

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 ESTABLISH STANDARDS AND PROCEDURES
TO GOVERN PROCEEDINGS ON REMAND
(March 7, 2013)**

GameFly, Inc. (“GameFly”) moves for adoption of the standards and procedures proposed in this Motion to govern the remanded phase of this complaint proceeding. This motion is divided into two sections. Section I summarizes the issues that have been resolved by Order No. 718, the Commission’s April 2011 final decision in the initial phase of this case, and *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013), the Court of Appeals’ January 2013 decision on review of Order No. 718. Section II of this motion proposes standards and procedures for resolving the handful of issues that remain.

I. THE SCOPE OF THE REMANDED PROCEEDING IS NARROW BECAUSE MOST OF THE KEY ISSUES IN THE CASE HAVE BEEN RESOLVED BY THE COMMISSION AND THE COURT OF APPEALS.

No party sought rehearing of the Court of Appeals’ January 2013 decision within the 45-day period allowed by Fed. R. App. P. Rule 40, and the court’s mandate issued on March 4, 2013. Fed. R. App. P. Rule 41. Accordingly, the Commission has now regained jurisdiction over the case.

The scope of the remanded proceeding before the Commission is narrow. Most of the issues in the case have been resolved by Order No. 718 and the court's decision, and are not open for relitigation on remand. The Postal Service did not seek judicial review of the Commission's adverse findings in Order No. 718; and neither the Commission nor the Postal Service has sought further appellate review of the Court of Appeals' January 13 decision. The following findings, in particular, are therefore now beyond challenge: (1) GameFly and Netflix are "similarly situated" under 39 U.S.C. § 403(c); (2) the Postal Service has been discriminating between GameFly and Netflix in the price and service offered to their DVD mailers; (3) the discrimination against GameFly lacks a reasonable basis, and is therefore unlawful; (4) the Commission has an affirmative obligation to devise an effective remedy or provide a reasonable explanation of why any residual discrimination is due or reasonable under 39 U.S.C. § 403(c); and (5) differences between the cost of handling letter-shaped and flat-shaped DVD mailers, and differences in the markups over attributable cost established by the Postal Service for letters vs. flats, are not reasonable grounds for allowing any residual price discrimination against GameFly, because its use of flat-shaped mailers is itself the product of the service discrimination that the Commission has allowed to continue. We discuss each point in turn.

A. GameFly And Netflix Are Similarly Situated.

In Order No. 718, the Commission held that GameFly was similarly situated to Netflix and Blockbuster. Order ¶¶ 4126, 5002. The Commission specifically considered and rejected the Postal Service's claims that differences in the business models (Order ¶¶ 4089, 4092), DVD designs (*id.* at ¶¶ 4096, 4102), mailpiece designs (*id.* at ¶¶ 4104,

4107), volumes (*id.* at ¶¶ 4108, 4125), mail density (*id.*), number of mail entry and collection points (*id.*), and average transportation distance were material enough to destroy the fundamental similarity of the three DVD rental companies and their mail (*id.*).

Moreover, the Commission held that GameFly's use of the flats rate category did not negate the company's fundamental similarity with Netflix and Blockbuster. *Id.* at ¶ 4084. GameFly used the flats category, the Commission found, only because the Postal Service refused to provide Netflix-comparable levels of manual processing to GameFly mailers entered as letters. *Id.* at ¶¶ 4084, 4137-4138. The Postal Service did not seek judicial review of these findings, and the Court of Appeals left them undisturbed.

B. The Postal Service Has Been Discriminating Against GameFly vis-à-vis Netflix.

In Order No. 718, the Commission also held that the Postal Service's provision of special manual processing of letter-shaped mailers at no extra charge to Netflix, while refusing to provide the same processing to GameFly, constituted discrimination against GameFly under 39 U.S.C. § 403(c). The Postal Service, the Commission found, "has given GameFly less favorable rates and terms and conditions of service than other similarly situated mailers"—specifically Netflix and, to a lesser extent, Blockbuster. Order No. 718 ¶¶ 1003, 4132-39, 5003, 5024.

