

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 STRIKE
PORTION OF THE REPLY BRIEF
OF THE UNITED STATES POSTAL SERVICE
(November 26, 2010)**

GameFly, Inc. ("GameFly") respectfully moves to strike two sentences from pages 79-80 of the November 18 Reply Brief of the Postal Service. The sentences read:

Further, IOCS [the In-Office Cost System] has been collecting information on the Permit Reply Mail (PRM) marking for a while, and PRM mail processing costs show a lower per-piece average than non-PRM single-piece First-Class Mail letters—11 cents per piece plus or minus 1.2 cents per piece for PRM (with piggybacks and similar costs) versus 14.3 cents per piece for other First Class Mail single piece letters in FY2009. As such, the Commission can through expert examination of its own data confirm the accuracy of the Postal Service's fundamental argument that its current processing of Netflix return mail is operationally efficient, and should accordingly be continued.

The thrust of this passage is that IOCS data not previously offered into the record show that processing Netflix DVD return mailers manually actually costs less than processing them on letter automation. The Postal Service evidently hopes that this 11th-hour claim will convince the Commission to disregard the analyses of GameFly witness Glick and Christensen Associates to the contrary, and resurrect the Postal Service's cost justification for the preferential service that Netflix enjoys.

This Hail Mary pass, however, is way out of bounds. The 11 cent, 1.2 cent and 14.3 cent unit cost figures are not in the record of this case. The Postal Service never submitted any testimony or data to support them, let alone identify the assumptions and methodology underlying them. Nor did the Postal Service produce any of the workpapers and backup documentation that 39 C.F.R. § 3001.31(k) require for admission of a party's cost studies into the record. To rely on cost figures presented to the Commission without any evidentiary foundation, in a *reply brief* filed after the close of the record, would violate the most basic norms of due process. Without a timely opportunity to review the data and analyses (if any) underlying the figures, probe them through discovery and cross-examination, and submit rebuttal testimony, GameFly has no meaningful way to challenge the figures. Nor does the Commission have any reasoned way to assess their validity.

A. Fundamental Norms Of Due Process Preclude Giving Any Weight to The Disputed Cost Figures.

1. Due process does not allow the Commission to credit disputed claims of fact made without record support or an opportunity for adversarial testing and rebuttal.

Barring unusual circumstances that are absent here (e.g., prior sponsorship or support for cost data by the party against whom they are offered), due process forbids the Commission from giving any weight to cost data proffered by one party in an adjudication without a full opportunity for adversarial testing and rebuttal. Giving any weight to the Postal Service's belated claims in this on-the-record adjudication¹ would be arbitrary and capricious, short of statutory right, without observance of procedure

¹ This case is an on-the-record adjudication within the meaning of 5 U.S.C. §§ 556 and 567. See Order No. 235 at 7-8; Presiding Officer's Ruling No. C2009-1/20.

required by law, and unsupported by substantial evidence. 5 U.S.C. § 706(2); 39 U.S.C. § 3663 (incorporating 5 U.S.C. § 706).

Thus, in *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1205 (2nd Cir. 1981), remanded on other grounds, *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810 (1983), the court overturned an adjustment to the Postal Service's revenue requirement based on briefs and comments solicited after the close of the record. Similarly, in *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 427-430 (D.C. Cir. 1993), the court overturned cost findings based on a methodology adopted by the Commission without giving adverse parties an opportunity to scrutinize and challenge the methodology through discovery, cross-examination and rebuttal testimony.

The Commission has reached the same conclusion in similar contexts. See, e.g., Docket No. R2006-1, Order No. 1482 (November 8, 2006) (declining to admit into the record certain Postal Service responses to Presiding Officer's Information Requests that were offered too late for intervenors to "conduct discovery, cross-examine the attesting witnesses, and prepare rebuttal evidence"); *id.*, Order No. 1 (December 22, 2006) (excluding from the record responses of an OCA witness to Presiding Officer's Information Requests concerning estimates of carrier street time costs because responses were offered into evidence after the close of the last round of hearings).

