

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**REPLY OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION TO MOTION  
OF GAMEFLY, INC. TO ADMIT CERTAIN POSTAL SERVICE DOCUMENTS INTO  
THE RECORD**  
(November 1, 2010)

On October 29, 2010, GameFly, Inc. filed a motion to admit the Christensen Study<sup>1</sup>, the OIG Report<sup>2</sup> and other documents<sup>3</sup> into the evidentiary record.<sup>4</sup> This motion represents the first time that GameFly has formally attempted to secure evidentiary status for these studies and other documents.

The Postal Service produced the documents during discovery, but has made no representations regarding their significance, accuracy or reliability. In this regard, as the proponent of its complaint against the Postal Service, GameFly's approach to its obligations under the Commission's rules and applicable legal principles has followed a familiar pattern. GameFly has taken for granted that it is entitled to rely on any document produced from the Postal Service's files during discovery, not only to prove the truth of the contents of the documents, but to validate GameFly's characterizations and interpretations of those documents. To insulate itself from discovery and scrutiny through written and oral cross-examination, it has chosen a strategy of avoiding testimony, in favor of an unprecedented attempt to make its case through legal

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<sup>1</sup> The Christensen Report appears on the documents designated GFL1020-1063.

<sup>2</sup> The OIG Report appears on the documents designated GFL685-704.

<sup>3</sup> These documents are designated as GFL732-737, 761-773, 844-845, and 849-854.

<sup>4</sup> See Motion of GameFly, Inc. to Admit Certain Postal Service Documents into the Record, PRC Docket No. C2009-1 (October 29, 2010).

argument that cites its unsponsored reliance and interpretation of any document found in discovery, regardless of the documents' apparent trustworthiness, or the level of sophistication of unsponsored data collection and analysis that underlies the documents on which it relies. It has resisted at every turn the Postal Service's attempts to secure compliance with the Commission's long-established standards for proof in contested proceedings and the reasonable expectations under due process that the proponent of a proposition has the obligation to prove its case through reliable evidence and testimony. Ironically, GameFly has relied on legal argument that should have been testimony, and has submitted testimony that, like its arguments, relies principally on citations to unsponsored records found in the Postal Service's files.

As it has repeatedly objected during hearings and pleadings to GameFly's attempts to secure evidentiary status for the documents obtained during discovery, the Postal Service objects to the admission of all documents subject to the Motion of GameFly, Inc. to Admit Certain Postal Service Documents into the Record (the "Motion") because GameFly has not met its burden, as the party relying on the documents, to authenticate or otherwise demonstrate reliability of documents in accordance with the Federal Rules of Evidence.<sup>5</sup> The Postal Service objects to the

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<sup>5</sup> GameFly has repeatedly asserted that the Postal Service's failure to seek reconsideration of the decision to admit certain materials into the record, when offered as evidence at hearings, constituted a "waiver" of the Postal Service's rights to object, or to otherwise pursue its own views, under the procedures available through the Commission's rules and administrative law. Motion at 6. In this regard, GameFly interprets the Presiding Officer's offer to entertain reconsideration of his rulings during hearings, if the Postal Service were to file a written motion, as sanctioning GameFly's assertion of waiver. The Postal Service vigorously rejects that argument. It is not based on the Commission's rules or on any interpretation of prior Commission precedent. The Postal Service respectfully submits, furthermore, that the Presiding Officer's rulings, during hearings and subsequently, were unaccompanied by legal

admission of the Christensen Study and the OIG Report for the additional reason that no party has sponsored them by providing necessary authentication involving such matters as tabulations of input data, discussion of alternative research designs, a discussion of data comparability over time, an assessment of editing and imputation, an explanation of all statistical tests performed together with all data and research design elements necessary for replication of results, confidence intervals, discussion of all processing steps including imputation and alternatives considered, and other requirements specified by Rule 31(k), all as required by the Commission rules.

**I. As the Party Seeking to Rely on the Documents Addressed by the Motion, GameFly Has the Burden of Demonstrating the Reliability of Documents.**

It is a fundamental rule of evidence that the party seeking to rely on a document or other evidence has the burden of showing reliability and admissibility. See Evans v. Port Authority of New York and New Jersey, 192 F. Supp. 2d 247, 263 (S.D.N.Y. 2002) (“The burden of establishing admissibility, of course, is with the proponent of the evidence.”). Not only does GameFly fail to recognize that it bears this burden, but it appears to argue that the burden should be flipped, and that the Postal Service must demonstrate that a document is not reliable. See Motion at 10 FN 4 (suggesting that negative inference should be drawn from the Postal Service’s failure to “sponsor[] one of the Christensen Associates professionals involved in the studies to challenge GameFly’s interpretation of the studies”). The Postal Service does not believe that the

