

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,  
TO COMPEL RESPONSES TO DISCOVERY REQUESTS  
GFL/USPS-3(e), 4(e), 6(a)-(e), (g)-(h), 7, 8, 14(e), 15,  
16(f), (g), 20(a)-(d), 21, 28, 29, 31, 40, AND 41(c)  
(August 24, 2009)**

Pursuant to Rule 3001.26(d) and 3001.27(d) of the Commission's Rules of Practice, GameFly, Inc. ("GameFly") respectfully moves to compel responses by the United States Postal Service to the following discovery requests: GFL/USPS-3(e), 4(e), 6(a) through (e) and (g) through (h), 7, 8, 14(e), 15, 16(f) and (g), 20(a) through (d), 21, 28, 29, 31, 40, and 41(c). These discovery requests were part of GameFly's first set of discovery requests, filed on July 31, 2009. The Postal Service filed partial or complete objections to these and other questions on August 10, 2009. Counsel for GameFly and the Postal Service conferred last week and reached agreement on several questions. The parties were unable to reach agreement, however, on the discovery requests that are the subject of this motion to compel.<sup>1</sup>

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<sup>1</sup> The Postal Service has also failed to provide answers to a number of discovery requests for which the Postal Service asserted no objection: GFL/USPS-9, 11, 16(a-d), 21, 32, 33, 38, 45, 46, 47, 58 and 65. The Postal Service has advised GameFly that these overdue discovery responses will be forthcoming soon. GameFly does not seek relief from the Commission with respect to this matter now. We reserve the right to seek such relief in the near future.

In its objections, the Postal Service seeks to place three kinds of information off-limits to discovery: (1) information about any aspect of preferential treatment received by Netflix *other than* the degree of manual processing of return DVD mailers; (2) information about the treatment received by DVD rental companies—*other than* GameFly—that have smaller mail volume than Netflix and Blockbuster; and (3) certain information about the Netflix-only drop slots at local post offices. These restrictions are unfounded. Discovery of information on these subjects is “reasonably calculated to lead to the discovery of admissible evidence,” Rules 3001.26(a), 3001.27(a), and is not overly burdensome in relation to the potential probative value of the information. In Section I of this motion, we demonstrate that the disputed areas of inquiry relate directly to disputed issues of material fact. In Section II, we apply this analysis to the individual discovery requests at issue.

**I. THE DISPUTED AREAS OF INQUIRY RELATE DIRECTLY TO DISPUTED ISSUES OF MATERIAL FACT.**

The scope of the factual issues in this case is defined in large part by 39 U.S.C. § 403(c), the primary antidiscrimination provision of Title 39. Section 403(c) states that:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make *any undue or unreasonable discrimination among users of the mails*, nor shall it grant *any undue or unreasonable preferences to any such user*.

39 U.S.C. § 403(c) (emphasis added). This provision raises two subsidiary issues. First, is the Postal Service “discriminating” among DVD rental companies or granting a “preference” to Netflix or Blockbuster vis-à-vis other DVD rental companies? Second, if such discrimination or preferential treatment exists, is it “undue or unreasonable”?

The first issue has been resolved by the Postal Service's own statements in this case. The Postal Service initially asserted that it had abandoned its practice of giving manual culling and manual processing to "the largest movie DVD providers" in the wake of the November 2007 report of the Office of Inspector General, and specifically "denie[d] that any 'large percentage' of inbound movie DVDs are processed manually."<sup>2</sup> Since GameFly began discovery, however, the Postal Service has admitted that the preferential treatment given to Netflix has continued or even increased since the OIG report. The Postal Service's August 14 response to GFL/USPS-18, for example, admits that "the amount of manual processing of Netflix mail *is likely at least as large as* was set forth in the [Office of Inspector General Audit] Report, though no specific percentages are available." (Emphasis added.) *Accord*, USPS response to GFL/USPS-19(b)-(c) (same). Given the finding of the OIG report that "approximately 70 percent" of the Netflix reply mailers studied by the OIG were manually processed in 2007,<sup>3</sup> this implies that the percentage of Netflix DVD reply mailers given manual processing at letter rates of postage is somewhere north of 70 percent today.