2. The Commission may not take official notice of the IOCS-based cost figures.

The Postal Service invites the Commission to excuse the absence of any opportunity for adversarial testing of the Postal Service's belated IOCS-based cost claims on the theory that the Commission can test the claims itself through "expert

examination of its own data.” USPS Br. 79. The Postal Service is, in essence, asking the Commission to take official notice of the IOCS-based claims. The Commission’s standards for official notice, however, do not permit this. Rule 3001.31(j) states:

Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of the Commission as an expert body: *Provided*, That any participant shall, on timely request, be afforded an opportunity to show the contrary.

39 C.F.R. § 3001.31(j). Federal Rules of Evidence Rule 201, which governs judicial notice in the federal courts, likewise restricts judicial notice to facts that are

not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid 201(b). Even for such facts, a party seeking to challenge the notice is entitled to a timely opportunity to rebut the purported fact to be noticed. Rule 3001.31(j) (last sentence); Fed. R. Evid. 201(e); *accord*, 5 U.S.C. § 556(e).

To state these requirements is to make clear that the putative IOCS values do not satisfy them. Their truth and accuracy is neither within the knowledge of the Commission” nor “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” And the closing of the record means that GameFly has no opportunity to rebut the putative IOCS values.

As the Commission is aware, the use of IOCS data to support cost estimates is a complex, judgmental and controversial. As the Postal Service has acknowledged, “[t]he role of IOCS in the distribution of costs is perhaps the system’s best known, and

perhaps most contentious, function.” Docket No. R2006-1, Bozzo Direct (USPS-T-46) at 2.

First, IOCS data have often misattributed the costs of one product, class or category to another product, class or category. For example, the IOCS has been found (or alleged) to:

- (1) Attribute costs of regular-rate or nonprofit Periodicals Mail to in-county Periodicals mail. R94-1 PRC Op. & Rec. Decis. (Nov. 30, 1994) at ¶ 3074.
- (2) Attribute costs of Standard Mail flats to Standard Mail parcels. Docket No. R2005-1, Direct Testimony of Marc A. Smith (USPS-T-13) (April 8, 2005) at 5 and 61; Docket No. R2006-1, Direct Testimony of Marc A. Smith (USPS-T-13) (September 1, 2006) at 4 and 34.²
- (3) Attribute costs of commercial Standard Mail to nonprofit Standard Mail. R97-1 PRC Op. & Rec. Decis. (May 11, 1998) ¶¶ 5613-5616.
- (4) Attribute costs of Presort First-Class Mail letters to Presort First-Class Mail flats. Docket No. R2010-4, Comments of Pitney Bowes, Inc. (August 17, 2010) at 6.

² In Docket No. R2006-1, the Commission made adjustments to correct for this error not just for Standard Mail Regular, but also for Standard Mail Enhanced Carrier Route and Presort First-Class Mail. Docket No. R2006-1, PRC-LR-9, shp08prc PRCFinal.xls, “FC PRESORT Parcel-Flat Adj.”, “Std ECR Parcel-Flat Adj.”, and “Std Reg Parcel-Flat Adj.”

Second, the potential for IOCS to produce inaccurate estimates is much higher for smaller groupings of mail. This is not only because of the smaller number of samples for smaller groupings, but also because “[e]rror rates are higher for finer levels of class/subclass/rate category detail because they are dependent on correct entry of more data elements.” Bozzo direct testimony in Docket No. R2006-1 (USPS-T-46) at 23 (emphasis added). The Postal Service has stated, for example, that:

- (1) IOCS data could not be used to estimate separately the costs of First-Class Mail automation and nonautomation letters. Docket No. R2005-1, USPS Responses to Presiding Officer’s Information Request No. 1, Question 1a at 4 (May 9, 2005). “[T]he Postal Service does not feel that the In Office Cost System (IOCS) can be used to accurately estimate separate mail processing unit costs by shape for nonautomation presort cards and letters and automation presort cards and letters.” Docket No. R2006-1, Response of the USPS to Presiding Officer’s Information Request No. 5, Question 4 (June 29, 2006).
- (2) There are also anomalies in FY 2009 mail processing costs by shape, which costs are estimated using IOCS data. For example, the unit mail processing cost of Periodicals Outside County letters is estimated to be nearly twice that of Periodicals Outside County flats. USPS-FY09-26, shp09prc.xls, “Final Results.” Also, to eliminate the flat/parcel issue discussed above, the Postal Service continued to adjust IOCS-based Standard Mail ECR costs for flats and parcels. USPS-FY09-26, USPS-FY09-26.doc at 2-3.

