

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**REPLY OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION TO
MOTION OF GAMEFLY, INC. TO STRIKE TWO SENTENCES FROM THE
REPLY BRIEF OF THE UNITED STATES POSTAL SERVICE**
(December 3, 2010)

On November 26, 2010, GameFly, Inc. filed a motion to strike two sentences from the Postal Service Reply Brief.¹ Motion of GameFly, Inc. To Strike Portion of the Reply Brief of the United States Postal Service, PRC Docket No. C2009-1 (Nov. 26, 2010) (GameFly Motion). GameFly's motion embodies three elements: (1) an attack on the evidentiary status of In-Office Cost System (IOCS) data; (2) a substantive reply to the Postal Service's arguments regarding the relevance and materiality of the IOCS data; and (3) an attack on the Postal Service for allegedly failing to answer discovery questions truthfully.

In substance, the second element dominates GameFly's motion. The motion constitutes a transparent example of filing still another unauthorized reply to a reply, this time to straightforward points made in the Postal Service's reply brief. The first element cannot be taken seriously since it is contrary to longstanding practice in Commission proceedings. After successfully arguing throughout this proceeding that GameFly should be exempt from the Commission's rules and practice requiring sponsorship and documentation of

¹ Reply Brief of the United States Postal Service, PRC Docket No. C2009-1 (Nov. 18, 2010) (Postal Service Reply Brief).

cost studies and analyses, and after evading its responsibility to support its case through testimony as an element of its “litigation strategy,” GameFly now argues that data from long-established Postal Service statistical data systems, which have been fully documented and filed publicly pursuant to the Commission’s rules and established methodologies—and further considered by the Commission and subject to public comment in connection with its ongoing annual compliance review procedures—should be disregarded because, according to GameFly, the Commission’s rules for sponsorship and documentation have not been followed. In the third element, GameFly follows its familiar pattern of attacking the integrity of the Postal Service by alleging that it deliberately hid the ball in responding to discovery questions. For the following reasons, the Postal Service disputes GameFly’s contentions and respectfully submits that they should be rejected and GameFly’s motion be denied.

I. THE COMMISSION SHOULD CONSIDER IOCS DATA ON PRM COSTS.

GameFly’s motion to strike focuses on the evidentiary status, and the substance, of IOCS data that the Postal Service refers to in its reply brief. In filing its motion, GameFly makes arguments that parallel those made in the Postal Service’s motion to strike the GameFly witness testimony,² and in its opposition to the admission of certain documents into evidence.³ Specifically,

² See Motion of the United States Postal Service to Strike the Rebuttal Testimony of Sander Glick for GameFly, Inc., PRC Docket No. C2009-1 (Nov.1, 2010).

³ See Reply of the United States Postal Service in Opposition to Motion of GameFly, Inc. to Admit Certain Postal Service Documents Into the Record, PRC Docket No. C2009-1 (Nov. 1, 2010).

GameFly asserts that the Presiding Officer should strike portions of Postal Service *argument* in its reply brief citing IOCS data because “[t]he Postal Service never submitted any testimony or data to support them,” and “[t]he Postal Service [did not] produce any of the workpapers and backup documentation that 39 C.F.R. § 3001.31(k) requires for admission of a party’s cost studies into the record.” See GameFly Motion at 2. GameFly objected to these same arguments when they were made by the Postal Service to challenge the status of documents relied upon by GameFly.⁴

The Postal Service continues to believe that prior Commission practice regarding sponsorship and documentation of analyses and studies should be followed.⁵ If not followed, however, the Postal Service requests that the Commission apply the same standard to GameFly’s motion to strike as it has applied to parallel arguments by the Postal Service; this would require denial of the GameFly Motion.

As stated by GameFly, “Rule 2001.21(c) provides that ‘[m]otions to strike are requests for extraordinary relief *and are not substitutes for briefs* or rebuttal evidence in a proceeding.’ Answer of GameFly, Inc., in Opposition to Motion of USPS to Strike Rebuttal Testimony of Sander Glick (GFL-RT-1), PRC Docket

⁴ See Presiding Officer’s Ruling Granting the October 29, 2010 Motions of GameFly and the Public Representative, POR No. C2009-1/45, PRC Docket No. C2009-1 (Nov. 8, 2010); Presiding Officer’s Ruling Denying Motion to Strike, Resolving Remaining Motions, and Closing the Record, POR No. C2009-1/46, PRC Docket No. C2009-1 (Nov. 8, 2010).

