

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Complaint of GameFly, Inc.

Docket No. C2009-1R

ORDER PRESCRIBING REMEDY

(Issued September 4, 2013)

On June 26, 2013, the Commission issued an order following a remand from the United States Court of Appeals for the District of Columbia Circuit in *GameFly v. Postal Regulatory Commission*, 704 F.3d 145 (D.C. Cir. 2013).¹ That order directed the Postal Service to equalize the rates for letter- and flat-shaped DVD mail either by establishing new equalized rates for letter- and flat-shaped DVD mail or by reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer. Order No. 1763 at 39, Ordering Paragraph 1.

For the reasons set forth below, the Commission directs the Postal Service to equalize the rates for letter- and flat-shaped DVD mail by reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce

¹ Order on Remand, June 26, 2013 (Order No. 1763).

First-Class letter-shaped round-trip DVD mailer effective September 30, 2013. In a companion order, the Commission is establishing further procedures to ensure development of a more complete record upon which to evaluate a Postal Service request for creation of a competitive product for round-trip DVD mailers.²

I. BACKGROUND

The background to the proceedings on remand is set forth in the Commission's June 26, 2013 order on remand. Order No. 1763 at 3-4. Following the Court's remand on March 7, 2013, the Commission received a series of pleadings from GameFly and the Postal Service advocating various alternative remedies. *Id.* at 5-13. Those remedies, as well as several others identified by the Commission, were summarized in the Commission's remand order. *Id.* at 10-13.

From the alternative remedies before it, the Commission selected two options, either of which would equalize the rates for letter- and flat-shaped DVD mail. *Id.* at 36-38. The first option allowed the Postal Service to establish new equalized rates for letter- and flat-shaped DVD Mail. The second option provided for the equalization of DVD mail rates by means of a reduction of the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer. *Id.* at 39. The Commission gave the Postal Service the opportunity to choose which of the two options it would implement. *Id.* at 39, Ordering Paragraph 1. The Postal Service was given 30 days, *i.e.*, until July 26, 2013, to notify the Commission of its choice. *Id.* Ordering Paragraphs 2 and 3. Either option had to be implemented not less than 45 days or more than 65 days after the date that the Postal Service filed a notice of price adjustment. *Id.*

Following the issuance of Order No. 1763, the Postal Service filed two motions. In its first motion, the Postal Service requested that the Commission extend the

² Docket Nos. MC2013-57 and CP2013-75, Order Granting Motion for Leave to File Additional Comments, September 4, 2013 (Order No. 1827).

schedule for complying with Order No. 1763.³ That motion was denied.⁴ In its second motion, the Postal Service requested reconsideration and clarification of Order No. 1763, the Commission's order on remand.⁵ The clarification sought by the Postal Service concerned the price cap implications of compliance with Order No. 1763. Request for Reconsideration and Clarification at 7-10. The Commission denied the request for reconsideration and granted the Postal Service's request for clarification.⁶

II. THE POSTAL SERVICE'S PROPOSED COMPETITIVE PRODUCT PROPOSAL

The day after filing its Request for Reconsideration and Clarification, the Postal Service filed a request for permission to create a new competitive product, tentatively called "Round-Trip Mailer," to replace the existing First-Class market dominant mailer options for round-trip DVD mail.⁷ The existing market dominant mailer options for round-trip DVD mail were established by Order No. 718, in response to the Commission's pre-remand finding of discrimination in Docket No. C2009-1.⁸

The Postal Service's Competitive Product Request was filed in the instant docket, Docket No. C2009-1R, "to ensure compliance with Order No. 1763 [the Commission's remand order]" pending action on the then-pending Postal Service Request for Reconsideration and Clarification. Competitive Product Request at 2. The Postal Service stated that "should the Commission, after its review, choose to deny this Request, the Postal Service would consider creating a new product with equalized rates on the Market Dominant list, if the Commission clarifies that the creation of such a

³ United States Postal Service Motion for Extension of Time in Which to Comply with Order No. 1763, July 19, 2013.

⁴ Order Denying Motion for Extension of Time, July 23, 2013 (Order No. 1787).

⁵ United States Postal Service Motion for Reconsideration and Clarification of Order No. 1763, July 25, 2013 (Request for Reconsideration and Clarification).

⁶ Order on Reconsideration and Clarification, August 13, 2013 (Order No. 1807). The significance of the clarification provided by Order No. 1807 is discussed below.

⁷ Request of the United States Postal Service Under Section 3642 to Create Round-Trip Mailer Product, July 26, 2013 (Competitive Product Request).