The Commission also considered and rejected the Postal Service's claims that (1) the special processing received by Netflix resulted from the independent decisions of local operating officials, and therefore could not be imputed to the Postal Service under

section 403(c); and (2) the special handling given to Netflix DVD mailers was a permissible exercise of “operational flexibility.” *Id.* at ¶ 4136. The Commission cited a variety of record evidence, including internal documents obtained from the Postal Service in discovery, indicating that “the forms and extent of special processing were known to Headquarters personnel and were both tacitly and expressly condoned.” *Id.* at ¶ 4134.

The Commission found further evidence of undue discrimination in the Postal Service’s refusal to (1) impose a surcharge on Netflix DVD mailers for nonmachinability (i.e., inability to be processed in automated sorting equipment), *id.* at ¶¶ 4209-29, or (2) establish a uniform set of rates and classifications for all DVD mailers, *id.* at ¶¶ 4230-4243. The Postal Service did not seek judicial review of these findings, and the Court of Appeals left them undisturbed.

C. The Discrimination Against GameFly Lacks A Rational Basis And Therefore Violates 39 U.S.C. § 403(c).

Also not open for relitigation on remand is the unlawfulness of the Postal Service’s discrimination against GameFly. In Order No. 718, the Commission held that the Postal Service had failed to demonstrate any rational basis for the discrimination, thereby making the discrimination unlawful under 39 U.S.C. § 403(c). *Id.* at ¶¶ 4140-4246, 5004-5005. The Commission considered and rejected each of the supposed justifications advanced by the Postal Service. In particular, the Commission found that: (1) the special manual handling given to Netflix DVD mailers had the approval of Postal Service headquarters, and could not be defended as the result of local operating decisions (*id.* at ¶¶ 4141-4155); (2) the special manual handling given to Netflix and

Blockbuster DVD mailers, rather than maximizing mail processing efficiency and minimizing the Postal Service's costs, had the opposite effect (*id.* at ¶¶ 4156-4166, 4177-4204); (3) giving the same level of manual handling to additional DVD rental companies such as GameFly would not be impractical (*id.* at ¶¶ 4167-4171); (4) the discrimination was unjustified by differences between GameFly and Netflix in mail volume, customer address density, average distance that the Postal Service must carry each company's mailers between company and customer, or number of points where the company picked up its return mail from the Postal Service (*id.* at ¶¶ 4172-4176); and (5) the discrimination was unnecessary to meet standards for speed of delivery. *Id.* at ¶¶ 4177-4208; see also USPS response to GFL/USPS-71(b); USPS Response to GFL/USPS-162(a) (admitting that claimed efficiencies of manual processing were not based on any studies or data); USPS Responses to GFL/USPS 73(b) and (d). The Postal Service did not seek judicial review of these findings, and the Court of Appeals left them undisturbed.

D. The Commission Has An Affirmative Obligation To Devise An Effective Remedy For The Discrimination Or Explain Why Any Residual Discrimination Is Reasonable.

Also beyond challenge on remand is the Commission's affirmative duty to prescribe an effective remedy for the discrimination against GameFly. 39 U.S.C. § 3662(c) provides that the Commission, upon finding that a complaint is justified, "shall order the Postal Service to take such action as the Commission considers appropriate to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance." The remedies available under this section include "ordering unlawful rates to be adjusted to lawful levels"—i.e., in the context of Section 403(c), to

prescribe nondiscriminatory rates. *Id.* The Commission’s duty to prescribe an effective remedy is mandatory, not permissive:

While the Commission is broadly empowered to fashion a remedy . . . the remedy it selects must be responsive to “the effects of any noncompliance.” . . . The remedy chosen by the Commission must, therefore, address [the particular] undue discrimination and be supported by, and consistent with, the record.

Order ¶ 5011; *see also GameFly*, 704 F.3d at 148-149.

In the initial phase of this case, GameFly suggested two alternative remedies for the discrimination against it. The Postal Service opposed both remedies, but offered no alternative. The Commission declined to adopt either of the remedies proposed by GameFly, and adopted instead an alternative remedy that (1) allowed the Postal Service to continue discriminating between Netflix and GameFly in terms of service, and (2) eliminated only about 1/3 of the difference in price between the service offered to Netflix (manually processed letter mail) and the alternative service (machine-processed flats mail) that the Postal Service’s discrimination in service forced GameFly to use. Order No. 718 at ¶¶ 1005, 5012, 5014-20, 5024-5030 and Appendix B; *see also GameFly*, 704 F.3d at 147-148.