⁵ Initial Brief of the United States Postal Service, PRC Docket No. C2009-1, at 94-101 (Nov. 8, 2010) (Postal Service Brief); Reply Brief of the United States Postal Service, PRC Docket No. C2009-1, at 70-73, 80-86 (Nov. 18, 2010) (Postal Service Reply Brief).

No. C2009-1 (Nov. 3, 2010) at 6. In fact, application of Rule 2001.21(c), by its terms, would prohibit GameFly's motion to strike, since its manifestly apparent purpose is not to strike Postal Service *argument*, but to serve as an unauthorized reply to that brief, thereby attacking the credibility and reliability of IOCS data in overt violation of Rule 21(c).

In developing the "law of the case," which formed the foundation of several rulings adverse to the Postal Service, the Presiding Officer recognized that "Rule 31 of the Commission's Rules of Practice and Procedure provides that 'relevant and material evidence which is not unduly repetitious or cumulative shall be admissible.'" POR No. C2009-1/46. Both GameFly and the Commission agree, furthermore, that a "report of a public agency in the course of exercising its responsibilities [] is subject to official notice under Rule 3001.31(d)" and "is a public record within the meaning of Fed. R. Evid. 803(8)." Reply Post-Hearing Brief of GameFly, Inc. (November 18, 2010) (GameFly Reply Brief) at 21; see POR No. C2009-1/45 at 9; POR R90-1/65, Docket No. R90-1, at 4 (Sept. 6, 1990).

In this regard, GameFly launches its attack on the IOCS data by contending that the Commission "may not take official notice of the IOCS-based cost figures." GameFly Motion at 3. It makes this assertion by claiming that the Postal Service is "in essence, asking the Commission to take official notice of the IOCS-based claims." GameFly Motion at 4. GameFly first argues from the wording of Rule 31(j) that it has been denied the opportunity to show that the matters to be judicially noticed are contrary to their representation in the official

report. *Id.* GameFly then embarks on a lengthy discussion intended to show why the Postal Service's accurate citation to IOCS data is not entitled to credibility or weight.

From the standpoint of fairness, in light of GameFly's position throughout this proceeding regarding other documentation on which it principally relies, and in light of previous rulings, the status of the IOCS data as official records of which the Commission is entitled to take official notice cannot seriously be questioned.⁶ The rulings upholding the status of these same documents, particularly the Office of the Inspector General audit report of 2007, are instructive in this regard.

Concerning the status of this report, POR C2009-1/45 stated:

In addition, the OIG Report is indisputably a report of a public agency, which is nearly entirely available in the public domain. It was prepared by the government office charged with, and dedicated to, conducting investigations, developing evaluations, and identifying irregularities in processing and delivering mail. The OIG report is thus subject to official notice under 39 CFR 3001.31(d). *Compare* Fed. R. Evid. 803(8). The Postal Service's contentions regarding past Commission practice regarding the evidentiary uses of official reports do not preclude admission of the OIG Report. The weight, if any, to be given to the OIG Report can be argued on brief.

POR C2009-1/45 at 9 (footnotes omitted).

Far beyond the status of the IOCS data as part of an official report generated by the Postal Service, its status as critical foundational data employed by the Commission itself to evaluate the Postal Service Annual Compliance Report under the policies established in the Postal

⁶ Note, however, that the Commission need not take official notice of IOCS data underlying its 2009 Annual Compliance Determination. As discussed, *infra*, reliance by the Commission on its own precedential data, analysis and discussion is a routine element of Commission opinions and orders.

Accountability and Enhancement Act (PAEA) gives the data the Commission's own imprimatur as precedent in subsequent proceedings. As acknowledged by GameFly, the IOCS is one of the most basic tools employed by the Postal Service and the Commission to estimate costs of postal products and categories of mail. For over three decades, the production and reliability of the data and the system that produces it have been the subject of intense scrutiny in rate cases and other Commission proceedings. It has been, and continues to be, one among the most well-documented sources of postal data and analysis. The foundational systems of which IOCS is representative have been repeatedly recognized by the Commission as reputable sources for evidence and findings in contested proceedings.⁷

Under the modernized system of postal ratemaking, and pursuant to the Commission's regulatory role established in the PAEA, IOCS assumes a prominent place among the periodic reports dictated by the Commission's rules (39 C.F.R. Part 3050) and ultimately relied upon by the Commission for its Annual Compliance Determination. It represents one of the basic building blocks among sources of postal data that are required for the Postal Service's annual compliance reporting (ACR) under 39 U.S.C. § 3652(a)(1), and that enable the Commission to conduct its annual compliance determination under 39 U.S.C. § 3653(b). The IOCS is specifically required to be exceptionally well-documented yearly under the

⁷ See POR R2000-1/72, at 7, 15 (May 30, 2000).