⁸ Order on Complaint, April 20, 2011, Appendix B (Order No. 718).

product would not have price cap implications.” *Id.* at 4. In footnote 9 to the quoted sentence, the Postal Service suggested that an acceptable alternative would be for the Commission to “clarify its order [Order No. 1763] by delaying any price cap calculations until the filing of the next annual price adjustment.” *Id.* at 4 n.9. By notice and order issued July 30, 2013, the Commission established Docket Nos. MC2013-57 and CP2013-75 to consider the Competitive Product Request.⁹

Thereafter, the Commission on August 13, 2013, issued its clarification of the price cap implications of equalizing DVD letter and flats rates on the market dominant product list. See Order No. 1807. In that order, that Commission clarified that:

[I]f the same equalized rate proposed by the Postal Service in its July 26, 2013 request for creation of a new competitive product had been filed as an equalized rate for market dominant round-trip First-Class letter-shaped and flat-shaped DVD mail, the Postal Service could have chosen to file its notice [of rate adjustment] in accordance with 39 C.F.R. § 3010.24, which would not require an immediate recalculation of available CPI pricing authority. Alternatively, the Postal Service could have chosen to recognize the creation of additional price cap authority produced by the reduction of the two-ounce round-trip First-Class flat-shaped DVD mailer to the one-ounce letter-shaped rate in an immediate recalculation of available CPI pricing authority.

Order No. 1807 at 10.

As discussed more fully in the companion order being issued in Docket Nos. MC2013-57 and CP2013-75, the Postal Service’s Competitive Product Request is opposed by GameFly, Inc, (GameFly), Netflix, Inc. (Netflix), the Public Representative, and two small businesses, MMAVault and CafeDVD Order No. 1827 at 3. That opposition, together with the potential complexity of the legal and factual issues being raised may preclude the development of a record adequate to permit a reasoned decision on the Competitive Product Request within the timeframe established for

⁹ Docket Nos. C2009-1R, *et al.*, Notice and Order on Request to Add Round-Trip Mailer Product to Competitive Product List, July 30, 2013 (Order No. 1794).

implementing the rate remedy prescribed by Order No. 718, *i.e.*, by September 30, 2013.¹⁰

The possibility for delay in the implementation of an equalized rate remedy is also implied by the Postal Service's previous suggestion that it might await the outcome of the proceedings on the Competitive Product Request before equalizing DVD letter and flats rates on the market dominant product list. Competitive Product Request at 4 (“[S]hould the Commission, after its review, choose to deny this Request, the Postal Service would consider creating a new product with equalized rates on the Market-Dominant list, if the Commission clarifies that the creation of such a product would not have price cap implications.” (footnote omitted)).

The uncertainty over when proceedings on the Postal Service's Competitive Product Request will be completed creates the potential for an indeterminate delay in the implementation of a remedy. Such a result is unacceptable. Delay in implementation of a remedy has the potential for causing significant harm to GameFly. Order No. 1763 at 25. The Commission has found that undue discrimination exists. The Commission has an obligation to impose a remedy for that discrimination.

Continuing harm to GameFly is unnecessary and can be avoided without material injury to the Postal Service. As discussed in Section I., *supra*, Order No. 1763 identified two potential equalized rate remedies. The Postal Service chose to pursue the first potential remedy—the option that allowed it to establish new equalized rates for letter- and flat-shaped DVD mail. In doing so, however, the Postal Service has made a proposal that has generated significant opposition from multiple parties, and has presented novel and potentially complex issues that do not appear to be susceptible to prompt resolution. As a result, the need for timely implementation identified in Order No. 1763 stands to be frustrated.

¹⁰ In Order No. 1827, the Commission is granting GameFly's request for leave to file additional comments on the Competitive Product Request and the Postal Service's motion for leave to respond to GameFly.

Under the circumstances presented, the Commission finds that the appropriate solution is to prescribe the rate levels proposed by the Postal Service in its Competitive Product Request as market dominant rates applicable to the existing First-Class round-trip DVD letter and flats mail categories to be effective September 30, 2013.¹¹ This implements the second remedy option identified in Order No. 1763. The second remedy option requires the Postal Service to equalize DVD mail rates by means of a reduction of the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer. Order No. 1763 at 39. That equalization is to be accompanied by the revision to the Mail Classification Schedule language prescribed in Order No. 1763. *Id.* Ordering Paragraph 3; *id.* Appendix. The equalization of these DVD mail rates must be implemented not later than September 30, 2013.

The implementation of this remedy effective September 30, 2013, will not result in any material injury to the Postal Service. First, the rate level of the remedy being prescribed for both DVD letter- and flat-shaped mail are the same as the rate levels for letter- and flat-shaped DVD mail proposed by the Postal Service in its Competitive Product Request.

Second, the September 30, 2013 implementation date is the same as the implementation deadline provided for in Order No. 1763, see Order No. 1763 at 39, Ordering Paragraph 3, and is the same implementation date proposed by the Postal Service for its Competitive Product Request, see Competitive Product Request at 2-3. The September 30, 2013 implementation date is the same deadline the Commission has consistently stated must be observed, see Order No. 1794 at 4.

