

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 THE PUBLIC REPRESENTATIVE TO ADMIT CHRISTENSEN SPREADSHEETS
INTO THE EVIDENTIARY RECORD**

(November 1, 2010)

On October 29, 2010, the Public Representative filed a motion to admit Christensen spreadsheets into the evidentiary record.¹ The Postal Service produced the Christensen spreadsheets during discovery, but has made no representations regarding their significance, accuracy or reliability. The Postal Service objects to the admission of the Christensen spreadsheets because no party has sponsored them as required by the Commission rules, and no party has authenticated or otherwise demonstrated their reliability in accordance with the Federal Rules of 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

[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). This rule applies to the Christensen spreadsheets because they are part of the Christensen study, which qualifies as a "study" under rule 31 (k).

See 39 C.F.R. § 3001.31. No party has undertaken the rule 31(k) analytical or

¹ See Motion of the Public Representative to Admit Christensen Spreadsheets into the Evidentiary Record, PRC Docket No. C2009-1 (October 29, 2010).

documentation requirements for entering the Christensen spreadsheet or the Christensen study into evidence. Accordingly, the Christensen spreadsheets are not evidence as defined by the Commission's rules.

In addition to the failure to comply with rule 31(k), the Christensen spreadsheets 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 spreadsheets 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.").

The Postal Service objects to admissibility, and asserts the lack of probative value, of any and all records, including the Christensen spreadsheets, for which the Public Representative or 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,

UNITED STATES POSTAL SERVICE
By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing and Product
Support

Kenneth N. Hollies
Jacob D. Howley
James M. Mecone

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-6525; Fax -6187
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