

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

COMPLAINT OF GAMEFLY, INC.                    )  
  )  
  )                   Docket No. C2009-1

**ANSWER OF GAMEFLY INC. TO  
MOTION OF USPS TO POSTPONE HEARING  
(June 8, 2010)**

GameFly, Inc., (“GameFly”) respectfully responds to the June 3 motion of the United States Postal Service to postpone the June 17 hearing set by the Commission in Presiding Officer’s Ruling No. C2009-1/20 for receipt of GameFly’s direct case. In ordinary circumstances, GameFly would consent to a request of this kind as a matter of course. But these are not ordinary circumstances. The June 3 motion is merely the latest in a chronic pattern of delay by the Postal Service in this case. By June 17, almost 14 months will have elapsed since the filing of GameFly’s complaint. Much of this delay has resulted from the Postal Service’s failure to respond to discovery, or establish objections to discovery, in a timely fashion. More than nine months elapsed before some of GameFly’s discovery requests received purportedly complete answers.

This delay has been costly to GameFly. At the company’s current volume of approximately 1.2 million pieces per month, the difference between the two-ounce flats rate of \$1.05 that GameFly must pay to avoid automated letter processing for most of its DVD mailers, and the one-ounce letter rate of \$0.44 that Netflix pays to avoid automated letter processing of return mailers, amounts

to about \$730,000 per month. This amount is nearly as much as the total net income earned by GameFly in six months.<sup>1</sup>

At the hearing on May 5 that led to the establishment of the current procedural schedule, several members of the Commission emphasized the importance of resolving this case quickly. See Tr. 46 & 55 (Commissioner Blair); *id.* at 19 (Commissioner Hammond); *id.* at 46 (Commissioner Langley); see also Rule 3001.30(f) (the “taking of evidence shall proceed with all reasonable diligence and dispatch”). Two days later, Presiding Officer’s Ruling No. C2009-1/20, in setting the remaining procedural dates in this case, emphasized that “this proceeding has been pending for some time.” *Id.* at 2. To protect the Postal Service’s due process rights, the Ruling nonetheless allowed the Postal Service more than six weeks of discovery after April 12, 2010, when the “Postal Service received GameFly’s direct case.” *Id.* at 2.

Given this history, one would expect the Postal Service to refrain from seeking any further delay absent an extraordinarily compelling justification. No such justification appears in the Postal Service’s June 3 motion. We respond in turn to each of the Postal Service’s asserted grounds.

**A. The Alleged Unavailability Of Postal Service Counsel To Cross-Examine GameFly Witness Sander Glick On June 17**

The Postal Service insists that it cannot cross-examine GameFly’s witness, Sander Glick, on June 17 because the most junior Postal Service lawyer on the case, James Mecone, is getting married, and his immediate superior,

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<sup>1</sup> Motion of GameFly, Inc., for Scheduling Conference (April 14, 2010) at 2.

Kenneth Hollies, has other responsibilities. The Commission, however, issued the current procedural schedule on May 7, and the Postal Service presumably was aware by then of Mr. Mecone's personal commitment. It is hard to believe that between May 7 and now the Postal Service could not find a substitute for Mr. Mecone or Mr. Hollies from the numerous headquarters lawyers with experience in trying postal rate and classification cases at the Commission. It is also hard to believe that the Postal Service law department will be less busy later in June or in July, when the Postal Service is expected to file price increases on its entire range of market-dominant products. See Docket No. PI2010-3, *Public Inquiry Concerning Procedures for Rate Cases Under Part 3010, Subpart E*, Order No. 456 (May 7, 2010).

Moreover, the Postal Service does not appear serious about cross-examining Mr. Glick. The Commission's rules reflect a clear policy that oral cross-examination should be used primarily as a supplement to written discovery. "Written cross-examination"—i.e., written answers to interrogatories and document requests—"shall be utilized as a substitute for oral cross-examination wherever possible," Rule 3001.30(e)(2). The Postal Service, however, has not submitted any discovery to Mr. Glick at all.

Nevertheless, GameFly is willing to move up the date for Mr. Glick's appearance from June 17 to June 15 or 16, two of the alternative dates that the Postal Service states would be acceptable for this purpose. USPS Motion at 4-5. A hearing date after June 17, however, would impose a significant hardship on GameFly. Its lead counsel, David Levy, has jury duty in the U.S. District Court

for the District of Columbia from June 18 through July 5.<sup>2</sup> Postponing the June 17 Commission hearing until even the first day after July 5 would entail a delay of almost three weeks.