Commission's rules. 39 C.F.R. § 3050.22. Furthermore, the opportunity for public review and comment is guaranteed under the statute, and routinely granted by the Commission in the procedures it establishes in connection with the ACR. 39 U.S.C. § 3653(a); Notice of Filing Annual Reports to the Commission by the Postal Service and Solicitation of Public Comment, Order No. 380, PRC Docket No. ACR2009 (Jan. 5, 2010).

Apart from these detailed requirements ensuring complete documentation and public review, the Commission exercises tight control and supervision over the format and contents of the IOCS and other data sources required under its rules for annual review of rates, classifications, and performance. No methodology or analytical principal may be employed in the production of the IOCS without prior Commission approval. Any change in methodology or analytical principle must be reviewed under a detailed procedure that provides any interested party an opportunity to comment on and challenge proposed changes under procedures that may allow discovery and access to Postal Service data. 39 C.F.R. § 3050.11.

This framework ensuring control and scrutiny of IOCS data by the Commission represents a sea change from the context in which rate cases and other proceedings were conducted under the Postal Reorganization Act. In the new system of PAEA regulation, the IOCS has become to a very large degree an outgrowth of Commission technical review and policy direction. Indeed, today, the Commission itself has

become, in effect, a co-sponsor of IOCS with technical control over its production process and ultimate data elements.

This enhanced status directly contradicts the assertion implied in GameFly's motion to strike that the IOCS should be regarded as proposed evidence that occupies a status equal to the unsponsored, undocumented Christensen and OIG reports.⁸ The IOCS and other basic data systems are no longer primarily tools available to justify changes advocated in contentious rate cases and other proceedings. In the changed context of ratemaking and review under the Commission's expanded regulatory authority, these basic data sources have, in effect, become endowed with a Commission sponsorship that sets them apart from studies and analyses proposed and sponsored by advocates in contested proceedings. Furthermore, the annual reporting requirements followed by the Postal Service ensure that full documentation requirements are met on a continuous, annual basis, and that the data and documentation are available to interested persons, under conditions specified by the Commission as one part of its annual review procedures.

The status of IOCS data as an authoritative source of information routinely relied upon by the Commission to evaluate rates, classifications, and performance creates a context in which the Commission has not only the opportunity but the obligation to consult the data when it has a direct

⁸ As noted above, even if the IOCS were to occupy a comparable status, the same freedom from documentation and sponsorship requirements that rulings have endorsed in this proceeding should apply equally to the IOCS.

bearing on issues pending before it. By citing the data in its reply brief, the Postal Service was simply directing the Commission's attention to a relevant source of information that would inform the Commission's consideration of the allegations and arguments made by GameFly through its reliance on the Christensen and OIG studies.

As explained *infra* and in its briefs, the Postal Service's primary evidence that any discrimination is not "undue" but based on good business reasons, consists of testimony by expert operations witnesses whose mail processing decisions are constantly reviewed by management for efficiency, adherence to budgetary limits, and satisfaction of performance expectations ranging from each day's mail processing windows to work hours and costs, to overall service performance. None of this evidence operates in any way to preclude the Commission from analyzing data produced by IOCS and aggregated in public proceedings, pursuant to its own rules and standard procedures, to elucidate the issues it now faces in this docket.

Apart from the IOCS's status, the propriety of recognizing the data cited is reinforced by the reasoning that was invoked to justify admission of both the Christensen and OIG analyses in their unsponsored, undocumented forms. GameFly argued strenuously that the Postal Service, in effect, was estopped from challenging the status of these

analyses, since the Postal Service itself relied upon them.⁹ This view was adopted by the ruling granting GameFly's motion to introduce the analyses as record evidence. POR No. C2009-1/45, at 10-11. In accepting GameFly's representation that the Postal Service had "invoked" the Christensen report, the ruling stated: "Having chosen to rely upon the Christensen Report, the Postal Service cannot successfully interpose a blanket objection to the admission of the report into evidence."¹⁰ *Id.* at 11 (footnote omitted). If that view continues to be sustained, the same logic necessarily applies also to GameFly's objections to the IOCS data.