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analysis or authoritative support. The Postal Service has voiced timely objections to GameFly’s efforts to secure evidentiary status and intends to argue the incorrectness of GameFly’s interpretation and reliance on those results on brief. In any event, the instant Motion by GameFly represents the first time that GameFly has sought to incorporate into the record as evidence the OIG report, the Christensen Study, and the other documents subject to the instant motion.

study provides any realistic understanding of how DVD mail is processed; while no other attempts to estimate costs of processing DVD mail are known to exist, the Postal Service position has been shared systematically since its refusal to acknowledge the propriety of remedial measures suggested by the OIG report—which also relies heavily on the flawed Christensen report. GameFly faults the Postal Service for not disproving the reliability of documents, blatantly ignoring its own failures to meet the dual burdens of going forward and establishing the study's *prima facie* reliability—thereby giving the Postal Service an opportunity to refute GameFly's position on a point by point basis. Notwithstanding, the Postal Service has shown, using the budget- and performance-driven financial and operational logic of mail processing decisions, exactly how and why the Christensen study is unreliable. See Tr. 9/1710-1715; Direct Testimony of Troy R. Seanor on Behalf of the United States Postal Service (July 8, 2010) at 2-7.

For example, GameFly states that the Postal Service's failure to “sponsor[] one of the Christensen Associates professionals involved in the studies to challenge GameFly's interpretation of the studies ... is telling – the equivalent of Sherlock Holmes' dog that did not bark.” See Motion at 10 FN 4. Although the obscure Sherlock Holmes reference does not clarify why GameFly believes the Postal Service's alleged failure is telling, GameFly appears to suggest that a negative inference should be drawn from the Postal Service's failure to offer a Christensen witness even though no party has sponsored the Christensen study as reliable.

The Postal Service does not believe that the Christensen study provides good estimates of how DVD mail is actually handled, let alone its appropriate costs. So requiring the Postal Service to provide testimony to the contrary makes no sense

factually and would not comport with the normal patterns by which due process rights are afforded to and utilized by each party. GameFly as complainant bears the burden of going forward to establish facts sufficient that it has made out a *prima facie* case; should it manage its burden—which the Postal Service does not believe GameFly has - then the burden shifts back to the Postal Service to prove why that case is incorrect or not persuasive, as a matter of fact and law. As things now stand, the proper inference for the Commission is that no party has established the reliability of the Christensen study. GameFly has failed to establish facts necessary to shift the burden of going forward in rebuttal to the Postal Service. GameFly is accordingly inviting the Commission to engage in an extreme violation of this normal give and take by which the burden of going forward shifts between the parties, with the Commission making its decision on the net result. GameFly's position amounts to an attempted elusion of its own burdens of going forward and establishing a *prima facie* case. It cannot shift those burdens to the Postal Service. The Presiding Officer should accordingly hold GameFly accountable and require it to satisfy the burden of showing the reliability of evidence it seeks to offer in accordance with the laws of evidence.

GameFly's superficial arguments in this regard studiously avoid comment on prior Commission practice. As the Commission is well aware, however, the issue of what status should be accorded studies, analyses, and other documents offered by parties to support their positions in Commission proceedings has a long history. Much of the evolution of the Commission's practice has surrounded debate over the status of library references in rate and classification cases under the procedures governed by the Postal Reorganization Act (PRA). A considerable amount of precedent also arose out

of questions relating to the status of cost and other studies and computer analyses and models. Admittedly, the Postal Service has been on the losing end of many of the controversies in the past. The Commission, however, has attempted to hold the Postal Service to a high standard in order to ensure the effectiveness of its procedures to produce reliable evidence and afford all parties due process rights under applicable principles of administrative law. The Commission should apply no less a standard to parties like GameFly, who seeks to establish and enforce against the Postal Service a serious legal complaint having potentially far-reaching consequences.

Over twenty years ago, in Docket No. R87-1, the Commission faced an issue involving what expectations should arise from reliance on a study that had been produced by a consultant to the Postal Service but not relied upon or sponsored by the Postal Service in an omnibus rate case. Parties other than the Postal Service sought to rely on the study for their own purposes. After considering the Postal Service's objections, the Commission directed the Postal Service to provide a witness to sponsor the study, rather than rely on it in its unsponsored form. In this regard, the Postal Service believed at the time that the Commission had struck the wrong balance in ordering the Postal Service to sponsor the study. In retrospect, however, the Postal Service must admit that the evidentiary and procedural principles the Commission enunciated had considerable weight. The Commission stated:

The Postal Service seems to recognize this duty when it argues that the factual material in the study is freely available to the parties for their expert witnesses to rely on in formulating their own conclusions. But this argument overlooks the rules of evidence that forbid acceptance of evidence into the record unless there has been an opportunity to test it through cross-examination, and that an opportunity to cross-examine evidence is generally not adequate unless a witness is made available who is competent to attest to its authenticity and veracity. That is why

interrogatory answers must be attested to under Rule 25(b), why oral testimony must be under oath, and why documents submitted for the record must be authenticated, under Rule 31. Rule 31 specifically states that designation of a document as a library reference does not confer any evidentiary status upon the document.