**B. Alleged need to cross-examine an institutional GameFly witness concerning the documents produced by the Postal Service in discovery and offered by GameFly as part of its April 12 direct case**

The Postal Service also suggests that it is entitled to engage in additional cross-examination concerning the Postal Service discovery responses cited by GameFly in its April 12 Memorandum. USPS Motion at 1-2 (describing documents as lacking “evidentiary status”). No cross-examination of a GameFly witness concerning these documents is necessary or warranted, however. They were *produced by the Postal Service itself*, and GameFly is entitled to move them into evidence without a sponsoring witness. Even federal courts, which apply the hearsay rule more rigorously than do expert administrative bodies such as the Commission, admit documents of this kind without a sponsoring witness under the exceptions to the hearsay rule for party admissions,<sup>3</sup> business

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<sup>2</sup> The U.S. District Court, unlike the D.C. Superior Court, does not have a one-day-or-one-trial rule.

<sup>3</sup> A party’s own out-of-court statements and statements that are attributable to a party are not hearsay when they are offered against that party.” Fed. R. Evid. 801(d)(2). Party admissions are admissible as substantive evidence of the fact stated. See, e.g., *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000); *United States v. Jenkins*, 928 F.2d 1175, 1180 (D.C. Cir. 1991). Statements by a party’s agent or employee are treated as party admissions if they were made during the agency or employment and they relate to a matter within the scope of the agency or employment. Fed. R. Evid. 801(d)(2)(D).

records,<sup>4</sup> and public records and reports<sup>5</sup> (among other exceptions).<sup>6</sup> The Postal Service's rejoinder that "discovery responses do not become evidence until they are entered into the record" (USPS Reply to GameFly Answer to Motion To Compel (June 7, 2010) at 3) misses the point. No potential evidence—including prefiled testimony and live testimony—becomes evidence until entered into the record. The issue here, however, is whether due process or the Commission's evidentiary standards prevent GameFly from entering the Postal Service's discovery responses into evidence on June 17 without calling the authors of the documents to the stand to verify them. The answer is no—at least not for the documents that the Postal Service, an adverse party, has produced in discovery.

Moreover, requiring that documents of this kind be sponsored by a witness who was involved in the creation of the documents would vastly multiply the time and expense needed to litigate a complaint case of this kind. The nature and the extent of the Postal Service's discrimination against GameFly vis-à-vis Netflix is spelled out in thousands of pages of documents with dozens of authors. Requiring that each relevant document be sponsored by the live testimony of an individual who was involved in its creation would require weeks or months of

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<sup>4</sup> See, e.g., *United States v. Lavalley*, 957 F.2d 1309, 1314 (6th Cir. 1992) (letters from commander of military base were admissible as business records); *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990) (police personnel files were admissible as business records).

<sup>5</sup> See Fed. R. Evid. 803(8).

<sup>6</sup> The Postal Service's suggestion that GameFly's April 12 Memorandum summarizing the documents was "unusual" or somehow illegitimate (USPS Motion at 1-2) is also unfounded. The document is a "trial brief" or "legal memorandum" within the meaning of Rule 3001.30(e)(1). Legal memoranda "on matters at issue" are "welcome at any stage in the proceeding." *Id.*

hearing time, and the appearance of dozens of Postal Service executives and employees on the witness stand. This would be a time-consuming distraction for the Postal Service, a needless imposition on the Commission, and, for all but the biggest mailers, an insuperable cost barrier to the use of the Commission's complaint remedies.

The Postal Service, if it disagrees with the conclusions that GameFly has drawn from these documents, is free to use its rebuttal testimony or briefs to argue for a different interpretation. But oral cross-examination of a GameFly witness about the meaning of documents that someone else created is unnecessary and pointless. In terms of Rule 3001.30(f)(3), such cross-examination is not "required for a full and true disclosure of the facts necessary for the disposition of the proceeding"; and the testimony so elicited would be "irrelevant, immaterial, or unduly repetitious." *Id.*

In any event, the Postal Service's request for an institutional witness is untimely. GameFly made clear in the very first paragraph of its April 12 Memorandum that it intended to base its direct case on both Mr. Glick's testimony and—separately—the Postal Service documents cited in the Memorandum:

GameFly's case-in-chief consists of (1) a cost study by Sander Glick (GFL-T-1) and (2) stipulations, interrogatory answers, and business records produced by the Postal Service in discovery. This memorandum provides a road map to the latter documents and the legal claims that they support.

