to multiple DVD rental companies because many postal facilities lack the room to store and handle the necessary containers. See GFL1 (third bullet); GFL311 ("There is no way the AFCS is set up to cull and separate DVDs for two different mailers—and who knows how many more request[s] that we are going to receive."); GFL77873 (first bullet). Given these statements, the Postal Service

has no foundation for asserting that GameFly would not take what the Postal Service has not offered, and may be unable to offer.

3. How GameFly "enters and takes delivery of mail," what GameFly pays to transport its DVDs to and from the Postal Service, and what GameFly would pay if it (hypothetically) entered and received DVDs at more entry points.

Differences between GameFly and Netflix in the number of their distribution centers, the average length of haul for the Postal Service between those distribution centers and the consumers served from those distribution centers, and the cost differences that result from the variations in length of haul also raise no material issue of fact warranting further cross-examination of GameFly. Cf. Motion at 5-6.

First, GameFly does not dispute that Netflix has more distribution centers than does GameFly; that the average distance between distribution centers and subscribers is therefore smaller for Netflix than for GameFly; or that, *ceteris paribus*, the Postal Service's transportation costs for Netflix are therefore slightly lower than for GameFly.

Second, and in any event, further questioning about GameFly's actual or hypothetical transportation costs would be pointless because GameFly simply does not have this information. Presiding Officer's Ruling No. C2009-1/23 made this very point in denying the Postal Service's motion to compel GameFly to produce additional information about GameFly's actual or hypothetical

transportation costs. Presiding Officer's Ruling No. C2009-1/23 at 9. The same outcome is warranted here.

Third, the Postal Service's transportation cost differences between Netflix and GameFly are not valid defenses to GameFly's claims under 39 U.S.C. § 403(c). As the Commission made clear in *Capital One NSA*, *supra*, cost differences between two similarly situated ratepayers do not undermine their functional equivalence. Furthermore, while cost differences can provide a rational basis for price discrimination, the Postal Service's own documents show that the differences in cost of service stemming from differences in average transportation distance and other factors amount to only a small fraction of the rate disparity. Indeed, Postal Service officials have acknowledged that there is no cost justification for the rate preference that Netflix enjoys. GameFly Memorandum at 57-60 (citing and discussing documents produced by USPS); Answer of Sander Glick to Public Representative/GFL-T1-1.

Finally, the transportation costs that *GameFly* incurs, or might incur, are completely irrelevant. The cost differences that potentially can justify price discrimination are those incurred by the Postal Service itself, not the costs of its customers. *See, e.g.*, *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One*, Docket No. MC2002-2, PRC Op. & Rec. Decis. (May 15, 2003) at ¶¶ 1008, 3030 (discrimination analysis under 39 U.S.C. § 403(c) focuses on the relationship between the rate differentials with the "costs avoided by the Postal Service"); *UPS Worldwide Forwarding v. USPS*, 66 F.3d 621, 632 (3rd Cir. 1995) (adopting Postal Service

position that price discrimination among customers could be justified under Section 403(c) by differences in the costs "incurred by the Postal Service"); *Sea-Land Service, Inc.. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) ("The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist."); *Transcontinental Bus System, Inc.*, *v. Civil Aeronautics Bd.*, 383 F.2d. 466, 483 (5th Cir. 1967) (explaining that the relevant factors for determining whether shipments are similarly situated are generally "limited to competition and factors directly relating to the cost of carriage or transportation."); *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 412 F.2d 926, 933 (1st Cir. 1969) (holding that the "inconvenience to traveler" of a service does not provide a legitimate basis for offering preferential services to certain travelers if the differing services provide no cost benefit *to the carrier*).

4. How the "composition and prices of [GameFly's] game DVDs compare with video DVDs"

The Postal Service has also failed to identify any material issue of disputed fact relating to "how the composition and prices of [GameFly's] game DVDs compare with video DVDs" (Motion at 6-7). Whatever the potential legal relevance of these issues, GameFly has produced all the information that it has on them. Specifically, GameFly believes that game and video DVDs are physically identical; that game DVDs cost more than video DVDs; and that the precise cost differential is proprietary information that has not been disclosed to GameFly. *See* GameFly Answers to USPS/GFL-50 and 52 and Compelled

Answer to USPS/GFL-50(a) and (b); *see also* Answer of GameFly, Inc. to Motion of USPS to Compel Discovery Answers (May 14, 2010) at 15. These answers were developed with input from GameFly's management and supplemented by additional on-line research. Forcing GameFly to sponsor a witness to repeat these answers on the witness stand will produce no additional information.

In Presiding Officer's Ruling No. C2009-1/23 (June 10, 2010), the Presiding Officer ruled (at 9) that GameFly would not be required to perform "any research or analyses of the material used in the manufacture of DVDs" beyond what GameFly had performed; and would not be ordered "to provide speculative cost and price comparisons based upon its 'general knowledge of the DVD industry'"—a "futile" act. The same outcome is warranted here.

5. GameFly's document retention policy.

The Postal Service asserts that additional cross-examination is warranted to fill gaps in the record caused by GameFly's assertedly "defective document retention policy," which the Postal Service characterizes as "spoliation of admissible evidence." Motion at 3-4. This claim is unfounded on several grounds.

First, the Commission has never developed document retention requirements comparable to the elaborate requirements developed by federal courts in recent years under Rules 26 and 37 of the Federal Rules of Civil Procedure. While this case suggests that further clarification of the rules is warranted, the Commission needs to give careful consideration to the potential

effects of imposing costly document preservation requirements on relatively small complainants in Section 403(c) discrimination cases.

Second, despite the absence of more formal document retention policies, GameFly produced an enormous volume of responsive documents for the Postal Service. These documents included approximately 348 megabytes of weekly performance reports dating back to 2002; over 91 megabytes of emails and other documents concerning DVD theft and loss data dating back to 2006; and more than 328 megabytes of documents responsive to other Postal Service discovery requests. Furthermore, GameFly did not destroy hard copy documents as a matter of course, and GameFly produced numerous documents related to meetings with the Postal Service, as well as copies of presentations given at those meetings. GameFly produced emails and other documents kept by its consultant, Sandy Glick, as well. GameFly even produced the entire file on theft, loss, and other topics kept by Jeff Kawasugi, a former employee who once held responsibility for GameFly's anti-theft efforts. In short, GameFly responded to the Postal Service's request in good faith, and there is no evidence that the document retention policies that were in place prevented GameFly from producing any material, relevant information.

Third, the subjects on which GameFly produced little or no responsive information—e.g., differences in the design and price of game and movie DVDs, and GameFly's costs of transporting DVD mailers to and from Postal Service facilities—were matters that GameFly simply had not studied. The most rigorous document retention policy would not have preserved what never existed.

Finally, and in any event, the Postal Service received the relief it claims to want: the opportunity to "cross-examine one or more knowledgeable GameFly witnesses on these matters." Motion at 4. As noted above, Mr. Glick was prepared to testify about GameFly's operations and mailing decisions, but the Postal Service failed to ask more than a perfunctory handful of questions about these matters.

CONCLUSION

For the foregoing reasons, the Postal Service's request for additional cross-examination of GameFly's direct case should be denied.

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June 23, 2010