This limited relief, the Court of Appeals held, fell short of the Commission’s duty under 39 U.S.C. §§ 403(c) and 3662(c) to remedy undue discrimination. “Where the Commission allows discrimination to exist in the postal rate structure, it must explain why that discrimination is due or reasonable under § 403(c).” 704 F.3d at 148. “[R]egardless of whether it adopted the precise remedy sought by the complainant, the Commission was required either to remedy all discrimination or to explain why any discrimination it left in place was due or reasonable under § 403(c). *Id.*

E. Continued Price Discrimination Against GameFly Cannot Be Justified By Differences In The Choice of Mailer Shape That Are Themselves The Product Of the Service Discrimination That The Commission Has Allowed To Continue.

The Court of Appeals' decision also forecloses any claim on remand that differences between the costs of handling letter-shaped and flat-shaped DVD mailers, or differences between the pricing policies for letter- and flat-shaped First-Class Mail, can justify any continued price discrimination between letter- and flat-shaped DVD mailers.

In Order No. 718, the Commission justified its decision not to equalize fully the rates available to round-trip DVD mailers entered as flats vs. letters on the grounds that (1) flat-shaped DVD mail may cost the Postal Service significantly more to process than letter-shaped DVD mail, and (2) the Postal Service has the right to charge the two shape categories different markups over cost. Order No. 718 at ¶¶ 4204, 5017-20 and 5029-30. This reasoning, the Court of Appeals held, was “illogical on its own terms”—and hence arbitrary and capricious—because GameFly’s very use of flat-shaped mail was a result of the Postal Service’s operational discrimination:

The unstated assumption of this explanation is that GameFly has a free choice in whether to use flats or letters. But the Commission's findings establish that the Postal Service's terms of service discrimination against GameFly, not GameFly's free choice, led to the companies' use of different mailers. The Commission found that GameFly would switch to letter mail if the Postal Service would provide the same service on the same terms it provides to Netflix. The Postal Service refuses to do so. Without special manual processing like that afforded to Netflix, switching to letter mail could subject GameFly to an epidemic of cracked and shattered DVDs. The Commission cannot justify the terms of service discrimination its remedy leaves in place (providing manual letter processing to Netflix but not to GameFly) based on the companies' use of different mailers when the use of different mailers is itself the product of the service discrimination.

In short, we conclude that the Commission's order is arbitrary and capricious. *Am. Fed'n of Gov't Emps.*, 470 F.3d at 380 (“Certainly, if the result reached is illogical on its own terms, the Authority's order is arbitrary and capricious.” (internal quotation marks omitted)).

GameFly, 704 F.3d at 149.

The Court of Appeals concluded by remanding the case to the Commission “for an adequate remedy.” *Id.* Specifically, the court held, the Commission “must either remedy all discrimination or explain why any residual discrimination is due or reasonable under § 403.” *Id.* For the reasons discussed in Section I, this explanation (if any) cannot rely on any of the factors discussed above.

II. THE COMMISSION SHOULD ORDER THE POSTAL SERVICE TO EQUALIZE THE RATES FOR LETTER-SHAPE AND FLAT-SHAPE ROUND-TRIP DVD MAILERS.

The record in this case establishes a practical and straightforward way for the Commission “to remedy all discrimination,” and without further delay. The Commission should order the Postal Service to do one of the following within 30 days: (1) reduce the First-Class price for a two-ounce flat-shaped round-trip DVD mailer to the current First-Class price for a one-ounce letter-shaped round-trip DVD mailer; or (2) propose and document an alternative remedy that would fully eliminate the discrimination and comply with the other provisions of Title 39. If the Postal Service chooses the second option, *GameFly* should have 30 days or 60 days to comment, depending on the nature of the proposed alternative remedy. The existence of at least one remedy that fully eliminates the discrimination means, however, that any alternative remedy which left some residual discrimination in place could not satisfy the court’s mandate under Sections 403(c) and 3662(c). *GameFly*, 704 F.3d at 148 and 149.