Memorandum at 1 ¶ 1. The Postal Service, however, has not moved for the designation of a GameFly witness to sponsor these Postal Service documents, let alone specified the particular matters that the Postal Service wished to ask the

witness about. Given the clear notice from the Commission about the need for expedition, the Postal Service's failure to move for an institutional witness until now should be regarded as a waiver.

**C. Alleged need to follow up on USPS discovery requests on issues raised by the USPS.**

The Postal Service's main argument for postponing the hearing date is that a hearing on or before June 17 might not allow enough time for the Postal Service to use GameFly's discovery responses to cross-examine an in-house GameFly witness (if the Postal Service chooses to demand that one testify) on issues that the *Postal Service* wishes to raise. USPS Motion at 1-4. This bootstrap fails on several grounds.

First, any time crunch is of the Postal Service's own making. As the Commission has noted, the Postal Service "had over six weeks to pursue discovery of GameFly" between April 12, when GameFly filed its direct case, and May 26, the close of discovery. Presiding Officer's ruling No. C2009-1/20 at 2. An additional three weeks will elapse between May 26 and the June 17 hearing date. Moreover, GameFly repeatedly laid out its theory of the case in great detail months before April 12.<sup>7</sup> Hence, the Postal Service readily could have served GameFly with discovery well before the June 17 hearing. The Postal Service

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<sup>7</sup> See, e.g., Joint Statement of Undisputed and Disputed Facts (July 20, 2009); GameFly Motion to Compel (Aug. 24, 2009); Response Of Gamefly, Inc., To Opposition Of USPS To Motion To Compel (September 3, 2009) at 9-23; Motion Of Gamefly, Inc., For Order Directing Interested Parties To Show Cause Why Certain Documents And Information Designated As Proprietary By The Postal Service Should Not Be Unsealed (September 25, 2009) at 7-12.

also knew that GameFly sought to get the case back on track by having the Commission adopt an expeditious procedural schedule. Yet the Postal Service waited until May 4, 2010—three weeks after GameFly filed its direct case—before serving its first discovery requests.

Second, the Postal Service has neither moved to require GameFly to produce an institutional witness nor even specified the issues on which it intends to cross-examine such a witness. Nine days before the June 17 hearing date, the notion that the hearing should be postponed indefinitely so that the Postal Service might continue contemplating the *possibility* of cross-examining an in-house GameFly witness, has an air of unreality.

Third, and in any event, the issues that the Postal Service invokes as potential grounds for compelling the appearance of an in-house GameFly witness are “irrelevant, immaterial,” and “[un]necessary for the disposition of this proceeding” under Rule 3001.30(f). Many of the propositions that the Postal Service claims it needs to establish through cross-examination have already been conceded by GameFly. More important, *none* of these propositions would constitute a valid defense to GameFly’s discrimination claim *even if true*.

As GameFly noted in its June 3 Answer to the Postal Service’s Motion to Compel, the basic elements of a discrimination case under Section 403(c)(3) are well established:

First, the complainant must establish that the service used by the complainant is “like”—*i.e.*, “similarly situated” or “functionally equivalent” to—the

service used by other ratepayer(s). GameFly Memorandum (April 12, 2010) at 47-52 (citing cases); *Experimental Rate and Service Changes to Implement Negotiated Service Agreement With Capital One*, MC2002-2 PRC Op. & Rec. Decis. (May 15, 2003) (“*Capital One NSA*”) ¶¶ 7011-7023; see also *MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990).

Second, the complainant must show that the Postal Service is *discriminating* against the complainant by offering a lower price or better terms and conditions of service to a similarly situated ratepayer, but not to the complainant. GameFly Memorandum (April 12, 2010) at 48-49 (citing cases); *Red Tag Proceeding, 1979*, MC79-3 PRC Op. & Rec. Decis. (May 16, 1980) (“*Red Tag*”) at 11; *MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990).