In this case, both of the "most important documents" relied upon by GameFly to contest the reasonableness of the Postal Service's operations draw on IOCS-based data sources.¹¹ The OIG audit relied on Library

⁹ Motion of GameFly, Inc. to Admit Certain Postal Service Documents into the Record, PRC Docket No. C2009-1, at 8 (Oct. 29, 2010); GameFly Brief, at 70. The Postal Service believes that this conclusion conflicts with the Commission's prior determinations as to what constitutes sponsorship and use of studies and analyses by the Postal Service. Furthermore, the Postal Service does not concede that GameFly's argument is supported in fact or legally correct. See Postal Service Reply Brief, at 70-73.

¹⁰ In point of fact, the Postal Service has steadfastly distanced itself from any indication that the Christensen study constitutes probative record evidence, starting with its refusal to agree with any of the recommendations embodied in the OIG report that also relied upon the Christensen study. While acknowledging that it is the only cost study known to have been undertaken of DVD mail, making it therefore the 'only' or 'best' such cost study (and incidentally also the 'worst'), its probative value on the actual costs of processing DVD mail, especially in 2010, is but marginally above nil.

¹¹ Although, throughout this proceeding, GameFly has principally relied upon a diverse collection of documents obtained through discovery purporting to establish unlawful discrimination in Postal Service operations, GameFly now deems Christensen and the OIG to be the "most important documents in the case," and it appears to relegate its other documentary support to the status of "secondary and peripheral documents." GameFly Reply Brief, at 66, n. 31. See

Reference 48 filed in PRC Docket No. R2006-1, the First-Class Mail letter/card processing model, which relies on IOCS data to distribute costs.¹² GameFly witness Glick explained that, in producing the Christensen Study so heavily relied upon by GameFly, Christensen Associates relied on data from PRC Docket No. R2006-1 equivalent to data from the same sources reviewed in connection with the Postal Service's Annual Compliance Report (ACR) and the Commission's Annual Compliance Determination (ACD). These data include the IOCS data at issue here. See Tr. 11/1991; Tr. 12/2060. For example, Christensen model tab "SP VV Costs" includes cost pool data developed using IOCS.

GameFly itself, furthermore, has relied on estimates utilizing IOCS data that were submitted in connection with the FY 2009 ACR. In its reply brief, GameFly cited Postal Service estimates of mail processing costs for single-piece nonmachinable letters, and cited the First-Class Mail Presort Letter Cost Model to draw conclusions allegedly validating the Christensen cost estimates. GameFly Reply Brief, at 52-53. Similarly, GameFly cited the Standard Mail Letter destination entry cost avoidance model estimates to support its claims regarding container handling costs. See Post-Hearing Brief of GameFly, Inc., PRC Docket No. C2009-1 (November 8, 2010) (citing PRC Docket No.

also id., at 39 (Christensen is the "most important evidence" on the issue of cost justification); *id.* at Appendix A, A-1 (describing Christensen and the OIG report as "the most important documents in the case.")

¹² Because it was unexplained and undocumented, the Postal Service has never been able to replicate the derivation of the OIG's estimate of per piece cost differences between automated and manual processing for the outgoing primary sorting operation.

ACR2009, USPS-FY09-13, STD DEST ENT LETTERS.xls, “Summary”); Rebuttal Testimony of Sander Glick for GameFly, Inc., PRC Docket No. C2009-1 (October 21, 2010) (same).

Fairness dictates applying the same standard used to justify admission of the Christensen and OIG analyses, over the Postal Service’s objections, to evaluate GameFly’s attacks on the Postal Service’s reference to the IOCS. In light of the enhanced role of IOCS data within the current regulatory framework, as explained above, GameFly has presented no sound reason to strike the Postal Service’s reference to IOCS data based on its evidentiary status.