A. As A Default Remedy, The Postal Service Should Be Ordered To Reduce The First-Class Price For A Two-Ounce Flat-Shaped Round-Trip DVD Mailer To The First-Class Price For A One-Ounce Letter-Shaped Round-Trip DVD Mailer.

GameFly asks that the Commission, as its default remedy, order the Postal Service to reduce the First-Class rate for a DVD mailer defined in MCS 1115.3 and DMM 333.2.7 to the current price of a one-ounce First-Class letter.¹ The reduced rate should take effect 30 days after the Commission's order. The reduced rate should remain in effect (subject, of course, to future adjustments in the price of one-ounce letter mail) unless and until the Postal Service proposes, and the Commission approves, an alternative rate design that remedies the discrimination between GameFly and Netflix as fully and effectively.

In the proceedings below, the Commission declined to award any pricing relief beyond elimination of the second-ounce charge for DVDs mailed as flats. The Commission reasoned that: (1) the difference between the Postal Service's costs of handling GameFly vs. Netflix DVD mailers was not known precisely, and (2) general ratemaking principles entitled the Postal Service to maintain price differentials between differing kinds of mail, at least in the "first instance." Order No. 718 at ¶¶ 4204, 5017-5020, 5029-5030.

The Court of Appeals dismissed these objections as illogical. The court reasoned that neither the possibility of differences in attributable cost between flat-shaped and letter-shaped DVD mail, nor the Postal Service's general "flexibility" in

¹ Attached as Exhibits 1 and 2, *infra*, are proposed MCS and DMM language implementing this rate equalization.

pricing letters vs. flats, are legitimate objections to rate equalization. 704 F.3d at 148-149.

In its decision, the court began by quoting “in its entirety” the Commission’s “explanation for the residual discrimination its order left in place”:

The difference in the rates that will be paid by Netflix and GameFly under the remedy is justified by cost differences and by general pricing differences between the First-Class Mail flat and letter products. Additional rate differences may arise between users depending on whether a given mailer presorts its outbound pieces. Such differences are the result of reasonable pricing differences that exist between the various single piece and presort rates applicable to First-Class Mail letters and flats.

The price granted by the remedy is not as low as the alternative remedy sought by GameFly, and even at this rate, GameFly mail may continue to generate more than double the contribution per piece than Netflix mail. However, the remaining rate disparity is reasonable in light of the differences between letter-shaped and flat-shaped round-trip DVD mailers. By making the letter-shaped and flat-shaped round-trip DVD mailer rates available to all qualifying mailers, any potential discrimination against other similarly situated mailers is also remedied.

Id. at 148-149 (quoting Order No. 718 at ¶¶ 5029-5030).

The court held this reasoning to be arbitrary and illogical because it ignored the Commission’s own finding that GameFly used flat-shaped mail in the first place only because of the Postal Service’s discriminatory handling of DVD mailers entered as letters:

The unstated assumption of this explanation is that GameFly has a free choice in whether to use flats or letters. But the Commission's findings establish that the Postal Service's terms of service discrimination against GameFly, not GameFly's free choice, led to the companies' use of different mailers.

The Commission found that GameFly would switch to letter mail if the Postal Service would provide the same service on the same terms it provides to Netflix. The Postal Service refuses to do so. Without special manual processing like that afforded to Netflix, switching to letter mail could subject GameFly to an epidemic of cracked and shattered DVDs. *The Commission cannot justify the terms of service discrimination its remedy leaves in place (providing manual letter processing to Netflix but not to GameFly) based on the companies' use of different mailers when the use of different mailers is itself the product of the service discrimination.*

GameFly, 704 F.3d at 149 (emphasis added); cf. Order No. 718 at ¶¶ 4084, 4137-4138 (finding that GameFly used flats only because the Postal Service refused to provide Netflix-comparable levels of manual processing to GameFly mailers entered as letters).