- (3) In the late 1990s, the erratic and anomalous unit costs produced by IOCS data for library rate mail caused the Commission to allow library rate mail to pay Special Standard Mail rates. R97-1 PRC Op. & Rec. Decis. ¶¶ 5743-45; R97-1 PRC Op. & Further Rec. Decis. (Sept. 24, 1998) at 14-17; R2000-1 PRC Op. & Rec. Decis. (Nov. 13, 2000) at ¶ 5929. In 2000, Congress codified the delinking of library rates from library rate costs as a matter of law. Public Law 106-384 § 1(e), 114 Stat. 1461 (2000), codified at 39 U.S.C. § 3626(a)(7).
- (4) A redesign of IOCS had huge impacts on the subclass cost estimates for Periodicals Within-County costs, increasing reported unit costs by 55.7 percent. Bozzo direct testimony in Docket No. R2006-1 (USPS-T-46) at 36, Table 6.³

Third, the Postal Service has offered no evidence that the cost of Permit Reply Mail (“PRM”) is a reasonable proxy for the cost of Netflix mail. Many kinds of First-Class Mail and Priority Mail matter—not just DVD mailers—are eligible to be marked and prepaid as PRM (DMM 507.10.1.1). PRM that consists of ordinary paper cards and letters (without DVDs) presumably can be processed on letter automation at relatively low costs.

Fourth, even if the average mail processing costs of Netflix returns were actually as low as 11 cents per piece (the purported unit cost of PRM) (USPS Reply Brief at 79), 11 cents is still more than the entire unit cost (including mail processing *and* all other

³ The anomalies were not limited to relatively small groupings of mail. Reported costs for Standard Mail ECR, a relatively large grouping of mail, increased by 36 percent. *Id.*

costs) that the Postal Service would incur handling Netflix returns on automation if Netflix pieces were actually machinable. Glick Rebuttal (GFL-RT-1) at 31, Table 2 (Tr. 12/2040); *id.*, Appendix A, Table A-1 (Tr. 12/2042)).

Finally, if the Postal Service were actually correct in claiming that manual processing of Netflix return mail costs only 11 cents per piece, this fact would also justify offering the same manual processing to GameFly since the additional costs of providing manual processing GameFly mail vis-à-vis Netflix mail are minimal. See Glick Rebuttal (GFL-RT-1) at 17-18 (Tr. 12/2026-2027).

These unresolved questions preclude the use of official notice to as a vehicle for crediting the Postal Service's belated IOCS-based claims without a full opportunity for discovery, cross-examination and rebuttal by GameFly.

3. The Postal Service's IOCS-based claims differ starkly from the Christensen Associates reports and other USPS-sponsored documents that the Commission found to be admissible against the Postal Service.

The Postal Service's attempt to stuff the record with its 11th-hour IOCS-based claims perhaps may be motivated in part by the Presiding Officer's repeated decisions upholding the admissibility of the Christensen Associates reports, the OIG reports, and other internal Postal Service documents into evidence against the Postal Service on the grounds that they documents were admissions by the Postal Service or public records. See GameFly Reply Br. at 17-25 (discussing Tr. 4/156-157, 66 (oral rulings by the Presiding Officer) and Presiding Officer's Rulings No. C2009-1/24, 40, 41, 45 and 46)). If so, this playground notion of justice fails on multiple levels. The Postal Service's internal IOCS data are neither admissions by GameFly nor public records. Moreover,

the Postal Service had ample notice that GameFly intended to rely on the OIG report, Christensen study, and internal Postal Service documents, and ample time to respond to their contents in the Postal Service's own testimony and briefs. No corresponding circumstances support admission of the Postal Service's belated IOCS-related claims against GameFly.

B. The Postal Service's Failure To Produce In Discovery The Data Underlying Its IOCS-Based Claims Is An Independent Ground For Striking Those Claims.