By necessary implication, the Postal Service is therefore discriminating against other DVD rental companies. The Postal Service does not dispute that the DVD reply

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<sup>2</sup> See, e.g., USPS Answer (May 26, 2009) ¶ 36 (emphasis added) ("That OIG report addressed a period in 2007 that no longer describes current mail processing policy. DVD mailpieces for other mailers, such as the largest movie DVD providers, *are today typically processed in the automation letters mailstream, which conforms to current policy.*"); Answer ¶ 37 ("Respondent denies the allegations in the first sentence of this paragraph of the Complaint, since the Respondent has no current practice of manually culling incoming DVDs. Respondent admits that some culling of the incoming DVDs (returns from customers) may, however, occur despite the change in policy. . . . Respondent . . . denies that any 'large percentage' of inbound movie DVDs are processed manually.") (emphasis added).

<sup>3</sup> Joint Statement Of Undisputed And Disputed Facts (July 20, 2009) ¶¶ 83-84.

mailers sent to other DVD rental companies as letter mail receive less manual culling and manual processing than Netflix's reply mailers receive. And the Postal Service has effectively admitted that it would not offer Netflix-like levels of manual processing to GameFly DVDs if GameFly entered them in lightweight Netflix-like mailers at one-ounce letter rates. In response to GFL/USPS-63, which asked whether the Postal Service would "offer to GameFly the same degree of manual culling and priority manual processing that the Postal Service currently provides to Netflix," the Postal Service declined to do so, stating instead that the level of manual culling received by GameFly DVD mailers would be left to the "discretion" of "field officials."<sup>4</sup> This, of course, is the very arrangement that has produced the current discrimination in favor of Netflix.

Because the existence of discrimination among DVD rental companies is undisputable, the Postal Service has retreated to the second line of defense under 39 U.S.C. § 403(c): that any discrimination is "due," "reasonable," and hence lawful. Specifically, the Postal Service's asserts that the discrimination among DVD rental companies in the processing of DVD reply mailers is justified because (1) Postal Service headquarters officials have delegated the decision to perform manual culling and manual processing on DVD reply mailers to the discretion of Area, District or local officials,<sup>5</sup> and (2) field personnel give disproportionately manual processing to Netflix reply mailers not to cater to a large customer, but to meet the Postal Service's own

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<sup>4</sup> Response of USPS to GFL/USPS-63 (filed Aug. 19, 2009).

<sup>5</sup> GameFly/USPS Joint Statement of Undisputed and Disputed Facts (July 20, 2009) ¶¶ 81, 86 and 105.

operational needs.<sup>6</sup> The first of these defenses is legally indefensible; the second raises issues of fact that are very much in dispute.

The Postal Service cannot wash its hands its hands of responsibility for undue discrimination by pushing the relevant decision-making authority out into the field. Section 403(c) bars undue discrimination and preferences by “the Postal Service”—not just by “Postal Service headquarters.” In any event, the Postal Service concedes that headquarters officials have known for years of the disproportionately manual processing received by Netflix,<sup>7</sup> but have not tried to stop this practice.<sup>8</sup> Hence, the Postal Service is responsible for this discrimination regardless of which level of the organization nominally authorized it.<sup>9</sup>

The Postal Service is certainly entitled to try to establish its alternative defense: that discrimination in favor of Netflix is justified by the Postal Service’s operational needs. Establishing such a defense, however, would be exceedingly difficult. It would require proof *not only* that (1) the Postal Service benefits from processing Netflix return mailers manually rather than in automated equipment, but also that (2) the Postal Service would not benefit by processing other customers’ return DVD mailers manually,

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<sup>6</sup> USPS Answer to Complaint ¶ 35; USPS Responses to GameFly Discovery Requests GFL/USPS-23(d) and 25.

<sup>7</sup> GameFly/USPS Joint Statement of Undisputed and Disputed Facts (July 20, 2009) ¶ 90; USPS Response to GameFly Discovery Requests GFL/USPS-23(c).

<sup>8</sup> USPS Responses to GameFly Discovery Requests GFL/USPS-23(b), (d) and (e), 24 and 25.

<sup>9</sup> The Postal Service’s decision to delegate manual processing decisions out into the field does, however, go to the weight of the Postal Service’s objections to discovery of information in Area, District, local or other field offices as overly burdensome. The need to search for information is an obligation of the Postal Service’s own making.

and (3) the Postal Service would not benefit further by charging higher rates for Netflix return DVD mailers. These propositions are very much in dispute. At a minimum, the Postal Service's assertion of the defense entitles GameFly to full discovery of information bearing on it.

