

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations Pertaining to
39 U.S.C. § 601

Docket No. RM2020-4

COMMENTS OF NETFLIX, INC.

April 7, 2020

Netflix Inc. provides DVD-by-mail subscription service for films and TV shows. Founded in 1997, Netflix has been a force for change in the way people watch entertainment media. Netflix has invested heavily in its DVD-by-mail service, maintaining a nationwide network of distribution centers to streamline delivery and pursuing technological innovations in DVD replication to reduce disk damage. In 2007, Netflix added a streaming service; and in 2012, it separated its DVD-by-mail service from its streaming service, rebranding it as Netflix DVD.com. The DVD-by-mail service remains popular today due to the breadth of video titles offered, the immediate accessibility of new releases, and the quick-turnaround delivery service. In addition, it is a vital source of entertainment and information for those who do not have access to high speed broadband.

Netflix currently mails DVDs as First-Class Automation Presort on outbound and as First-Class Single-Piece on return under the legacy Round Trip (RT) DVD Letters category in First Class. In 2019, Netflix's postage was approximately \$60 million. The Postal Service benefits from this mail in ways beyond the high cost coverage of First-Class Mail—it increases the value and relevance of mail, enhances the "Mail Moment," and highlights the Postal

Service's service and reliability. Our pieces are fully machinable, both outgoing and returning, and are processed along with other First-Class Mail letters. Our DVDs do not jam sorting machines and are not hand culled; they are fully compliant with all the specifications for First-Class Mail Letters in the Domestic Mail Manual. Due to a historical anomaly,¹ Netflix mail is technically classified as First-Class RT DVD Letters, but we pay the same rate as First-Class Mail Letters, and our pieces are processed the same way as First-Class Mail Letters. For all intents and purposes, Netflix pieces are handled and should be viewed as First-Class Letters.

Order No. 5422, initiating this docket, references Docket No. MC2013-57, the Postal Service's request to transfer the First-Class RT DVD product to the Competitive Products list.² A key issue presented in that case was whether the RT DVD product fell within the postal monopoly. Because the Commission found that the Postal Service had failed to show that it lacked market power, as required by 39 U.S.C. § 3642(b)(1), the request was denied, and the postal monopoly issue was not resolved. However, in the course of opposing the transfer, Netflix gained insights into how the Private Express Statutes (PES) directly affect Market Dominant mailers. It submits these Comments to provide its perspective as a large First-Class Mailer on the effect of redefining the scope of the PES monopoly, responding to Questions 5, 6, and 10 - 14 of Order No. 5422.

¹ The RT DVD category was a construct created by the Commission to resolve a 2009 complaint case. Order on Remand, Order No. 1763, Docket No. C2009-1R, June 26, 2013. It is indisputable that the facts alleged in that decade-old complaint do not exist today.

² Advance Notice of Proposed Rulemaking to Consider Regulations to Carry out the Statutory Requirements of 39 U.S.C. 601, Order No. 5422, Docket No. RM2020-4, February 7, 2020, at 6.

1. Changing the scope of the PES monopoly, and, in particular, the definition of “letters”, could harm Market Dominant mailers by diluting the protection afforded by 39 U.S.C. § 3642(b)(2) in proceedings to transfer Market Dominant products to Competitive.

Prior to Docket No. MC2013-57, Netflix, like many other large First-Class mailers, considered the PES monopoly as primarily affecting delivery service providers such as Federal Express and UPS. But in 2013, when the Postal Service proposed transferring the First-Class RT DVD product to Competitive, the Postal Service was required by 39 U.S.C. § 3642(b) to demonstrate first, that it did not have market power (§ 3642(b)(1)), and second, that RT DVD mail was not covered by the PES monopoly (§ 3642(b)(2)). In addressing subsection (b)(2)’s requirement, the Postal Service based its position on a 1985 Advisory Opinion interpreting its pre-PAEA regulations under 39 CFR § 310.1 (a) and subsection (a)(7).