The IOCS-based value offered by the Postal Service should be excluded for the record on a second and independent ground. The claims, and the underlying IOCS data, were responsive to multiple information requests submitted by GameFly in an effort to discover any and all of the information that the Postal Service might offer in support of its putative cost defense. The Postal Service failed to disclose, or even acknowledge the existence of, the IOCS values, in response to any of GameFly's discovery requests, even though the IOCS data were clearly responsive to those requests. This noncompliance with discovery bars the Postal Service from any reliance on the IOCS data in this case.

GameFly institutional discovery request GFL/USPS-24(d) asked the Postal Service whether it had:

Performed any studies, analyses, surveys or other inquiries to determine since January 2007 whether the choices made by local, district or area officials between the "automated" and "manual handling of Netflix DVD return mail" in fact are promoting the "overall efficiency of mail processing operations"? If your answer is anything but an unqualified negative, please produce all documentation of those studies, analyses, surveys and other inquiries, and the results thereby obtained."

The Postal Service responded, “Headquarters has not conducted any specific studies on this issue. The Postal Service has begun an effort to study ways to improve handling and reduce breakage, but no results have been obtained.” GameFly Document Compendium at C203-C204.

GameFly institutional discovery request GFL/USPS-71(a)-(e) asked the Postal Service to provide the following information:

Please define “most efficient method” as the term is used in the Postal Service’s response to GFL/USPS-23(d).

(a) In particular, is it the Postal Service’s position that processing Netflix’s pieces manually is sometimes a lower cost processing option than processing them on automation?

(b) Is it the Postal Service’s position that processing Netflix’s pieces manually is often a lower cost processing option than processing them on automation?

(c) Is it the Postal Service’s position that processing Netflix’s inbound pieces manually, but charging machinable letter rates for those pieces, is more efficient than processing Netflix’s inbound pieces manually and charging extra for the manual processing, e.g., through a nonmachinable surcharge?

(d) Please explain your answers to parts (a) through (c) in detail and, if the answer to any part is “yes”, provide all reasoning and calculations.

(e) Please produce all studies, analyses and similar information that you contend support your responses to parts (a) through (d).

The Postal Service responded to part (e): “All responsive documents that have been located have already been provided.” GameFly Document Compendium at C224-C225.

The documents produced to GameFly included nothing about the IOCS-related cost values at issue here.

GameFly institutional discovery request GFL/USPS-73 asked the Postal Service for the following information:

GFL/USPS-73. Please refer to Paragraph 81 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 81 contains the following contention by the Postal Service:

[M]ail processing decisions concerning the automated or manual handling of Netflix DVD return mail are made locally based on determinations as to what makes the best sense in the local mail processing environment, and processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations, based on the characteristics of Netflix mail (such as the density of its volume).

(a) Please identify all circumstances in which you contend that removing "Netflix mail from automation operations ensure[s] the overall efficiency of mail processing operations."

(b) Please produce all studies, analyses and similar documents that you contend support your response to part (a).

(c) Please explain how allowing "mail processing decisions concerning the automated or manual handling of Netflix DVD return mail" to be "made locally" in fact "ensure[s] the overall efficiency of mail processing operations".

(d) Please produce all studies, analyses and similar documents that you contend support your response to part (c).

The Postal Service responded to parts (b) and (d) as follows: "*This response is not predicated on any studies.*" GameFly Document Compendium at C573 (emphasis added).

GameFly institutional discovery request GFL/USPS-162(a) asked the Postal Service as follows:

Please refer to the response to GFL/USPS-71(a) where it states, "Yes, it [manual culling] would sometimes be a lower cost processing operation. If

the pieces were culled out immediately upon arrival at the AFCS, and put into Netflix-only tubs or trays, bypassing any and all processing and being handed directly to the Netflix agent, the only mail processing costs incurred would be the culling activity at the AFCS, and a cross-dock to the staging area where the tubs or trays are then handed to the Netflix agent.”

(a) Please provide all calculations supporting the assertion that the method described in response to GFL/USPS-71(a) is a lower cost processing option than automated process.

The Postal Service responded to 162(a) as follows: “The response to GFL/USPS-71(a) *was not based on any specific calculations.*” GameFly Document Compendium at C258-C259 (emphasis added).

GameFly institutional discovery request GFL/USPS-163(a) through (d) asked the Postal Service as follows:

GFL/USPS-163. Please refer to the eight spreadsheets in the ZIP file entitled Cost Models.zip, which was attached to an email sent from Sam Cutting on or about November 10, 2006.