II. GAMEFLY’S MISLEADING CLAIMS ABOUT IOCS LACK MERIT.

Section II(B)(4) of the Postal Service reply brief (pp. 77-80) makes various observations about cost trends that may be visible in data supplied to the Commission in PRC Docket No. ACR2009 (and, logically, in previous Annual Compliance Reports), pursuant to the Commission’s procedures specifying how such data are both prepared and filed. Use of the Commission’s established methodology and reliance upon the Commission’s rules regarding how that data is constructed and provided give the data an enhanced status that warrants Commission consideration. This conclusion is cemented by the Commission’s reliance on all data supplied in PRC Docket No. ACR2009 as the foundation for its Annual Compliance Determination (March 29, 2010).

GameFly’s motion to strike Postal Service argument applies to just two sentences, only one of which contains any numbers. Striking the second sentence seems inappropriate on any ground, since it merely embodies the

tautological assertion that the Commission remains free to consult its own data and judgment to elucidate claims made by any particular case participant, as it always has. Any claim that, for example, the Commission needed to subject litigated studies, or conclusions regarding costs, from a previous rate case to the requirements of Rule 31(k) before it could rely upon that information in a subsequent rate case lacks merit. Instead, such information has invariably been treated as precedent upon which participants can reasonably rely, just as the Commission itself can. Hence there is no basis for striking the second Postal Service sentence stating “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.”

A. Any Cost Study Must Conform With Operational Reality To Be Meaningful.

The Postal Service direct case relies upon the testimony of three highly experienced operations experts, who explain how the Postal Service uses one-touch processing to improve overall automated mail processing efficiency whenever some particular identifiable and separable type of mail comprises a large proportion of overall volume in a given location. Based on local operations decisions, any such mail may be diverted from automated processing via one-touch processing. Netflix, whose mail can reach 10 percent of all mail in some plants, is often handled in this fashion; however, as the operations experts explain, a great deal of other mail also gets such processing. The Postal Service employs one touch processing in furtherance of improved operational efficiency,

and recent increases in use of this method are causally linked to the incredible efficiency gains the Postal Service has experienced in the last few years. The Postal Service notes that over 10 billion dollars in costs have been driven from operations in the last few years; postal management makes data driven decisions that have increased productivity to historically high levels.

GameFly's ultimate theory supporting its claims of undue discrimination is that no cost studies support the Postal Service's operational choices, so its witnesses' testimony cannot be accurate. Instead, GameFly argues that a four year old unsponsored, undocumented Christensen study provides appropriate and decisive cost estimates for handling Netflix mail that somehow outweigh the Postal Service testimony, which has been subjected to close scrutiny and adversarial testing on the record.

GameFly's theory of the case is deeply flawed because it assumes an opposition between any cost study and the experience of operations experts. In the real world, any cost study begins by consulting the most experienced operations experts available. This consultation explores how the targeted operations or mail flow actually occur, so that a mail flow model can be assembled that allows identification of sequential cost elements, drawing upon existing data sources, appropriate proxies, time/motion observations, and such that allow construction of the cost study. Accordingly, the tie between the knowledge of operations experts and the cost study is fundamental to construction of any good cost study. The fact that no such tie can be found in the evidentiary record of this proceeding illustrates exactly why the Postal Service

argues that the Christensen study does not provide meaningful or reliable cost estimates for how Netflix mail is processed.

The Postal Service has based its defense against GameFly's haphazard claims of undue discrimination by forthrightly explaining its actual reasons for processing mail, including Netflix return pieces, using the one touch method. Presumably, either party could have undertaken the conduct of any new cost study.¹³ GameFly compounds its error of detaching its cost study from operational expertise by asserting that the only way the Postal Service could defend its local mail processing choices would be through some other cost study. Operational experts are just that, experts in choosing what is efficient in respective locations; and, their choices are borne out, or not, by their performance based on budget, meeting operational deadlines consistently, and getting the mail delivered on time and at low cost.

GameFly's motion to strike two sentences from the Postal Service Reply Brief constitutes a further compounding of error. The Postal Service Reply Brief spent four pages suggesting how the Commission could explore its own data to see whether the Postal Service's claims of efficiency are supported. GameFly

¹³ Postal Service testimony demonstrates that mail processing methods for DVD mail rely upon local decisions that serve operational efficiency; it also rebuts GameFly claims that local mail processing decisions must, of necessity, be based upon simple, systemwide cost measures (that fail to account for local variation). If the processing of DVD mail is efficient as its direct testimony shows, the Postal Service fully expects that examination of data provided on terms specified by the Commission can provide additional quantitative support for the Postal Service position. Such an examination would be consistent with the Commission's statutory role, its expert knowledge of mail processing costs, and the data collected and reported pursuant to Commission approved methodologies.

evidently has no problem with the Commission doing so (given that it does not seek to strike the whole section), but focuses on the specific reference to a conclusion drawn from IOCS data. Since the Commission is free to check its data, it can validate or invalidate as it sees fit. The Postal Service has provided extensive testimony regarding mail processing operations pertinent to DVD mail, and fully expects that the IOCS data conforms to operational reality.