Order Directing Production of Postal Service Witness, Order No. 772, Docket No. R87-1, at 3-4 (August 14, 1987). In so ruling, the Commission followed a clear principle that subordinated expediency and formality of status, in favor of an evidentiary standard calculated to ensure reliability and due process. See *also*, Presiding Officer's Ruling No. R2000-1/92, Docket No. R2000-1(July 18, 2000)(directing the Postal Service to provide a witness to sponsor a study referred to in a Postal Service witness's interrogatory responses); Presiding Officer's Ruling Granting Motion of United Parcel Service for Authorization to Depose Certain Postal Service Employees, Docket No. MC78-1 (Dec. 15, 1978)(directing the deposition of Postal Service witnesses whose opinions were cited in Postal Service testimony).

Nor has the Commission adopted a superficial and general standard for evidentiary status that ignores the use made of materials in Commission proceedings, and the degree of reliance by the party asserting their authenticity. Rather, the Commission has followed an approach that evaluates status on a case-by-case basis. See Presiding Officer's Ruling No. R90-1/65, Docket No. R90-1, at 5 (Sept. 6, 1990). Particularly with regard to documents claimed to be imbued with "official status" by virtue of their origin as public records, the Commission has taken a highly nuanced approach to evaluating evidentiary status. In docket No. R90-1, in assessing the status of a variety of kinds of documentation, the Presiding Officer stated:

In general, the analysis agrees that the documents associated with the Postal Service, the Commission, and the GAO are public

documents within the meaning of rule 31(d), but finds this does not resolve their evidentiary status, nor automatically preclude any further inquiry into authentication and sponsorship. Admissibility is determined on a case-by-case basis, depending on the nature of the material and use to which it is put by the witness.

*Id.* at 5.

In this case, GameFly's direct case, as well as its testimony filed on rebuttal, is almost completely derived from its reliance on Postal Service documents, or, in large part more precisely, documents found in Postal Service files that may or may not reflect reliable study findings, analyses, and official opinion. To a very large degree, furthermore, GameFly offers its arguments and testimony, not as the opinion of its own experts, but rather as summaries of unsponsored conclusions and interpretations.<sup>6</sup> In this context, the Commission should apply its higher standard of proof, realizing that the reliability of the evidentiary record depends on the discipline that legal principles of evidence and procedure impose on the administrative process, and that GameFly, not the Postal Service, has the burden of proving its case. See Order on Certified Motions, Order No. 1201, Docket No. R97-1, at 14 (Nov. 4, 1997)([In rate cases], "the proponent of any particular finding must attempt to provide sufficient evidence so that a Commission finding in favor of that proposition can be said to rest on 'substantial evidence.'")

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<sup>6</sup> To the degree to which GameFly's approach in this case reflects a conscious attempt to insulate itself from scrutiny through a particular litigation strategy, in past proceedings, Presiding Officers and the Commission have not favored such strategies. See Presiding Officer's Ruling No. R97-1/20, Docket No R97-1, at 10 (September 17, 1997); Order on Certified Motions, Order No. 1201, Docket No. R97-1, at 16 (Nov. 4, 1997).

**II. GameFly Has Failed to Comply with the Commission’s Rules Governing Use of the Christensen Study and the OIG Report as Evidence.**

Rule 31(k) of the Commission’s rules sets forth the requirements that a party must satisfy to submit a study into evidence or rely upon it. This rule states, at a minimum that

[i]n the case of all studies and analyses offered in evidence in hearing proceedings or relied upon as support for other evidence, there shall be a clear statement of the study plan, all relevant assumptions and a description of the techniques of data collection, estimation and/or testing. In addition, there shall be a clear statement of the facts and judgments upon which conclusions are based, together with an indication of the alternative courses of action considered.