Proof of these elements establishes a prima facie case of discrimination, and shifts to the Postal Service the burden of showing that the discrimination is reasonable. To do so, the Postal Service must show that the discrimination is rationally related to differences in the Postal Service's costs of service or (in some circumstances) the mailers' elasticities of demand—and that the terms and conditions that qualify or disqualify mail on these grounds were published in the MCS or a similar tariff-type publication. *Id.*; GameFly Memorandum (April 12, 2010) at 63-66 (citing cases); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317-1318 & n.12 (D.C. Cir. 1984) (quoting *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 196-97 (1913)) (“The published tariffs made no

distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged.”<sup>8</sup>

The defenses that the Postal Service has sought to establish through discovery (and apparently wants the right to pursue in cross-examination) may be summarized as follows:

1. GameFly is not similarly situated or functionally equivalent to Netflix because:
  - (a) game DVDs cost more than movie DVDs, and
  - (b) Netflix has many more distribution centers than GameFly, allowing a smaller average distance between Netflix distribution centers and subscribers than between GameFly distribution centers and subscribers.
2. The Postal Service’s subjection of GameFly DVD mailers to automated letter processing unless GameFly uses mailers that require payment of the two-ounce flats rate is not discriminatory. GameFly DVDs break at greater rates in automated letter processing than in flats processing or manual processing *not* because automated

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<sup>8</sup> The Postal Service tries to brush off these legal standards on the ground that they “have not been endorsed or adopted by the Commission *in this complaint action.*” USPS Reply to GameFly Answer to Motion To Compel (June 7, 2010) at 2 (emphasis added). Since the Commission has yet to decide this case, this claim is an obvious truism. But the legal standards cited by GameFly were “endorsed or adopted” by the Commission and other tribunals in *previous* discrimination cases. The Postal Service makes no attempt to distinguish this precedent.

letter processing is more destructive, but because GameFly's DVDs are more fragile than movie DVDs, or GameFly's mailers offer less protection than other company's mailers.

3. Postal Service employees steal or lose enough GameFly DVDs that GameFly should want to avoid manual processing. GameFly therefore has no business complaining about being denied manual processing as an option.

USPS Motion to Compel (May 28, 2010); GameFly Answer to USPS Motion to Compel (June 3, 2010); USPS Reply to GameFly Answer (June 7, 2010). None of these supposed defenses raises a disputed material issue of fact under Rule 3001.30(f). We discuss each one in turn.

#### **1. The alleged dissimilarity between GameFly and Netflix**

GameFly does not dispute that game DVDs cost more than movie DVDs; that Netflix currently has more distribution centers than does GameFly; or that the average distance between distribution centers and subscribers is therefore smaller for Netflix than for GameFly. But these facts do not undermine the functional equivalence between the two companies' DVD mailers.

Functional equivalence does not require that the service sought by two mailers be *identical*. *Capital One NSA* at ¶ 7015. "Minor," "incidental" or "immaterial" differences between two customers' mail do not make them unlike. *Id.* at ¶¶ 7015-7021; *MCI*, 917 F.2d at 39. Thus, for example, it is immaterial to the question of functional equivalence or substantial similarity whether two rate-

payers are the same size, generate the same amount of mail, impose the identical operating requirements on the Postal Service, cost the Postal Service the same to serve, or have the same competitive options. *Capital One NSA* at ¶¶ 7020-7021, 7023.

Under these legal standards, the mail service used by GameFly is indisputably “like,” “functionally equivalent to” and “similarly situated to” the mail service used by Netflix notwithstanding any differences in the value of the DVDs or the average length of haul between distribution center and subscriber. Both companies use First-Class Mail to ship DVDs in mailers to and from subscribers. Both companies’ DVDs are small and light enough to be mailed in lightweight mailers as one-ounce letters if the Postal Service processes the pieces in a non-destructive fashion. And Postal Service officials themselves have conceded the functional equivalence between the mail service provided to Netflix and the service provided to other DVD rental companies. These officials have repeatedly expressed concerns about the risk that the preferred treatment given to the former might lead to a discrimination complaint by the latter. GameFly Memorandum (April 12, 2010) at 32-33 (discussing directive to remove Netflix-only drop slots from post offices due to the “legal ramifications” of maintaining them); *id.* at 33-34 (citing internal Postal Service emails questioning why Netflix was not required to pay a nonmachinable surcharge and suggesting that this treatment would “open the door to other mailers requesting the same treatment”); *id.* at 36; *id.* at 40 (discussing internal Postal Service emails suggesting that a complaint could be filed if the treatment of Netflix mail was codified in a national SOP); *id.* at 45-47 (providing an overview of Postal Service documents discussing the

possibility of a complaint being filed by other DVD mailers if Netflix continued to receive preferential treatment).