The Postal Service has not conducted a recent cost study of DVD mail, nor does it believe that such a study is necessary to conduct its operations or evaluate their reasonableness. Furthermore, the Postal Service has consistently denied the utility of the Christensen study as a meaningful guide to evaluating the reasonableness of its operations. Postal Service evidence draws from the real experts, those with responsibility for efficient processing of the mail. This cogent testimony explains what is done where, and why, and supporting evidence shows that mail processing decisions are increasingly efficient. Were a cost study of DVD mail conducted today, it would start with those same operations experts and also look at what data are available. The fact that IOCS began collecting information in 2007 about Permit Reply Mail (almost all of which is Netflix volume) would presumably draw attention if the Commission chooses to evaluate whether its data support GameFly's claims of undue discrimination, or the Postal Service explanation of how mail processing decisions are instead driven by legitimate business concerns.

- B. Computing the IOCS-based cost for Permit Reply Mail is possible using established Commission methodology.

GameFly argues that the complexity of and controversy over IOCS-based mail processing cost estimates prevents the Commission from considering the Permit Reply Mail cost estimate. (GameFly Motion at 4.) While mail processing costing methods may be complex (or at least complicated), and the data may be controversial, their application has been well-established over the course of extensive litigation in several omnibus rate cases, most notably PRC Docket No. R97-1. Accompanying its FY2009 Annual Compliance Report (PRC Docket No. ACR2009), the Postal Service provides the Commission with full IOCS data (folder USPS-FY09-NP21), and a public IOCS data dictionary showing which IOCS data elements identify Permit Reply Mail (folder USPS-FY09-37, file IOCSDataDictionaryFY09.xls). Source code and other data for the calculation of mail processing costs using Commission methodology are provided in folder USPS-FY09-7, and the methods for computing piggybacked unit costs are detailed in folder USPS-FY09-26.

Under Commission methodology, the cost of a product is the cost associated with IOCS tallies for the product, plus allocations of "mixed mail" and "not handling" costs, as detailed in folder USPS-FY09-7. Disaggregating costs below the CRA product lines using finer IOCS data is commonplace; in the ACR, such methods are used to estimate sample-based costs for metered single-piece First-Class Mail letters among other shape-level costs (in USPS-FY09-7 part 5), and for disaggregating mail processing costs for Standard ECR (in folder USPS-FY09-18). While extracting costs associated with subsets of tallies for a CRA

product may not be simple by some standards, the data and methods are well established and available to the Commission.

- C. GameFly's criticisms of IOCS are off the mark, and provide no basis for questioning the accuracy of IOCS data on Permit Reply Mail.

GameFly cites various controversies involving IOCS-based costs in an attempt to undermine the validity of IOCS data on Permit Reply Mail (GameFly Motion at 5-7). In doing so, GameFly fails to represent accurately the testimony on IOCS from previous rate cases—notably Dr. A. Thomas Bozzo's testimony on IOCS redesign in PRC Docket No. R2006-1 (USPS-T-46). The central thrust of that testimony explains that the "team that redesigned the IOCS data collection instrument improved the quality of the data produced by the system, while collecting all of the information required for CRA production." USPS-T-46 at 3. GameFly thus cites IOCS issues long predating IOCS redesign—such as issues with identification of nonprofit versus commercial Standard Mail in PRC Docket No. R97-1—without acknowledging that the Postal Service demonstrably improved IOCS data collection in the interim. Also of significance, GameFly quotes Dr. Bozzo's statement that IOCS "[e]rror rates are higher for finer levels of [product] detail," but omits the error rates themselves, derived both from controlled and field studies described in Dr. Bozzo's testimony: 1 percent at the class level and 2-3 percent at finer ("subclass") levels. PRC Docket No. R2006-1, USPS-T-46 at 24, 26.

