

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**
(August 31, 2010)

In accordance with 39 C.F.R. § 3007.21, the United States Postal Service (“Postal Service”) applies for non-public treatment of certain materials filed under seal with the Commission. The materials covered by this Application consist of the Appendix to the Response of the United States Postal Service to Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests or, in the Alternative, to Strike Testimony of USPS Witness Robert Lundahl (USPS-T-4) (“Appendix”), filed concurrently with this application. These documents contain studies, analyses and reports created by witness Rob Lundahl under agreement with Netflix. These documents are covered by a nondisclosure agreement between Netflix and witness Lundahl’s firm, Automated Technology and Research Corporation. As explained in Comments of Netflix on GameFly, Inc., Motion to Compel (“Netflix comments”)¹, Netflix has agreed to allow limited disclosure of the documents covered by the nondisclosure agreement.

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);

¹ See Comments of Netflix on GameFly, Inc., Motion to Compel, PRC Docket No. C2009-1 (August 30, 2010).

Under 39 U.S.C. § 410(c)(4), the Postal Service is not required to disclose “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” As explained in the Netflix comments, the documents contained in the Appendix contain sensitive, commercial information of Netflix, which, if disclosed, would prejudice Netflix.

(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;

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(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 studies, analyses and reports related to the nature of DVD failure.

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

As described in the Netflix comments, disclosure of the documents would prejudice Netflix and discourage investment in research and development, as it would allow Netflix’s competitors to obtain for free the competitive information and advantage derived from Netflix’s substantial investment in research and development related to DVD failure. The likelihood of harm is significant.

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

Netflix's competitors learn of Netflix's proprietary methods to increase the durability of its discs. Netflix's competitors apply these methods, eliminating Netflix's competitive advantage related to the durability of its discs. The forced public disclosure discourages companies in the DVD industry, and possibly other industries, from investing in research and development. This has negative effects on the quality of products and the efficiency of processing DVD mail.

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

The Postal Service seeks protection from disclosure to any party who does not agree to abide by the confidentiality provisions established in this docket.

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

The Commission's regulations provide that non-public materials shall lose non-public status ten years after the date of filing with the Commission, unless the Commission or its authorized representative enters an order extending the duration of that status. 39 C.F.R. § 3007.30. The Postal Service believes that the ten-year period of non-public treatment is sufficient to protect the interests threatened by disclosure of the non-public materials.

(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 Appendix.

Respectfully submitted,

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