

PRESIDING OFFICER'S
RULING NO. C2009-1/39

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING ON
THE TREATMENT OF NETFLIX COMMENTS

(Issued September 24, 2010)

Introduction. This ruling addresses whether a non-party's comments, filed to affirmatively waive its objections to discovery requests, should remain on the record or be removed and placed into a separate information file. The question arose from a series of pleadings.

On August 25, 2010, GameFly, Inc. (GameFly) filed a motion to compel the Postal Service to answer discovery requesting information from Postal Service witness Robert Lundahl (USPS T-4) or, in the alternative, to strike his testimony.¹ Nearly all of the requested information was objected to as proprietary to Netflix, and covered by a nondisclosure agreement between Netflix and the witness's employer, Advanced Technologies and Research Corporation. On August 30, 2010, Netflix filed comments raising several associated concerns while graciously agreeing that witness Lundahl may disclose under seal the confidential information requested.²

¹ 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), August 25, 2010 (Motion).

² Comments of Netflix on GameFly, Inc., Motion to Compel, August 30, 2010 (Netflix Comments).

The Postal Service filed the responsive documents under seal the next day.³ Also, on August 31, 2010, upon GameFly's request, a ruling was issued to postpone the rebuttal hearing, which had been scheduled to begin on September 1, 2010.⁴

On September 7, 2010, GameFly addressed several contentions raised by the Netflix Comments.⁵ As a final point, citing 39 CFR 3001.20b(c), GameFly objected to the Commission's continuing treatment of the Netflix Comments as a proper filing of record, as opposed to a mere informational filing by someone other than a party or limited participant. *Id.* at 3-4.

Analysis. Netflix waived its potential objections to producing documents under seal to facilitate the development of the evidentiary record. The production of the documents appeared to render GameFly's Motion moot. Netflix added certain statements of its views on the litigation beyond the waiver of its potential objections.

The Netflix statement on procedural matters related to its proprietary documents properly may be considered along with the materials produced, particularly those that support their continuing non-public treatment. More specifically, comments on privileges, claimed or not claimed, are properly regarded as part of the formal record. No unequivocal reason to exclude them from the record arises in the context described above.

Any substantive statements contained in the Netflix Comments unrelated to the waiver will be treated as though they were separately submitted comments. Without segregating the statements from the points related to the qualified waiver filed in the record, the statements will be accorded the status of commenter remarks. No compelling basis exists to exclude them from the record for decision or to segregate the

³ 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), August 31, 2010, *see also* Appendix to Response (under seal).

⁴ P.O. Ruling No. C2009-1/35, August 31, 2010.

⁵ Answer of GameFly, Inc., to Comments of Netflix, September 7, 2010, at 3-4.

language of Netflix Comments by any formal action. The Commission is fully capable of distinguishing this material and according it appropriate weight.

RULING

The request to exclude Netflix Comments from the record contained in the Answer of GameFly, Inc., to Comments of Netflix, filed September 7, 2010, is denied.

Dan G. Blair
Presiding Officer