Most of the other costing controversies GameFly cites involve issues where the correct product cannot be inferred solely from markings or other

information observable on the mailpiece. These include the issues regarding Within-County Periodicals, measurement of costs by shape in Standard Mail, and separating costs for automation and nonautomation presort in First-Class Mail. Within-County Periodicals do not bear a subclass marking and thus require edits involving identification of mailing geography and publication-specific postage statement data, which were developed by Postal Service witness Degen in PRC Docket No. R94-1 (USPS-ST-12), and which continue to be implemented.¹⁴ The testimony GameFly cites with respect to the Standard Mail flat-parcel issue explains that some "parcel-shaped Standard Regular pieces qualify for flats rates" (PRC Docket No. R2005-1, USPS-T-13 at 5). The adjustment aligns the cost data (based on the observable physical shape) with the volume data (based on the rate category). With respect to non-automation First-Class Mail, GameFly fails to cite the original PRC Docket No. R2005-1 POIR response on the subject, in which Postal Service witness Abdirahman explained that "Based solely on the physical examination of mail piece characteristics (e.g., barcodes), it is not always possible for data collectors to determine whether the revenue of a given

¹⁴ See, e.g., USPS-LR-L-9 (cited in the preface to PRC Docket No. ACR2009, USPS-FY09-37). See also PRC Docket No. R2006-1, USPS-T-46 at 35-36. Dr. Bozzo explains the increase in Within-County Periodicals costs cited by GameFly as a consequence of improved data collection techniques:

Any tally preliminarily identified as Within-County Periodicals in the automated processing of IOCS data is reviewed for evidence of eligibility to claim Within-County rates (see USPS-LR-L-9, Appendix D). Since title information must be entered in IOCS, and the tallies are reviewed after processing, I consider it unlikely that pieces not belonging to the Within-County subclass are being misidentified. The photocopy and keying studies also showed no tendency for data collectors to misidentify pieces of other classes as Periodicals.

Id.

mail piece, and the piece itself, was recorded at the nonautomation rates or automation rates." (PRC Docket No. R2005-1, Response to POIR No. 1, part A.) Significantly, these issues do not involve IOCS data collectors systematically misreporting observable mailpiece markings or other characteristics, as GameFly would have one believe.

While the non-observability of the rate category for certain products may be a structural limitation of IOCS, it is not a limitation germane to the measurement of costs for Permit Reply Mail. The vast bulk of Permit Reply Mail is comprised of Netflix return pieces using Netflix's distinctive mailer, a letter-size piece paying letter-shape rates, marked clearly and prominently with the "Permit Reply Mail" marking. There is simply no obstacle in IOCS to the correct identification of Permit Reply Mail, and the evidence on IOCS accuracy is that error rates are too small to support any contention that the PRM data would be subject to material non-sampling error.

- D. The correct interpretation of differences between contemporary, sample-based costs and results from the Christensen Study is that the Christensen model assumptions were overly pessimistic.

GameFly's observation that the Christensen Associates report's estimate of Netflix return costs differs markedly from the IOCS-based cost for PRM returns (GameFly Motion at 8) has no implication for the reliability of the IOCS data. As the Postal Service discussed in its Reply Brief, the Christensen report's estimates of DVD return costs depend critically on various assumed productivities and other assumed parameters. Where assumptions and reliable measurements conflict, the measurement should prevail. In this case, Postal Service operations

experts describe an operational environment that would necessarily be modeled correctly by current PRM data.

III. GAMEFLY'S COMPLAINTS ABOUT POSTAL SERVICE DISCOVERY RESPONSES REFLECT ITS OWN MISUNDERSTANDING AND MISGIVINGS.

The GameFly Motion spends eight pages (pp. 9-16) decrying alleged Postal Service failures to respond properly to various discovery requests. While all of these attacks lack merit, it should first be noted that GameFly relies upon a narrow view of what constitutes a “cost study” and the ramifications it would attach to that term. In the previous section, the Postal Service explains how a cost study would generally be undertaken once the need for one is established: discussion with operations experts would be followed by examining available data to discern how best to model mail flow costs. The Postal Service has undertaken no systematic cost study in this docket, and the Christensen study on which GameFly bases its entire case is the only—albeit unsponsored and undocumented—cost study that has been placed at issue in this proceeding.¹⁵ Nor has the Postal Service perceived the need for another cost study.

