

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**MOTION AND APPLICATION OF THE UNITED STATES POSTAL SERVICE FOR
NON-PUBLIC TREATMENT OF MATERIALS**

(July 7, 2010)

In accordance with 39 C.F.R. § 3007.21, the United States Postal Service (Postal Service) hereby applies for non-public treatment of certain materials filed under seal with the Commission. The materials covered by this Application consist of The United States Postal Service Direct Testimony (USPS-T-1, USPS-T-2, USPS-T-3, USPS-T-4). These documents reflect direct testimony of Postal Service witnesses. Because of recent rulings and the timing of this case, the logical order of progression for this litigation has been upset and non-public treatment of these materials is necessary to prevent premature disclosure of the materials and resulting prejudice to the Postal Service.

The factors set forth in 39 CFR § 3007.21(c) are listed below.

(1) The rationale for claiming that the materials are non-public, including the specific statutory basis for the claim, and a statement justifying application of the provision(s);

Under 39 U.S.C. § 410(c)(4), the Postal Service is not required to disclose “information prepared for use in connection with proceedings under chapter 36 of this title.” The Postal Service filed its direct testimony in connection with the GameFly complaint, PRC Docket No. C2009-1, brought before the Postal Regulatory Commission under chapter 36. The circumstances warrant that this testimony be maintained under

seal and protected from disclosure to GameFly counsel or any other party until after the Postal Service has the opportunity to cross-examine a GameFly institutional or pursue other remedies. Allowing disclosure of the Postal Service direct testimony to GameFly before GameFly has completed presentation of its direct case would bestow an unfair advantage on GameFly, prejudice the Postal Service, and violate the fundamental principles of law and the logical order of progression for litigation.

(2) Identification, including name, phone number, and email address for any third-party who is known to have a proprietary interest in the materials, or if such an identification is sensitive, contact information for a Postal Service employee who shall provide notice to that third party;

N/A.

(3) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

The materials consist of direct testimony by four witnesses for the Postal Service. This testimony sets forth the basis for the Postal Service's defense to GameFly's Complaint and direct case.

(4) Particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

Disclosure of the Postal Service direct testimony to GameFly before GameFly has completed the presentation of its direct case would reveal the Postal Service's defenses to GameFly and allow GameFly to respond to these defenses in its direct case and answers to cross-examination. The Postal Service would have no additional opportunity to rebut GameFly's direct case, and its ability to defend itself would be severely harmed. The likelihood of harm is almost certain.

(5) At least one specific hypothetical, illustrative example of each alleged harm;

GameFly learns of a previously unknown defense offered by the Postal Service in its direct testimony. GameFly's partial presentation of its direct case supports this new defense. GameFly instructs its witness to include in its answers to cross-examination information that would weaken the Postal Service's newly revealed defense. Or, in the alternative, GameFly could use the newly revealed defense to avoid selecting an institutional witness who may have information that could help support that defense.

(6) The extent of protection from public disclosure deemed to be necessary;

The Postal Service seeks protection from disclosure to any third party, and specifically GameFly or GameFly counsel, until after the Postal Service has the opportunity to cross-examine GameFly's institutional witness or pursue other remedies.

(7) The length of time deemed necessary for the non-public materials to be protected from public disclosure with justification thereof; and

The Postal Service seeks protection until at least the completion of the Postal Service cross-examination of the GameFly institutional witness, as disclosure before this event will result in extreme prejudice to the Postal Service. The Postal Service anticipates that the conditions necessitating protection will cease on August 2, 2010.

(8) Any other factors or reasons relevant to support the application.

N/A.

Conclusion

For the reasons discussed, the Postal Service asks that the Commission grant its application for non-public treatment of the United States Postal Service Direct Testimony.

Respectfully submitted,

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