Federal Express entered the proceeding to argue that the PAEA had rendered all Postal Service regulations “ultra vires,” subject to limited grandfathering provisions. Without those regulations to interpret the 1872 PES, Fed Ex argued, the Commission could look only to a contemporaneous definition of “letters”— Attorney General Wayne MacVeagh’s 1881 opinion which interpreted “letters” as limited to personal correspondence, not commercial documents.³ Since the RT DVD was not “personal correspondence,” applying this draconian approach would result in RT DVDs falling outside the PES monopoly. Netflix responded that Fed Ex’s reasoning would have far-reaching consequences for all commercial documents and could not be resolved in the context of the RT DVD transfer proceeding. The Commission subsequently found that the Postal Service had not shown that it lacked market power and therefore it was unnecessary to resolve the PES issue. It did acknowledge that “[t]he legal and policy issues surrounding the

³ Federal Express Corporation Comment on the Scope of the Postal Monopoly, Docket No. MC2013-57, September 17, 2013, at 3-4.

postal monopoly have far-reaching and important implications that go beyond the boundaries of this proceeding.”⁴

Because Section 3642(b)(2) incorporates 18 U.S.C. § 1696, and by reference, Section 601,⁵ Market Dominant mailers have a direct stake in any Commission action to change the scope of the PES monopoly. For example, narrowing the definition of “letters” in 39 CFR § 101.1(a) or limiting the suspensions of subsection (a)(7) could shift the burden of proof of §3642(b)(2) from the Postal Service to the mailer, a result clearly not intended by Congress. We urge the Commission to retain for now the current definition of “letters” as articulated in Publication 542:

A letter is a message directed to a specific person or address and recorded in or on a tangible object. Tangible objects used for letters include but are not limited to paper, recording disks, and magnetic tapes. Tangible objects used for letters do *not* include the following:

- a. Objects whose material or shape and design make them valuable or useful for purposes other than as media for long-distance communications, unless the objects are actually used as media for personal and business correspondence.
- b. Outsized, rigid objects not capable of enclosure in envelopes, sacks, boxes, or other containers commonly used to transmit letters or packets of letters.

⁴ Order Denying Request, Order No. 2306, Docket No. MC2013-57, December 23, 2014, at 54-56.

⁵ Congress established specific criteria in Section 3642 to prevent the inappropriate transfer of a product under price cap protection to the Competitive Products list. Section 3642(b) sets two main requirements that the Postal Service must show before a product can be transferred to Competitive: Under subsection (b)(1), the Postal Service may not have market power, and, under subsection (b)(2), the product may not be “covered by the postal monopoly.” Section 3642(b)(2) provides: “[T]he term ‘product covered by the postal monopoly’ means any product the conveyance or transmission of which is reserved to the United States under section 1696 of title 18, subject to the same exception as set forth in the last sentence of section 409(e)(1).” The last sentence of Section 409(e)(1) states: “... any private carriage of mail allowable by virtue of section 601 shall not be considered a service reserved to the United States under section 1696 of title 18.” While not a model of clarity, it appears that a product may not be transferred from the Market Dominant list if it falls under the term “letters or packets” of 18 U.S.C. § 1696 or within the exceptions under 39 U.S.C. § 601(a) and (b).

*Generally, all First-Class Mail® and all Standard Mail® matter, other than merchandise or other goods, delivered to a specific person or place in accordance with a selective delivery plan would be considered a letter.*⁶

Netflix's mail pieces, sent as First-Class Mail, clearly fall under the postal monopoly.⁷ For mailers, this definition, and in particular, the last sentence, is understandable, clear, and easy to apply.

Retaining the current working definition of "letters" in Publication 542 would not foreclose carriers or the Postal Service from seeking clarifications of Section 601 suspensions from the Commission. It is beyond the scope of these Comments to discuss whether Section 601(b)(3)'s grandfathering provision for suspensions should be applied broadly or narrowly (e.g., Question 3 of Order No. 5422), but Section 601(c) authorizes the Commission to establish a process for carriers to seek interpretations of current suspensions from the Commission.⁸ From our experience, however, we are concerned with granting precedential effect to the Postal Service's Advisory Opinions, mainly because of the lack of transparency of the Advisory Opinions. As acknowledged in the USPS' Response to Question No. 2 of CHIR No. 1, almost all of the Advisory Opinions are not accessible online; special arrangements must be made with the USPS Headquarters Library in Washington DC to view hard copies. In Docket No. MC2013-57,

⁶ https://about.usps.com/publications/pub542/pub542_ch2_001.htm (emphasis added). The USPS referenced Publication 542 in its Response to Question 1 of Responses of the USPS to Questions 1-3 of CHIR No. 1, Docket No. RM2020-4, March 11, 2020. *Accord* 39 C.F.R. § 310.1(a).

⁷ Round Trip DVDs cannot be considered "merchandise" since they are not "goods to be bought and sold." Oxford Dictionary, at http://oxforddictionaries.com/us/definition/american_english/merchandise. They are sent "Round Trip," and disk return is a key element of the subscription business model. Netflix is not engaged in the business of selling DVDs. Additional Comments of Netflix, Docket No. MC2013-57, September 11, 2013, at 8.