GameFly’s argument that the Postal Service has failed to identify or supply it with details of some other cost study mistakenly equates examination of publicly available materials provided in accordance with Commission rules and methodologies to a “cost study”. Citation to or analysis of Commission precedent

¹⁵ Some might argue that the unsponsored, undocumented, and unexplained OIG report also constitutes a cost study. However, it was not undertaken with any understanding or awareness of Commission standards, and, as previously noted, the Postal Service was never even able to understand how the OIG arrived at its quantified estimates. Notwithstanding, the OIG report relies, in part, upon the Christensen study.

does not in fact constitute a cost study of the sort the Christensen study is— which must ordinarily satisfy the mandates of Rule 31(k) as a foundation for admission into the evidentiary record. GameFly’s elevation of a citation to the level of a “cost study” would accordingly trigger Rule 31(k) requirements whenever a participant (or the Commission) relies upon any number from a previous docket. The Commission has never asserted the application of any such standard, nor should it; the GameFly position accordingly lacks merit.

GameFly’s complaint of undue discrimination focuses upon why the Postal Service handles various DVD mail as it does. GameFly asserts that distinctions in mail processing among respective DVD mailers’ pieces constitute undue discrimination; so the Postal Service responded by explaining in exceptionally concrete terms exactly why current distinctions exist. Simply put, they serve the Postal Service’s own statutory obligation to process and deliver mail efficiently and effectively, with due attention to service considerations. By any measure the Postal Service applies to mail processing decisions, its processing of DVD mail responds only to its own needs for efficient and effective processing.

Specific allegations in the GameFly Motion also warrant a response. GameFly explains its mystification, in a section that bridges the boundary between pages eight and nine, as to why the Postal Service mentions IOCS data, stating, in addition, “The Postal Service’s internal IOCS data are neither admissions by GameFly nor public records.” GameFly Motion at 8. It would be difficult for this sentence to be less accurate. As explained above, IOCS PRM data are those relied upon by the Commission in PRC Docket No. ACR2009 and

in its FY2009 ACD. Similar data are available publicly at the Commission for previous years. That review process, moreover, examined the prices for First-Class Mail single piece letters and flats, the very prices that GameFly's strained efforts to articulate a complaint implicitly attack.¹⁶ The review also afforded GameFly an opportunity to comment upon those prices, or argue that the Postal Service engages in discrimination in how it administers those prices. GameFly chose not to participate or comment. The main point is that IOCS data for PRM are taken from the Commission's own public records, not those of some other agency for which judicial notice might be appropriate.

On page 9, GameFly begins its serial claims that the Postal Service failed to respond in full to various GameFly discovery efforts. Each Postal Service answer was a complete and accurate response to the precise question asked. Each discovery request GameFly identifies in section B of its motion relied upon assumptions or suppositions that entail quite different foci than GameFly would now have them imply. Questions focus on distinctions between automated versus manual handling when GameFly claimed that the latter was something expedited and special afforded uniquely and exclusively only to Netflix. As Postal Service testimony subsequently explained in great detail, one touch handling entails operationally cognizable efficiencies that drive the processing of a lot of mail, not just that of Netflix. The discovery requests also focus on

¹⁶ GameFly never has been able to explain exactly how its use of the First-Class Mail two ounce flat price somehow entails undue discrimination among other users of that price; nor has it explained why it is experiencing undue discrimination from other users of the First-Class Mail single ounce price when it has never shown real interest in using that price.

“studies” undertaken to define or defend field processing choices, when the evidentiary record has shown that “studies” are usually a Headquarters driven undertaking serving some other purpose. Field decisions are data driven—but typically not “study” driven. As the operations experts all testify, field managers use the familiar data systems but in quite different ways than customarily seen in Commission proceedings. As GameFly has studiously failed to recognize, field processing decisions are typically not based upon an analyst’s cost studies. Throughout this case, the Postal Service has been forthright in identifying the information it possesses regarding DVD mail, with copies of everything made available to GameFly.

GameFly’s argument that two numbers stated in argument by the Postal Service somehow amount to a “cost study” is inaccurate and misleading. GameFly’s apparent argument that the Commission should somehow be foreclosed from examining reliable information in its custody made public in a previous proceeding should be dismissed.

CONCLUSION

The Postal Service accordingly requests that the instant GameFly motion to strike two sentences of Postal Service argument from its reply brief be denied.

Respectfully submitted,

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