A variety of information indicates that the Postal Service's preferential treatment of Netflix is driven primarily by a desire to cater to a large customer, and that the operational needs that supposedly justify this discrimination are pretexts.

(1) Perhaps the most telling sign is the inability of the Postal Service to keep its story straight about whether it is discriminating at all. As noted above, at the outset of this case the Postal Service represented to the Commission that the practice of giving manual culling and manual processing to "the largest movie DVD providers" had been abandoned in the wake of the November 2007 report of the Office of Inspector General. Since then, however, the Postal Service has admitted that Netflix DVD return mailers get at least as much manual processing as in late 2007. See p. 6, *supra*.

(2) In response to GFL/USPS-28, the Postal Service asserts that dedicated mail slots for Netflix DVD mailers in "lobby drops available for the public to deposit mail" are "against current Headquarters policy, as detailed in the attached Retail Digest." USPS response to GFL/USPS-28 (filed August 14, 2009). The attached headquarters directive states that:

In an effort to accommodate Netflix mail, some offices have created special mail drops and signage for Netflix returns. This is *not* an authorized use of mail drop slots and it has legal ramification [sic] for the Postal Service.

*Id.* (Retail Digest, May 4, 2007, p. 2, first item on page). The headquarters directive is an admission that this form of preferential treatment for Netflix has no operational justification; and the “legal ramification” alluded to is presumably liability for discrimination under 39 U.S.C. § 403(c).

Whether the Postal Service has seriously attempted to enforce compliance with the directive, however, is unknown. The following is a photograph taken earlier this month showing the lobby drops at the post office in Susanville, California:



And here is a photograph taken earlier this month showing the lobby drops at the post office in Alturas, California:



(3) GameFly's complaint has prompted an outpouring of unsolicited comments in the discussion pages of websites frequented by postal employees. The overwhelming thrust of these comments is that (1) Netflix return DVD mailers entered at letter rates are given manual culling and processing at mail processing facilities throughout the United States; and (2) postal service managers provide this special treatment to accommodate Netflix in response to its complaints about the high rates of breakage of Netflix DVDs on automated letter processing equipment. See

[www.haloscan.com/comments/postalnews/9181678729162017431](http://www.haloscan.com/comments/postalnews/9181678729162017431);

[www.haloscan.com/comments/postalnews/5246963227708462661](http://www.haloscan.com/comments/postalnews/5246963227708462661).

The Postal Service can be expected to brush off the lobby drop photographs as merely “anecdotal.” The Postal Service undoubtedly will also argue—and not without merit—that anonymous comments of postal employees on internet sites are hearsay that merits little or no weight. But arguments of this kind merely underscore the importance of unfettered discovery of the information that the Postal Service objects to producing.

For example, information about the extent of *other* kinds of preferential treatment received by Netflix may very well shed light on whether the disproportionate degree of manual culling and manual processing given to Netflix reply mailers is required by Postal Service operational needs—or is one instance of a broader pattern of preferential treatment. Likewise, information on the extent to which other, smaller DVD rental companies receive manual processing of their DVD reply mailers may (1) provide a baseline from which to measure the degree of preference given to Netflix, and (2) shed light on the Postal Service’s claim that manual processing of Netflix (and Blockbuster) reply mailers serves some unique operational need that the reply mailers of other DVD rental companies do not present.

## **II. ANALYSIS OF INDIVIDUAL DISCOVERY REQUESTS**

### **A. GFL/USPS-3(e), 4(e), 14(e) and 20(d)**

**GFL/USPS-3.** Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with Reed Hastings, Tom Dillon, William Henderson or Andrew Rendich concerning any of the following matters:

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(e) Any other aspect of the service performance received by Netflix.

**GFL/USPS-4.** Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with any in-house or outside attorney of Netflix concerning any of the following matters:

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(e) Any other aspect of the service performance received by Netflix.

**GFL/USPS-14.** Please produce all documents reflecting any written communication or relating to any oral communication since February 23, 2006, with any Blockbuster senior executive (i.e., assistant vice president or higher) or any attorney for Blockbuster concerning any of the following matters:

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(e) Any other aspect of the service performance received by Blockbuster.