(a) Please confirm that the spreadsheets in the ZIP file are the final versions of the cost models prepared by Christensen Associates for the “USPS Mail Characteristics Study of DVD-by-Mail” report. If not confirmed, please produce the final versions.

(b) Please confirm that the spreadsheets in the ZIP file are the source of the unit cost estimates shown in Tables 4 through 7 of the report entitled “USPS Mail Characteristics Study of DVD-by-Mail.” If not, please produce the spreadsheets that are the source of the unit cost estimates.

(c) Do the unit cost estimates in these spreadsheets represent the Postal Service’s best estimates of its cost to handle Netflix (i.e., the “floppy-edge envelope”) and Blockbuster (i.e., the “centralized-disk envelope”) mailpieces? If not, please explain fully and provide the Postal Service’s best estimates.

(d) Are the cost models in these spreadsheets the most recent models of the USPS cost to handle Netflix and/or Blockbuster mail? If not,

please explain fully and provide the Postal Service's most recent estimates.

The Postal Service's response to part (c) was: "Yes, these are the best, and most recent, available cost estimates, as the Christensen Associates study is the *only such cost study that has been performed.*" (Emphasis added.) Likewise, the Postal Service's answer to part (d) was "Yes"—i.e., "the cost models in these spreadsheets [are] the most recent models of the USPS cost to handle Netflix and/or Blockbuster mail." GameFly Document Compendium at C574-576.

GameFly renewed its requests for data supporting the Postal Service's efficiency claim after it resurfaced in the July 6 testimony of USPS witnesses Belair and Seanor. Neither witness cited or produced any IOCS-related data in response to these requests. GameFly discovery request GFL/USPS-T2-8 asked USPS witness Belair as follows:

One page 5 of USPS-T-2, you testify that culling of Netflix mailers can improve efficiency in several ways. Please produce all analyses, studies, memoranda and other documents quantifying the cost savings assertedly allowed by . . . culling Netflix mail . . .

Mr. Belair's response: "I have not prepared any studies quantifying the cost savings, and I am not aware of any studies prepared by anybody else." Tr. 9/1626.

Similarly, GameFly discovery request GFL/USPS-T2-9 asked Mr. Belair as follows:

Please provide any studies, analyses or other documents that you have prepared, or of which you are aware, that compare (a) the costs of processing Netflix mail or any other letter DVD mail by segregating it as described on page 4 of your testimony with (b) the cost of processing letter DVD mail in the automation stream. For each study, analysis or other document responsive to this question, please also provide the author or authors and the period over which the study was performed."

Mr. Belair's response: "I am not aware of any studies comparing the costs." Tr. 9/1627.

GameFly discovery request GFL/USPS-T2-16, and Mr. Belair's responses, were in the same vein. See Tr. 9/1634. The questions were:

GFL/USPS-T2-16. On page 13, lines 9-10, of USPS-T-2, you refer to "immense costs" that have been eliminated as a result of local processing decisions.

(a) Please quantify the contribution that manually processing Netflix return mail has made to these cost reductions.

(b) Please produce source documents and workpapers sufficient to verify your assumptions and analyses.

Mr. Belair's responses were:

(a) I am not aware of any studies or analyses that identify the specific contribution to these cost reductions as a result of processing decisions involving Netflix DVD mail.

(b) I am not aware of any documents responsive to this discovery request.

The answers of USPS witness Seanor also made no mention of any IOCS-related cost data. GameFly discovery requests GFL/USPS-T3-16(c) and (d) stated:

GFL/USPS-T3-16. On page 7, lines 9-11, of USPS-T-3, you state:

Where culling of Netflix by a delivery unit or local facility is done, operations has concluded that this efficient handling makes good business sense, as it can save additional downstream processing costs.

* * *

(c) Please produce all studies, analyses, data or other information that you contend support the proposition that culling "can save additional downstream processing costs."

(d) Please provide all studies or analyses showing that culling by a delivery unit or local facility is good business sense.

Mr. Seanor's responses were:

(c) I am not aware of any formal studies documenting this.

(d) I am not aware of any formal studies documenting this.

Tr. 10/1757.