Where differences between GameFly and Netflix may play a role is in the third analytical step of a discrimination case: deciding whether the discrimination has a *rational basis*. *MCI* at 39. But the difference in price between game and movie DVDs, and the greater number of distribution facilities operated by Netflix, are both insufficient as a matter of law to provide a lawful justification for the \$1.22 in additional postage per round trip that the Postal Service forces GameFly to pay for an equivalent degree of bypass of automated letter processing.

First, the Postal Service may not argue that, because game DVDs sell for more than movie DVDs, value-of-service or Ramsey pricing principles entitle the Postal Service to appropriate some of that value for itself by charging mailers of game DVDs higher rates of postage than mailers of movie DVDs. The Commission has held that differences in demand elasticities among similarly situated customers may justify differences in price *only* when the differences in demand elasticities are so great as to warrant reclassifying the two customers' mail as separate subclasses.<sup>9</sup> Among the tens of thousands of pages of emails, analyses and studies performed by the Postal Service since 2002 and produced in discovery in this case, GameFly has not found any hint that anyone at the Postal

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<sup>9</sup> See *Postal Rate and Fee Changes*, R2006-1, PRC Op. & Rec. Decis. (Feb 26, 2007) at ¶ 5083 (citing the need for “distinct differences in demand characteristics” to warrant reclassification into separate subclasses); MC95-1, PRC Op. & Rec. Decis. at ¶ 5481 (“The driving factor for the definition of a subclass . . . is the perceived differences in demand as well as costs.”); *id.* at ¶ 5497 (“In the absence of convincing market differences, rates for worksharing categories should be based on cost avoidance.”).

Service performed a comparative analysis of the demand elasticities of Netflix versus the other DVD rental companies; let alone claim that differences in demand elasticities were large enough to justify the preferences given to Netflix; let alone argue that Netflix DVD mailers and GameFly DVD mailers should be put into separate subclasses.

Similarly, evidence that GameFly DVD mailers have a longer average haul in the postal system (and thus may impose higher transportation costs on the Postal Service) than do Netflix DVD mailers also fails to provide a rational basis for the Postal Service's discrimination between Netflix and GameFly. The Postal Service's own documents show that the differences in cost of service stemming from differences in average transportation distance and other factors amount to only a small fraction of the rate disparity. Indeed, Postal Service officials have acknowledged that there is no cost justification for the rate preference that Netflix enjoys. GameFly Memorandum at 57-60 (discussing record); Answer of Sander Glick to Public Representative/GFL-T1-1. The Postal Service should not be allowed to use discovery as a backdoor way of disputing what its own employees and agents have already admitted.<sup>10</sup>

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<sup>10</sup> Inquiry into *GameFly's* transportation costs is even wider of the mark. The costs that are relevant for determining whether discrimination is justified are the costs incurred by the Postal Service itself, not its customer, GameFly. See, e.g., *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One*, Docket No. MC2002-2, PRC Op. & Rec. Decis. (May 15, 2003) at ¶¶ 1008, 3030 (discrimination analysis under 39 U.S.C. § 403(c) focuses on the relationship between the rate differentials with the "costs avoided by the Postal Service"); *UPS Worldwide Forwarding v. USPS*, 66 F.3d 621, 632 (3<sup>rd</sup> Cir. 1995) (adopting Postal Service position that price discrimination among customers could be justified under Section 403(c) by differences in the costs "incurred by the Postal Service"); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) ("The core concern in the nondiscrimination area has

Finally, none of the justifications for discrimination belatedly advanced by the Postal Service are cognizable in this case because the Postal Service has never filed notice in the MCS—or any other tariff-like publication—of precisely what mailers must do to qualify for the lower rates. Such publication is a basic requirement of common carrier regulation and a fundamental protection against discriminatory conduct. Every regulatory agency with jurisdiction over common carriers, including this Commission, has held this filing requirement to be a necessary condition of the lawfulness of any rate charged or service provided by a common carrier.<sup>11</sup> The terms and conditions of the preferences granted to

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been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.”); *Transcontinental Bus System, Inc., v. Civil Aeronautics Bd.*, 383 F.2d 466, 483 (5th Cir. 1967) (explaining that the relevant factors for determining whether shipments are similarly situated are generally “limited to competition and factors directly relating to the cost of carriage or transportation.”); *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 412 F.2d 926, 933 (1st Cir. 1969) (holding that the “inconvenience to traveler” of a service does not provide a legitimate basis for offering preferential services to certain travelers if the differing services provide no cost benefit *to the carrier*).