**GFL/USPS-20** Please produce all available data, studies and analyses concerning the following measures of the service provided by the Postal Service to DVD mailers:

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(d) Any other dimension of the quality of mail service.

**Argument:** The Postal Service has objected to these interrogatories on the basis that they “stray far beyond the scope of this proceeding.” Objections at 4. This relevance objection is premised on the theory that the only forms of discrimination between Netflix and other DVD rental companies that could be discoverable in this proceeding are discrimination with respect to (1) the degree of manual processing of DVD return mailers and (2) the breakage rates of DVDs in return mailers that result. Objections at 4, 2.

Information on other forms of discrimination, however, could very well lead to the discovery of admissible evidence. Evidence of other areas of discrimination could tend to show that (1) discrimination in the manual processing of DVD mailers is part of a larger pattern of undue preferences, and (2) the discrimination is motivated not by the Postal Service's operational needs, but by a desire to accommodate the desires of a large customer.

Finally, although the Postal Service did not explicitly assert a burden objection to these questions, the universe of documents sought by GFL/USPS-3(e), 4(e) and 14(e) is narrowly drawn. GFL/USPS-3(e) is limited to communications with the CEO and the Chief Operating Officers of Netflix. GFL/USPS-4(e) is limited to communications with Netflix attorneys. GFL/USPS-14(e) is limited to communications with Blockbuster executives with the rank of assistant vice president or higher. And GFL/USPS-20 is limited to existing "data, studies and analyses."

While GFL/USPS-3(e), 4(e), 14(e) and 20 are not limited to responsive documents located at Postal Service headquarters, discovery into data, studies and analyses in field offices – most likely by Area and District offices – is entirely appropriate. As noted above, the Postal Service has asserted repeatedly that it has pushed responsibility for deciding whether to give manual processing to DVD reply mailers out into the field. Unless GameFly is able to obtain discovery of field-level information concerning the bases for the treatment of Netflix vis-à-vis other DVD rental companies, these claims may evade scrutiny and testing.

**B. GFL/USPS-6(a)-(e), (g) and (h)**

**GFL/USPS-6.** Please produce all written communications between any employee or agent of the Postal Service and any employee or agent of Netflix since November 1, 2007, concerning any of the following matters:

- (a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to Netflix.
- (b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for Netflix.
- (c) The terms of service established by the Postal Service for the DVD mail of Netflix.
- (d) The Postal Service's actual performance in processing and delivering DVDs to or from Netflix.
- (e) The breakage or loss of DVDs sent to or from Netflix.

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- (g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of Netflix after the issuance of the OIG report.
- (h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of Netflix.

**Argument:** The Postal Service objects to these requests on the grounds of relevance and undue burden. Its relevance objection is essentially the same as for GFL/USPS-3(e)—i.e., that the requests seek information beyond the issue of manual processing of Netflix mail. Objections at 5. The Postal Service also complains that the requests are irrelevant to the extent that they seek information about Netflix's *outbound* mail.

For the reasons explained above, the discrimination in matters other than manual processing are relevant to this proceeding. Evidence that the Postal Service has granted preferences to Netflix's outbound mail, or that the Postal Service has favored Netflix in a variety of ways other than manual processing, would tend to show that the

disproportionate degree of manual processing received by Netflix reply mailers is part of a broader pattern of undue preferences, and would tend to undermine the Postal Service's contention that the discrimination in favor of Netflix is driven solely or primarily by operational needs.

The Postal Service's burden objection appears to be tied to its relevance objection in that the Postal Service objects to producing information "far removed" from the issue of manual processing. Objections at 3. As GameFly believes this information is relevant, the burden on the Postal Service in searching for and producing this information is not undue. GameFly does not seek information on "mundane, day-to-day topics," Objections on 5, but to the extent that the Postal Service has information regarding the quality of mail processing received by Netflix, GameFly is entitled to review that information.

### **C. GFL/USPS-7 and 8**

**GFL/USPS-7.** Please produce all documents, studies, analyses, workpapers, memoranda and similar documents created since January 1, 2005, relating to the establishment of Permit Reply Mail ("PRM").

**GFL/USPS-8.** Please produce all documents relating to communications between the Postal Service and Netflix concerning the establishment of Permit Reply Mail ("PRM") since January 1, 2005.