GameFly discovery request GFL/USPS-T3-17(e) asked Mr. Seanor the following:

GFL/USPS-T3-17. On page 7, lines 11-14, of USPS-T-3, you state:

In some locations, separation of Netflix mail can begin in the delivery unit. If the carriers drop the collection pieces into a unique tub or tray, this eliminates the need for any subsequent AFCS or other automated letter sortation.

* * *

(e) Please produce all cost studies and analyses that you show that separating the mail as you describe actually saves money.

Mr. Seanor's response to part GFL/USPS-T3-17(e) was:

(e) Local management decisions have real and immediate consequences for each local management team, which must manage against rigorous budgetary constraints within the framework of overall financial controls and processes within the Postal Service. *I am not aware of any general studies measuring this activity that would apply outside of the local context.*"

Tr. 10/1759-1760 (emphasis added).

In a similar vein, GameFly discovery request GFL/USPS-T3-19 asked Mr. Seanor the following:

GFL/USPS-T3-19. This question refers to page 7, lines 9-19, of USPS-T-3, where you state:

Where culling of Netflix by a delivery unit or local facility is done, operations has concluded that this efficient handling makes good business sense, as it can save additional downstream processing costs. In some locations, separation of Netflix mail can begin in the delivery unit. If the carriers drop the collection pieces into a unique tub or tray, this eliminates the need for any subsequent AFCS or other automated letter sortation. This helps overall clearance of all originating mail in the narrow processing window. Operations would not be doing this if it added any overall time (cost) in field operations. A large plant can handle somewhere between seven and twelve thousand Netflix DVDs nightly. If a good portion of this volume can be trayed the first time it is handled, the savings will compound by reducing overall handling costs and enabling the facility to achieve overall clearance time targets.

Please produce all analyses, studies, and other calculations quantifying the cost savings from culling Netflix mail.

Mr. Seanor's response to part GFL/USPS-T3-19 stated, in relevant part: "*I am not aware of any study measuring the cost savings* that would apply generally outside of the local context." Tr. 10/1762 (emphasis added).

The Postal Service's serial unresponsiveness to these discovery requests is an independent bar to the Postal Service's belated assertion of its IOCS-based cost claims. In this regard, the Postal Service cannot credibly claim that the supposed IOCS data (unlike the supposed non-adoption of the Standard Operating Procedure at issue in Presiding Officer's ruling No. C2009-1/43) did not come into existence until just prior to the filing of the Postal Service's reply brief. *Cf.* POR-43 at 8-9.

The IOCS has been a major Postal Service costing system for decades, and remains in use today. Moreover, the Postal Service's attempted cost justification for its discrimination in favor of Netflix is not a new issue that sprang up for the first time in

GameFly's initial post-hearing brief. Postal Service has claimed since the outset of this case that processing Netflix mail manually saves the Postal Service money. See, e.g., Joint Statement Of Undisputed And Disputed Facts (July 20, 2009) ¶ 81 ("The Postal Service contends that . . . processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations"); Belair Direct (USPS-T-2) at 5, 20 (Tr. 9/1597, 1612); Seanor Direct (USPS-T-3) at 6-7, 22 (GameFly Document Compendium at C174-175, C190). Under the circumstances, the Postal Service has no credible basis for claiming that it was institutionally unaware of the existence of the IOCS when GameFly asked in discovery for any and all data that might arguably support the Postal Service's cost justification.

CONCLUSION

The appropriate remedy for the Postal Service's misconduct is to strike the offending sentences or, alternatively, to rule specifically that they will be given no weight. The alternative of reopening the record for GameFly to engage in supplemental discovery, cross-examine a Postal Service sponsoring witness, and prepare, file and defend rebuttal testimony is a nonstarter. Reopening would add months to a case that the Postal Service has already delayed unduly. Each month of additional delay would further compound GameFly's injury by approximately \$700,000. This injury would be irreparable, because Title 39 offers no basis for GameFly to recover damages on past mailings.

Presiding Officer's Ruling No. C2009-1/46 decreed that "[t]he evidentiary record is closed." POR-46 at 3. Compliance with this ruling, and fundamental principles of due

process, require that the IOCS-related claims from pages 79-80 of the Postal Service's reply brief be stricken.

Respectfully submitted,

/s/

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