⁸ The PAEA provides carriers additional protection through 39 U.S.C § 404a and the Complaint process of 39 U.S.C § 3662.

the Postal Service used a 1985 Advisory Opinion as a sword to support its arguments, but other parties had limited access to the Advisory Opinions to prepare responses.⁹

2. The Commission should refrain from adopting new, sweeping changes to the PES monopoly based on broad claims of competition from digital communications.

Order No. 5422 quotes the Postal Service as stating that the “most significant competitor for First-Class Mail is digital communication, including electronic mail, and other digital technologies.”¹⁰ While mail volumes have decreased over the years as digital communications have grown, we believe that the question of effective competition is more nuanced and should remain a product-specific, factual inquiry, as it may arise in the context of a Section 3642(b)(2) case. In those cases, the burden of proof remains on the Postal Service. The record of Docket No. MC2013-57, as described below, demonstrates that whether a specific form of digital communication is effective competition is a fact-specific inquiry.

In Docket No. MC2013-57, the Postal Service alleged that streaming of videos and games competed with Postal Service delivery of DVDs in the market for access to digitized entertainment content. The two primary DVD mailers, joined by the Public Representative, responded that there were “important limits on alleged alternatives,” including legal principles (such as the “first-sale doctrine” of federal copyright law), practical considerations (such as industry practices of “windowing”, first-day-of-release limitations, etc.), the unavailability of broadband in certain geographic areas, and other technical considerations relating to streaming.¹¹ Netflix noted that its DVD library was much more extensive than its streaming

⁹ See Additional Comments of Netflix, Docket No. MC2013-57, September 11, 2013, at 10 n. 32 detailing the difficulties.

¹⁰ The U.S. Postal Service Five-Year Strategic Plan FY2020-FY2024, January 7, 2020, at 14.

¹¹ Order No. 2306 at 21.

library and that millions of customers subscribed to both its streaming and DVD-by-mail services, showing that the two services were not interchangeable.¹² The Commission concluded:

*The record demonstrates that legal principles, industry practices, and other practical limitations restrict the availability of both movies and games by means of electronic delivery systems. Based upon the record before it, the Commission concludes that the legal, commercial, technical, and practical limitations discussed above raise serious questions as to whether digitized entertainment content made available by means of electronic delivery systems is a reasonably interchangeable substitute....*¹³

Docket No. MC2013-57 demonstrates that broad claims of competition from digital communications must be subject to scrutiny on a case-by-case, product-specific basis. The Commission should refrain from reaching general conclusions about competition from digital technologies and relying on them to redefine the PES monopoly.

3. Changes to the PES monopoly will have wide-ranging implications and must be supported by an extensive record; the Commission should defer this rulemaking while stakeholders are focused on coping with the COVID-19 pandemic.

The scope of the PES monopoly is closely tied to the pillars of the Universal Service Obligation and the Mailbox Monopoly, and mailers have strong interests in all three. One should not be changed without considering the effects on the other two. At the same time, stakeholders are in the midst of an unprecedented pandemic which may limit their ability to fully address these crucial issues. Additionally, the industry finds itself in turmoil because of the changes to the rate structure proposed in Docket No. RM2017-3.

While the Commission did not extend the deadline for this first round of Comments, we urge it to postpone next steps in this proceeding. We believe it would be unwise to pursue

¹² See Additional Comments of Netflix, Docket No. MC2013-57, September 11, 2013, at 17-19; Reply Comments of Netflix, Docket No. MC2013-57, April 4, 2014, at 5-6.

¹³ Order No. 2306 at 30 (emphasis added).

important changes to the PES monopoly, affecting the Universal Service Obligation and the Mailbox Monopoly, at a time when many stakeholders are coping with supply chain and mail processing disruptions due to COVID-19, facing major changes to the price cap regime, and in some cases operating with a workforce at limited capacity.

If the Commission chooses to move forward with this rulemaking, we propose that it (a) retain for now the Postal Service's working definition of "letters" stated in Publication 542; (2) retain the case-by-case approach to the PES issue in Section 3642(b)(2) for transfer requests (which places the burden of proof on the Postal Service); and (3) refrain from reaching premature conclusions relating to competition from digital technologies without first conducting thorough product-specific, fact-driven inquiries.

Respectfully submitted,

Joy M. Leong
Counsel for Netflix

April 7, 2020