**Argument:** Discovery requests GFL/USPS-7 and 8 seek information about the development of Permit Reply Mail ("PRM"), a service that allows mailers to pre-pay the postage of return pieces. The Postal Service objects to these interrogatories on the grounds of burden and relevance. Objections at 4. As to relevance, the Postal Service contends that "PRM is simply a means by which mailers can pre-pay postage for a return mailing at the time of the entry of the mailpiece," that the interrogatory would

“require ‘all documents’ concerning matters regarding postage payment and mailpiece formatting,” and that these “issues . . . have no relevant connection to the discrimination claim.” *Id.* As to burden, the Postal Service states that “it would be unduly burdensome for the Postal Service to have to identify and compile the documentation sought here, as the documentation underlying the establishment of PRM is potentially large.”

GameFly has been advised, however, that PRM was established in large part for the benefit of Netflix—specifically, to create a method of paying for reply mailpieces that would help differentiate the reply mail service received by Netflix from the reply mail service provided to other DVD rental companies, and to minimize the risk that they could assert discrimination claims against the Postal Service with respect to Netflix. In other words, PRM may have been created to serve as a pretext for the Postal Service’s preferential treatment of Netflix mail reply. This possibility, if true, would tend to support the proposition that the degree of manual processing received by Netflix is part of a larger overall pattern of preferences vis-à-vis other DVD mailers. Accordingly, GameFly is entitled to seek discovery of probative information relating the Postal Service’s actual motives for creating PRM.

Finally—as GameFly informed the Postal Service last week—GameFly is willing to limit the scope of GFL/USPS-7 and 8 to information concerning the development and creation of PRM, and to exclude any documents or information relating to the operation of PRM after the service was implemented.

**D. GFL/USPS-15, 20, 21 and 41(c)**

**GFL/USPS-15** Please produce all written communications with any DVD rental company other than Netflix, Blockbuster or GameFly since November 2007 concerning any of the following matters:

- (a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to that company.
- (b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for that company.
- (c) The terms of service established by the Postal Service for the DVD mail of that company.
- (d) The Postal Service's actual performance in processing and delivering DVDs to or from that company.
- (e) The breakage or loss of DVDs sent to or from that company.
- (f) The OIG report, or the investigation that led to the OIG report.
- (g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of that company after the issuance of the OIG report.
- (h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of that company.

**GFL/USPS-20** Please produce all available data, studies and analyses concerning the following measures of the service provided by the Postal Service to DVD mailers:

- (a) The extent of manual culling and priority manual processing.
- (b) The extent of automated letter processing.
- (c) The rate of DVD breakage

**GFL/USPS-21** Please produce all Confirm scan data and other business records that relate to the extent to which DVD mail pieces to or from Netflix, Blockbuster, and other DVD rental companies have been processed on letter sorting equipment, flats sorting equipment, or manually.

**GFL/USPS-41** Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents created since January 1, 2005, by the Postal Service, any subordinate department or division of the Postal Service with national responsibilities (e.g., engineering, operations, marketing, pricing, Postal Inspection Service or Office of Inspector General), or any contractor or consultant to the Postal Service, relating to any of the following subjects:

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(c) The actual rate of DVD breakage (for Netflix, any other DVD rental company, any group of DVD rental companies, or the DVD rental industry generally).

**Argument:** The Postal Service objects to these interrogatories to the extent that they request information concerning DVD mailers *other than* Netflix or Blockbuster. Information about other mailers, the Postal Service contends, “is fundamentally irrelevant in determining whether Netflix receives an unlawful preference in relation to GameFly.” Objections at 6. The Postal Service also contends that “discovery into the various smaller players in the DVD mailer market would dramatically increase the burden of discovery on the Postal Service, without any material contribution to the record.” *Id.*

The Postal Service’s relevance objection fundamentally misconstrues the nature of GameFly’s complaint. GameFly’s complaint is against the Postal Service, not Netflix. While the complaint is based primarily on the preferential treatment given to Netflix and Blockbuster, information about the treatment given to the DVD mailers of other DVD rental companies is likely to lead to admissible evidence regarding:

- (1) The extent of the disparities in the Postal Service’s treatment of individual DVD rental companies..
- (2) The relationship between the degree of manual processing and DVD breakage rates.
- (3) The validity of the Postal Service’s claim that the high breakage rates of GameFly DVD mailers in automated letter processing must be due in substantial part to some physical difference between game DVDs and

movie DVDs.<sup>10</sup> A number of the smaller DVD rental companies offer movies, not games. Analysis of those companies' breakage rates could be illuminating.