<sup>11</sup> See *Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan*, Opinion and Recommended Decision, Docket No. MC2005-3 at 38-39 (May 10, 2006) (specifically pointing to the public availability of the terms and conditions of the NSA and the ability of other mailers to obtain service on substantially the same conditions as support for holding the NSA nondiscriminatory); Docket No. RM2003-5, *Rules Applicable to Baseline And Functionally Equivalent Negotiated Service Agreements*, Order No. 1391 at 23 (Feb. 11, 2004) (“Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings . . . . The Commission will adhere to its preference, and presumption, that the contents of the actual contract shall be made publicly available.”); *UPS Worldwide Forwarding v. United States Postal Service*, 66 F.3d 621, 635 (3d Cir. 1995) (“The regulation promulgating the ICM program requires the Postal Service to ‘make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions. . . . To facilitate that process, the regulation mandates that the Postal Service *publish detailed information* about each ICM

Netflix vis-à-vis other DVD rental companies have never been published in a tariff-like schedule. They are essentially a secret NSA or niche classification. For this reason, even if differences between GameFly's and Netflix's costs, production processes and distribution networks were otherwise potentially relevant to establishing a valid basis for discriminating between the two, the Postal Service's defense would fail for lack of a published schedule indicating the conditions under which mailers are eligible for the same treatment as Netflix.

A letter dated May 17, 2010, from the Postal Service to GameFly, self-styled as "not an offer of settlement" and attached as Exhibit 1 to the Postal Service's June 7 Reply to GameFly's Answer to the Postal Service's Motion to Compel, appears to be a belated attempt to give public notice of the terms and conditions of the special deal that the Postal Service has provided Netflix. The letter does not begin to satisfy the public notice requirement, however. The terms and conditions of service have not been set forth in MCS format. The letter leaves unmentioned many of the preferences given to Netflix. *Compare* GameFly Memorandum (April 12, 2010) at 13-33 (discussing USPS discovery responses). The letter conditions the availability of manual processing on

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agreement. . . . We believe the publication of this information will permit competitors and mailers alike to verify that the Postal Service is complying with its mandate not to grant 'undue or unreasonable' discrimination or preferences" (emphasis added); *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-224 (1998) (citing precedent supporting "filed rate doctrine"); *American Warehousemen's Ass'n v. Ill. Cent. R. Co.*, 7 I.C.C. 556, 590, 591 (1898); *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004) ("[Federal Energy Regulatory] Commission policy generally favors disclosure of individual jurisdictional contract information in order to ensure that the pipeline's contracting practices are not unduly discriminatory, and no undue preferences are granted to any customer.)

GameFly's agreement to enter and pickup mail at "approximately 130 locations," even though (1) the cost savings to the Postal Service from the reduced average length of haul would be only a fraction of the \$1.22 rate surcharge over Netflix that GameFly now pays;<sup>12</sup> (2) Postal Service employees have admitted that the preferences received by Netflix are not justified by any quantified cost savings;<sup>13</sup> and (3) Netflix had far fewer than "130 locations" when the Postal Service first began offering Netflix manual processing at automation letter prices.<sup>14</sup> Finally, the letter disavows any guaranty or commitment that GameFly or other DVD rental companies would actually receive Netflix levels of manual processing in exchange for the myriad operational requirements sketched out in the letter. Once again, the Postal Service hides behind the supposedly uncontrolled "discretion of local mail processing operations." Letter at 1 & 2 n. 1; *compare* USPS answer to GFL/USPS-63 (declining to "offer to GameFly the same degree of manual culling and priority manual processing that the Postal Service currently provides to Netflix," and insisting that the level of manual culling received by GameFly DVD mailers would be left to the "discretion" of "field officials." This, of course, is the very arrangement that has produced the current discrimination against GameFly.

