

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,
TO COMPEL THE POSTAL SERVICE TO PRODUCE
MORE RESPONSIVE ANSWERS TO
GAMEFLY DISCOVERY REQUESTS RELATING TO THE
TESTIMONY OF USPS WITNESS ROBERT LUNDAHL (USPS-T-4)
(September 14, 2010)**

Pursuant to Rules 3001.26(d) and (e) and 3001.27(d) and (e) of the Commission's Rules of Practice, GameFly, Inc. ("GameFly") moves to compel more responsive answers to GameFly discovery requests T4-4-9, 12, 13, 15, 16-19, 22, 23(a)-(d) and (f), 27(c), 28, 29, 31(a), 33(c) 35(a), 37(a), (c) and (d), 39 and 40(a).

As the Commission is aware, these discovery requests seek documentary information and narrative responses concerning the studies, analyses and related information underlying the testimony of USPS witness Robert Lundahl (USPS-T-4)—particularly his claim that certain changes in DVD design, manufacturing, packaging and handling would enable GameFly to avoid DVD breakage from automated letter processing. After the Postal Service objected to answering many of the questions, and filed facially incomplete answers to others, GameFly moved to compel answers on August 25.

The following day, the Presiding Officer ordered the Postal Service to respond to GameFly's motion to compel by August 31. Presiding Officer's Ruling No. C2009-1/34 (Aug. 26, 2010).

On August 31, the Postal Service filed a two-page response stating that the Postal Service was separately filing under seal "documents containing 'the studies, analyses, [and] reports . . . cited or otherwise relied on by Mr. Lundahl.'" USPS Response at 1 & n. 3. "Because the Postal Service has provided the documents sought in GameFly's motion to compel," the Postal Service asserted, "GameFly's alternative motion to strike witness Lundahl's testimony is unnecessary and moot." *Id.* at 1 n. 1.

GameFly has reviewed the documents produced by the Postal Service. Contrary to the Postal Service's assertion, its August 31 filing has not rendered GameFly's motion to compel unnecessary or moot. The Postal Service's documents and narrative responses have serious gaps and omissions, and leave many of GameFly's discovery requests partly or entirely unanswered. In the words of the late John Ehrlichman, the Postal Service's August 31 document production was a "modified, limited hangout."¹ These are some of the most obvious gaps in the Postal Service's responses:

1. The Postal Service has not stated whether the Netflix/ATR documents produced on August 31 constitute the entire universe of

¹ Transcript of White House tapes (March 22, 1973) (available at www.hpol.org/transcript.php?id=130).

Netflix/ATR documents that are responsive to each discovery request, or just a subset of such documents.

2. The documents produced by the Postal Service are in pdf format, but all appear to have been generated from PowerPoint or Word files. For scientific or engineering research of this kind, however, one would expect to see the source data collected in Excel or database files. Indeed, some of the pdf reports explicitly refer to underlying “spreadsheets.” None appear to have been produced.
3. Several of GameFly’s discovery requests asked for any studies or other information on the comparative rate of DVD breakage in automated letter processing vs. manual processing. GFL/USPS-T4-15 and 16. The documents produced by the Postal Service on August 31 do not address this issue. If no information responsive to this question exists, the Postal Service should state so. If responsive information exists, the Postal Service should produce it.
4. GameFly requests GFL/USPS-T4-17, 28 and 35 asked for any information on the extent to which the practices and procedures recommended in Mr. Lundahl’s testimony have actually been adopted by Netflix and other DVD rental companies, and the reasons why any recommendations have not been adopted. The documents produced by the Postal Service on August 31 do not address these issues. If no information responsive to these

questions exists, the Postal Service should state so. If responsive information exists, the Postal Service should produce it.

5. GameFly requests GFL/USPS-T4-18 and 19 asked for information about the extent to which Netflix or any other DVD rental companies, after learning of the practices and procedures recommended by Mr. Lundahl and ATR, became more willing to have its DVD mailers receive more automated letter processing. The documents produced by the Postal Service on August 31 do not address this issue. If no information responsive to these questions exists, the Postal Service should state so. If responsive information exists, the Postal Service should produce it.

On September 2, counsel for GameFly sent James Mecone, one of the Postal Service's lawyers, an email asking whether the Postal Service intended to "provide the narrative answers that were also covered by the objections." If not, "could you let me know?" Neither Mr. Mecone nor any other Postal Service lawyer has responded.

The Postal Service's production of the ATR documents has rendered moot any objection to production of the outstanding information on grounds of privilege or confidentiality. Given the Postal Service's failure to file a timely substantive response to the merits of GameFly's August 25 motion to compel, the Postal Service has no legitimate ground for not responding fully to the outstanding discovery requests.

Respectfully submitted,

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September 14, 2010