- (4) The validity of the Postal Service's suggestion that the high breakage rates of GameFly DVD mailers in automated letter processing must be due to rough handling of the DVDs by GameFly employees or customers, or some other factor other than the automated letter processing of the DVDs by the Postal Service.<sup>11</sup> Evidence that high rates of DVD breakage in automated letter processing is pervasive throughout the DVD rental industry would tend to show that the greater rate of breakage in automated letter processing is due to Postal Service handling rather than GameFly practices.

With regard to GFL/USPS-21, the Postal Service objects to providing information on Confirm scans with respect to Netflix, as Netflix does not use Confirm service. If the Postal Service is correct, it can simply so state with respect to Netflix in its answer. As to other mailers, however, the Confirm data could provide evidence as to how these mailers are discriminated against vis-à-vis Netflix. This discovery request, therefore, requests information that is likely to lead to the discovery of admissible evidence, and the Commission should compel the Postal Service to answer it.

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<sup>10</sup> USPS Answer to Complaint at ¶ 16; Joint Statement of Undisputed and Disputed Facts ¶¶ 33-34 (statements of disputed facts).

<sup>11</sup> USPS Answer to Complaint ¶ 22-23; Joint Statement of Undisputed and Disputed Facts ¶¶ 32, 35-37 (statements of disputed facts).

**E. GFL/USPS-16(f) and (g)**

**GFL/USPS-16** Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents relating to the following matters:

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(f) Any changes considered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.

(g) Any changes actually ordered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.

**Argument:** The Postal Service objects to these requests on the grounds of relevance and burden. Objections at 5. The Postal Service's primary objection is that this interrogatory inquires "into a wide variety of issues concerning DVD mail unrelated to the manual processing of Netflix return pieces." Objections at 5. For the reasons discussed above with respect to GFL/USPS-3(e) and GFL/USPS-(15), information about Netflix mail, or the degree of manual processing given to Netflix or other companies' DVD mailers, does not represent the entire universe of information relevant to this proceeding. Information about other aspects of the treatment afforded to Netflix, Blockbuster, and other DVD mailers will either support or undermine the Postal Service's fundamental claim that its admitted discrimination in favor of Netflix has a reasonable basis.

**F. GFL/USPS-28 and 29**

**GFL/USPS-28** What percentage of Postal Service retail facilities have mail slots designated for members of the public to deposit:

(a) Netflix DVD mailers?

(b) Blockbuster DVD mailers?

(c) The DVD mailers of any DVD rental company?

**GFL/USPS-29** Please produce copies of any signs, placards, posters and similar items that are used to direct or encourage members of the general public to deposit DVD reply mailers separately from other mail.

**Argument:** The Postal Service objects to these interrogatories as unduly burdensome, claiming with respect to GFL/USPS-29 that the “extreme level of detail sought in this interrogatory has no material bearing on the Commission’s consideration of” GameFly’s discrimination claim. Although the Postal Service has provided a narrative response to GFL/USPS-28, it objects to “having to conduct any census of its retail facilities in order to identify which, if any,” have designated mail slots for DVD mailers.

Contrary to the Postal Service’s claims, these interrogatories impose little burden on the Postal Service. A simple email to all retail facilities inquiring as to whether they have dedicated mail slots for DVD mailers would satisfy the census requested in GFL/USPS-28. With respect to GFL/USPS-29, GameFly is willing to settle for a similar email census of retail facilities containing such signage, possibly followed up with a sampling of signs from facilities that report using them. Again, there is little burden on the Postal Service in performing such a census. Moreover, as the Postal Service’s primary defense to GameFly’s complaint appears to be that any decisions to handle Netflix or Blockbuster mail differently than GameFly mail were made at the local level, the Postal Service cannot hide behind burden objections to prevent the production of materials related to those local decisions.

## CONCLUSION

For the reasons stated above, GameFly requests that the Presiding Officer order the Postal Service to compel responses to the discovery requests discussed in this motion.

Respectfully submitted,

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