39 C.F.R. § 3001.31(k). Further documentation requirements are specified in that rule for statistical and computer studies. This rule applies to the Christensen Study and the costing and other analyses incorporated in the OIG Report because they both rely upon a “study” under rule 31(k). See 39 C.F.R. § 3001.31. No party has undertaken the rule 31(k) procedures for entering the Christensen Study or the OIG Report into evidence. In fact, GameFly has disavowed sponsorship of the OIG Report. See Tr. 11/1952-1955 (conceding that witness Glick “[i]s not sponsoring” the OIG Report). If GameFly intends to rely on these documents for its evidentiary support, it must sponsor them and provide the foundation required by the Commission’s rules. See Presiding Officer’s Ruling No. R2006-1/74, Docket No. R2006-1, at 6 (October 2, 2006)(“Professor Kelejian’s declaration, although incorporated within witness Clifton’s testimony, cannot properly be admitted into evidence without Professor Kelejian’s sponsorship and submission to discovery under section 30(e) of the rules of practice.”).

The Motion does not recognize the Commission’s Rule 31(k) procedures or explain why they should not apply to the Christensen Study or OIG Report. Instead of

addressing the Commission's rules, GameFly makes unsupported representations regarding the reputations of the OIG and Christensen Associates. See Motion at 5 ("The OIG is a highly respected investigative arm of the Postal Service."); id. at 9 ("Christensen Associates is a reputable economic consulting firm."). Self-serving representations that the author of a study or report is "highly respected" or "reputable," even if true, do not demonstrate the accuracy or reliability of the study or report produced by the authors. Cf. Arthur Andersen and Enron. In addition, despite GameFly's unsupported contentions, a party who commissions a report expresses no position regarding the report's reliability or accuracy, as at the time of the commission it has no knowledge of the results. If that or some other party subsequently wants to rely upon the study's results, then it faces Rule 31(k), at least if the proceeding is before the Commission. In fact, with respect to the Christensen Study and the OIG Report, Postal Service witnesses have expressed repeatedly the Postal Service's disagreement with the accuracy and reliability of reports it commissioned. See Tr. 9/1715-1717 (Christensen); Tr. 10/1888-1889 (OIG).

In its Motion, GameFly for the first time attempts to enter the Christensen Study and OIG Report into evidence. Because GameFly waited to file the Motion until this late stage of the proceedings, with no more witnesses scheduled to appear, GameFly passed up its opportunity to sponsor the Christensen Study and OIG Report as required by the Commission's rules. Accordingly, the Christensen Study and OIG Report are not evidence as defined by the Commission's rules.

### **III. The Christensen Study, OIG Report and Other Documents Addressed by the Motion Are Not Admissible Evidence.**

The Christensen Study, OIG Report and other documents addressed by the Motion cannot be entered into evidence because they have not been sponsored, authenticated or otherwise shown to be reliable. Federal Rule of Evidence 803(6) requires a party to submit sponsoring testimony or a written certification that records are authentic. See also Fed. R. Evid. 901(a), 902(11). The hearsay exception for business records requires more than that the records exist within the files of a business. In order to be reliable and therefore meet the federal judiciary's procedural and evidentiary standards, a proponent must first show that the records were

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation.

Fed. R. Evid. 803(6). No party has demonstrated, with particularity, that the Christensen Study and OIG Report are "business records" meeting these or comparable indicia of reliability. E.g., United States v. Lemire, 720 F.2d 1327, 1350-51 (D.C. Cir. 1983); Partido Revolucionario Dominicano (PRD) Seccional Metropolitana de Washington-DC, Maryland y Virginia v. Partido Revolucionario Dominicano, Seccional de Maryland y Virginia, 311 F. Supp. 2d 14, 16-17 (D.D.C. 2004); see also United States v. Kim, 595 F.2d 755, 761 (D.C. Cir. 1979) ("[Regarding hearsay, t]here is no place in scheme of the [Federal] Rules of Evidence for selective waiver of the requirements of particular exceptions.").

With respect to documents other than the Christensen Study and OIG Report, GameFly has not supported its statements regarding the accuracy and reliability of these documents. GameFly states "Postal Service employees created the documents in the course of their employment." Motion at 11. However, GameFly does not specify

the authors of the documents or provide other indicators of reliability. As explained above, because GameFly seeks to rely on the documents, it has the burden of demonstrating their accuracy and reliability.

#### **IV. Conclusion**

The Postal Service objects to admissibility, and asserts the lack of probative value, of any and all records, including the Christensen Study, OIG Report, and other documents subject to the Motion, for which GameFly has not made a proper foundational showing that the documents are authentic and were made in the regular course of business. The burden of supporting one's attempt to admit evidence as reliable, truthful, and authentic must reside with the evidence's proponent. By requiring a demonstration of reliability, the Commission furthers the interest of fairness to all parties, and its own interest in an accurate record.

Respectfully submitted,

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