

to view the evidence against it before presenting its defense. Because of the lack of time between yesterday's issuance of Presiding Officer's Ruling No. C2009-1/24 and today's deadline for filing the Postal Service direct testimony, as well as the Commission's interest in prompt resolution of this matter, rescheduling the filing of the Postal Service's direct testimony is not feasible. To avoid prejudice to the Postal Service and unfair advantage to GameFly, the Presiding Officer should protect from disclosure the Postal Service direct testimony until after the Postal Service has the opportunity to cross-examine GameFly's institutional witness or exhaust other remedies.

I. Allowing GameFly to View the Postal Service Direct Testimony Before Cross-Examination of the GameFly Institutional Witness Would Prejudice the Postal Service.

A failure to impose protective conditions on the Postal Service's direct testimony will prejudice the Postal Service and bestow an unfair advantage on GameFly. Yesterday, in POR No. C2009-1/24, the Presiding Officer ruled that, as part of GameFly's direct case, the Postal Service would have the opportunity to cross-examine a GameFly institutional witness. If permitted to review the Postal Service's direct testimony and use it in preparation of its institutional witness, GameFly will have the ability to use cross-examination of the GameFly direct case to rebut the Postal Service's defenses. This would distort accepted doctrines of fairness, allowing the proponent to make its case after assessing the accused party's defenses, and preventing the respondent from obtaining knowledge of the proponent's case before presenting its defense. And, as an added disadvantage, the Postal Service would have no opportunity to respond to

the information elicited during cross-examination, as the Commission's rules confer the right of rebuttal testimony on only the proponent. See 39 C.F.R. § 3001.30(e)(1).

This potential procedural disadvantage to the Postal Service would add to the number of procedural disadvantages that have already arisen. The litany of procedural disadvantages occurred early on with the allowance of GameFly's "trial brief"² that resembled unsupported testimony and was justified under a rule that specified appropriate procedures for respondents, but not proponents. See *id.* In this regard, the Postal Service must reiterate its strong objection to the practice approved in the current case of permitting the proponent of a complaint against the Postal Service to avoid its real obligation to support its allegations with testimony. The most recent ruling by the Presiding Officer goes part-way to correct that irregularity by directing that GameFly produce a witness to sponsor its responses in written cross-examination. By far the more serious omission, however, remains GameFly's apparently successful attempt to insulate itself from scrutiny through discovery and adversarial testing of its blatant misrepresentations of the content and meaning of a set of selected internal communications derived from tens of thousands of documents obtained through discovery. While the Commission's rules do not speak specifically to the appropriateness of this practice, it most fundamentally violates a clear principle that has emerged from Commission practice and jurisprudence in the past, namely, that the proponent in a case has the burden of supporting its contentions

² Memorandum of GameFly, Inc., Summarizing Documentary Evidence, PRC Docket No. C2009-1 (April 12, 2010).

through actual evidence, and that it has the responsibility to file all of the testimony on which it intends to rely with its direct case. In this regard, there is no doubt that GameFly's "trial brief" represents actual testimony in its interpretations of Postal Service conduct, some of which do not even cite to internal documents. Nor does the Postal Service concede the propriety or legal correctness of the conclusion that many of the documents cited in GameFly's Memorandum should be permitted evidentiary status for their content. If this practice were to become standard in Commission complaint proceedings, an ill-advised pattern of conduct would have been sanctioned. In any case where a potential complainant could fabricate unsubstantiated allegations and convince the Commission to proceed, it could engage, as here, in seemingly interminable fishing expeditions within the Postal Service's vast electronic data base of internal communications, selectively pluck emails, slides, and handwritten notes from those sources, and string them together with unsponsored testimony in the purported form of legal argument. During that process, the Postal Service would be required to devote considerable time and expense to comply with discovery, while being deprived of basic opportunities of due process to construct its defense. Allowing this pattern to develop, furthermore, cannot be dismissed merely by observing that unsponsored testimony can be tolerated because the Commission can always give appropriate weight to materials that are not subject to defense. The practical consequences of this approach to the litigation in wasted time and expense will still have been forced by the procedure.

Much has been justified by GameFly in this proceeding so far with an argument that implies or accuses that the Postal Service has deliberately sought to employ delaying tactics to draw out the proceeding beyond reasonable limits. While it is fair to observe that discovery in this case has been slow, much of the delay has been induced by the relative novelty in Commission practice of the type of forays into a vast body of electronic communications maintained throughout the Postal Services enormous operational network represented by GameFly's discovery. In the process of responding to the procedural framework established by the Commission's rules, mistakes were made, and both sides have learned something from them. Nevertheless, the Postal Service has always acted in good faith, including in its commitment to do the very opposite of the conduct for which it is accused. From the very outset of this case, the Postal Service has tried to save time, by engaging in an effort to stipulate facts that would avoid discovery, and by cooperating informally with GameFly to save time. Those efforts, however, were met with no discernable decrease in GameFly's appetite for more extensive and intrusive discovery. At the same time, GameFly has been guilty of delay itself. Most recently, GameFly delayed in producing ten DVDs containing responsive documents until less than a week – and for some DVDs two days – before the Postal service's June 16 cross-examination of Mr. Sander Glick. See Notice of GameFly, Inc.'s Designation of Certain Discovery Responses As Library References (June 14, 2010); Notice of GameFly, Inc.'s Designation of Certain Discovery Responses As Library References (June 10, 2010).

By maintaining the Postal Service direct testimony under seal and protecting it from disclosure to GameFly until after the Postal Service has an opportunity to cross-examine the GameFly institutional witness or exhaust other remedies, the Presiding Officer will avoid further prejudice to the Postal Service.

II. Time Limitations Prevent Rescheduling of the Filing of the Postal Service Direct Testimony or Other Remedies.

The Presiding Officer issued POR No. C2009-1/24 yesterday, and there is not sufficient time for interested parties to offer briefs, or for the Commission to provide full consideration of the potential prejudice to the Postal Service. Because the Postal Service's direct testimony is due today, the Postal Service will suffer prejudice with the disclosure of its direct testimony to GameFly and any motions it filed seeking remedies to avoid the prejudice would become moot. Even if the Postal Service could reschedule filing of its testimony in light of the recently recognized need for cross-examination of a GameFly institutional witness, this would conflict with the Presiding Officer's stated preference for prompt resolution of this matter and avoidance of further delay. Accordingly, under the circumstances, the Presiding Officer can best balance the interests of promptness and fairness by maintaining the Postal Service direct testimony under seal until cross-examination of GameFly's institutional witness or exhaustion of other Postal Service remedies.

Conclusion

For these reasons, the Postal Service respectfully requests that the Presiding Officer maintain its direct testimony under seal and protect it from

disclosure to GameFly counsel or other parties until after cross-examination of the GameFly institutional witness or exhaustion of other Postal Service remedies.

Respectfully submitted,

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