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<sup>12</sup> GameFly Memorandum (April 12, 2010) at 57-60 (discussing record); Answer of Sander Glick to Public Representative interrogatory PR/GFL-T1-1.

<sup>13</sup> GameFly Memorandum (April 12, 2010) at 57-60 (citing USPS discovery responses).

<sup>14</sup> See GFL 460 (stating that Netflix had *twelve* distribution centers nationwide in September 2002).

## 2. The supposedly greater fragility of GameFly DVDs or DVD mailers

The Postal Service's continued insistence that GameFly DVDs must be more fragile than other DVDs is baffling. By all accounts, game DVDs are physically identical to movie DVDs; a fact that the Postal Service conspicuously does not dispute, despite the widespread availability of public information about DVD design specifications. GameFly, for its part, has no knowledge of any physical difference in design.

Moreover, GameFly's discrimination claim would not be undermined even if game DVDs were in fact more fragile than movie DVDs. The record in this case makes clear that *both* kinds of DVDs suffer higher breakage rates when forced to undergo automated letter processing than when they bypass automated letter processing. That is why the DVD rental industry—and candid officials within the Postal Service itself—regard the processing of return DVD mailers on automated letter processing equipment as an inferior service.<sup>15</sup> And that is why

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<sup>15</sup> See GFL773 (the Round-Trip Disc Mail (RDM) Work Group Minutes: 26 September 2005) (“Disc damage is now becoming the number one issue with RDM [round-trip DVD mail] mailers as more mail is processed on equipment.”); GFL1335 (slide from USPS PowerPoint Presentation titled “LSS Project Re-Measure: Return DVD Handling & Damage Reduction” and dated February 24, 2009) (“Automated USPS handling procedures cause a perceived amount of damage to mailers’ DVD products causing a large return volume to be processed manually at the mailers’ request.”); GFL126 (document titled “Netflix and the Round-Trip Disk Mail (RDM) Project”) (“these tests suggest that if RDM disks are processed completely within letter automation in both directions, they would suffer losses due to cracking in excess of 5 percent per round trip.”); GFL216 (reporting a disk breakage rate of 4.5% within “a small sample set of other mailers”); GFL768 (“[T]he overriding issue for Netflix concerned disc damage on the AFCS”); GFL10 (internal USPS memorandum noting that “damaged (broken) disks during processing and/or delivery” were “common problems” reported by Netflix); GFL 771 (“[Blockbuster] expressed concern about damage to the discs in the current Blockbuster design. [Blockbuster] reported an overall damage rate

the Postal Service violates 39 U.S.C. § 403(c) by giving the overwhelming majority of Netflix DVD return mailers custom manual processing at one-ounce letter rates, while allowing GameFly to avoid automated letter processing only by paying the two-ounce flats rate. GameFly Memorandum at 41-42. A precise calibration of relative injury is unnecessary.

**3. Postal Service employees steal or lose enough GameFly DVDs that GameFly should not want manual processing. GameFly therefore has no business complaining about being denied this option.**

The Postal Service's insistence on the need for discovery and cross-examination about the theft and loss of GameFly DVDs in transit is equally misplaced. GameFly and the Postal Service agree that a nontrivial number of GameFly DVDs are stolen or lost by Postal Service employees. But this is not a cognizable ground for injuring GameFly further by discriminating on price and terms of service. If the theft and loss of GameFly DVDs in transit has any effect on the net value of the service that the Postal Service provides GameFly, and the price that the Postal Service can reasonably charge for that service, the effect is downward, not upward. Moreover, while the theft of DVDs imposes a cost on *GameFly*, this cost in no way prevents the *Postal Service* from offering GameFly

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of 3% with the newer envelope designs."); GFL374 (stating, in response to testing of a DVD mailer's proposed envelope design, that "engineering's ongoing experience with the poor machineability of this design indicates that the [DVD mailer's] mailer will sustain damage . . . during processing."); GFL7293 (same); GFL7295 (same); Joint Statement at ¶ 102 (noting that Blockbuster formally asked the Postal Service to "immediately implement manual culling and processing of inbound mail pieces for Blockbuster Online" to mitigate the "persistent damage to mailer contents and longer mail duration rates as judged against comparable mailings.").

service on the same terms as Netflix. Whether to use that service is a decision for GameFly, not the Postal Service, to make.

Respectfully submitted,

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