Third, the equalized rate remedy prescribed by the Commission in this Order will not have adverse price cap implications for the Postal Service. This conclusion is established by the Commission's clarifications in Order No. 1807 regarding the price

¹¹ Consideration of the Round-Trip Mailer as a new competitive product replacing First-Class Mail round-trip mailer rate categories shall proceed in Docket Nos. MC2013-57 and CP2013-75 as provided in Order No. 1827, issued contemporaneously herewith.

cap implications of equalizing DVD letter and flats rates on the market dominant product list. Order No. 1807 at 10. For purposes of the price cap, the Commission will treat the rates specified in this Order in the manner prescribed in 39 C.F.R. § 3010.24. It will not calculate an annual limitation and no unused rate adjustment authority will be generated. The Postal Service retains the option to recoup price cap credit for the rate reduction in its next annual price adjustment.

Fourth, implementation of the remedy prescribed by this Order does not preclude the Postal Service from continuing to pursue its Competitive Product Request and, if ultimately approved by the Commission, implementing the proposal contained in that request. In this regard, the result produced by this Order is no different than the result that would have been produced had the Postal Service waited to file its Competitive Product Request until after the second remedy option prescribed by Order No. 1763 had taken effect in accordance with the terms of Order No. 1763 (*i.e.*, because the Postal Service did not present an alternate equalized rate proposal within 30 days of the issuance of Order No. 1763). Nor is the Postal Service precluded from making other DVD mail rate proposals in future filings. This Order simply ensures timely implementation of an equalized rate remedy effective September 30, 2013.

One final issue requires discussion. In its comments on the Postal Service's Competitive Product Request, GameFly renews an earlier request that the Commission "clarify that all DVD mailers, including Netflix, must mail their DVDs at the round-trip DVD rate."¹²

The Commission denied GameFly's earlier clarification request as premature, noting that under the Commission's rules interested persons would have ample opportunity to address whether any future Postal Service rate adjustment proposals conform with Commission orders. Order No. 1807 at 11. Netflix also opposes

¹² Docket Nos. C2009-1R, *et al.*, Comments of GameFly, Inc. on USPS Proposal to Reclassify DVD Mailers as Competitive Products, August 15, 2013, at 32-34 (citing Docket No. C2009-1R, Response of GameFly, Inc., to USPS Motion for Reconsideration and Clarification of Order No. 1763, August 1, 2013—refiled August 2, 2013, at 14 (GameFly Response to Clarification Request)).

GameFly’s renewed request for clarification by asserting, *inter alia*, that such a clarification would be premature in a changing operational environment.¹³ On August 29, 2013, GameFly filed a response to the Netflix Reply Comments.¹⁴

The Commission agrees with Netflix. Indeed, GameFly itself expressly acknowledges that its concern that DVDs mailed at a generic letter rate, as opposed to the round-trip DVD rate, could become a vehicle for renewed discrimination depends upon round-trip DVD mail becoming costlier or lower in quality than generic letter mail. GameFly Response to Clarification Request at 33. Neither of those conditions exists, nor is their emergence imminent. GameFly’s renewed request for clarification remains premature and is denied. The GameFly and Netflix comments on the potential for renewed discrimination remain before the Commission in Docket Nos. MC2013-57 and CP2013-75.

III. ORDERING PARAGRAPHS

Pursuant to the Commission’s authority under 39 U.S.C. § 3662 to “take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance...[,]...such as ordering unlawful rates to be adjusted to lawful levels”,

¹³ Docket No. MC2013-57, Reply Comments of Netflix, Inc., August 22, 2013, at 2 (Netflix Reply Comments).

¹⁴ Docket Nos. C2009-1R, *et al.*, Response of GameFly, Inc., to Reply Comments of Netflix, Inc., August 29, 2013 (GameFly Response). The GameFly Response was accompanied by a motion for leave to file. Motion of GameFly, Inc., for Leave to File Response to Reply Comments of Netflix, Inc., August 29, 2013. This latter motion is granted.

It is ordered:

1. The prices proposed by the Postal Service in Request of the United States Postal Service under Section 3642 to Create Round-Trip Mailer Product, July 26, 2013, shall take effect September 30, 2013 as market dominant rates, and shall result in prices for two-ounce First-Class flat-shaped round-trip DVD mail equal to the prices for one-ounce First-Class letter-shaped round-trip DVD mail.
2. The Mail Classification Schedule language applicable to two-ounce First-Class flat-shaped round-trip DVD mailers shall be revised as provided in the Appendix to Order No. 1763.
3. The Round-Trip Mailer product will continue to be considered for prospective addition to the Mail Classification Schedule as a competitive product in Docket Nos. MC2013-57 and CP2013-75.
4. GameFly's renewed request for clarification discussed in the body of this Order is denied.

By the Commission.

Ruth Ann Abrams
Acting Secretary