Because the Postal Service's operational discrimination is the cause of GameFly's use of flat-shaped DVD mailers, the differences (if any) between the costs of processing DVD mailers as letters vs. flats, and the "general pricing differences between the First-Class Mail flat and letter products," are immaterial to the choice of a price remedy for the discrimination. The Postal Service, having refused or failed to provide GameFly DVDs mailed as letters the same degree of manual processing that Netflix receives for its DVDs mailed as letters, must offer GameFly and other disfavored DVD rental companies the next best alternative: a price for two-ounce flat-shaped DVD mail service that is equal to the price charged for one-ounce letter-shaped DVD mail service. Evidence on the relative costs of handling letter- vs. flat-shaped DVD mailers is irrelevant to this task. *To avoid any confusion or ambiguity on this point, GameFly formally withdraws any request for a rate remedy that equalizes the contribution received by the Postal Service between letter-shaped and flat-shaped DVD mailers.*

The Commission has ample authority to implement the default remedy proposed here—immediately and without further evidentiary hearings. First, the extensive record compiled by the parties, and the Commission’s robust and meticulous findings in the first 108 pages of Order No. 718, establish all of the preconditions for relief required by 39 U.S.C. § 403(c): (1) GameFly and Netflix are similarly situated; (2) the Postal Service is discriminating between the two customers; and (3) the discrimination has no rational basis. Those issues are not open for relitigation. See pp. 1-8, *supra*.

Second, 39 U.S.C. § 3662(c) empowers the Commission to cure the discrimination by prescribing rate adjustments. As discussed above, Section 3662(c) requires the Commission, if finds that a complaint is justified, to “order the Postal Service to take such action as the Commission considers appropriate to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance,” including “ordering unlawful rates to be adjusted to lawful levels.” In Order No. 718, the Commission exercised this authority by prescribing a rate reduction on flat-shaped DVD mailers—i.e., elimination of the 20-cent second-ounce charge. Order No. 718 at ¶¶ 5025-5027, 5032-5034; *GameFly*, 704 F.3d at 147. The Postal Service did not seek judicial review of this rate prescription, and correctly so. The authority of federal regulatory commissions to prescribe rate adjustments as a remedy for undue discrimination under similar remedial statutes has long been recognized. See, e.g., *ICC v. Ill. Cent. R. Co.*, 263 U.S. 515, 521 (1924); *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 392 (1933); *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 23-24 (2d Cir. 1978) (the FCC, having found the existence of undue discrimination, need not conduct exhaustive financial or cost studies before prescribing relief); see also *Suncor Energy Marketing Co., Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242 at P 137

(2010) (ordering pipeline to implement a proration policy proposed by shippers to remedy concerns about discrimination raised in complaints and protests brought under the Interstate Commerce Act).

Third, as explained above, the January 2013 decision of the Court of Appeals, by rejecting the two objections offered by the Commission in Order No. 718 to providing complete pricing relief, has left no material issue of fact that must be resolved before awarding relief. Accordingly, the Commission is entitled to award immediate relief without reopening the record. See Docket No. ACR2010-R, *Annual Compliance Report, 2010*, Order No. 1427 (August 9, 2012) (resolving issue remanded in *USPS v. PRC*, 676 F.3d 1105 (D.C. Cir. 2012), without reopening the evidentiary record).

Finally, the balance of the equities also favors immediate relief. This litigation has been pending since April 2009—almost four years ago. Before that, GameFly spent 18 months working with the Postal Service in an unsuccessful attempt to resolve informally the issues on which the complaint was based. At the company's current volume of more than 12 million shipments per year, the difference between the one-ounce flats rate of \$0.92 that GameFly must pay to avoid automated letter processing for most of its DVD mailers, and the one-ounce letter rate of \$0.46 that Netflix pays to avoid automated letter processing of return mailers, amounts to about \$5.6 million per year. This amount exceeds GameFly's annual net income. This financial injury will continue to mount until the more complete remedy mandated by the Court of Appeals becomes effective. Moreover, the financial injury will be irreparable: 39 U.S.C. § 3681 precludes any refunds or reparations of postage paid at the rates in effect when the mailings were entered.

B. Standards And Procedures For Consideration Of Any Alternative Remedies Proposed By The Postal Service.

It is possible that the Postal Service, rather than equalize rates for letter- and flat-shaped DVDs at current one-ounce letter rate, may prefer to equalize the rates for letter-shaped and flat-shaped DVD mailers at a slightly higher level. Such a choice, if exercised consistently with the pricing constraints of Title 39, including but not limited to the CPI-based cap on average First-Class rates established by 39 U.S.C. § 3622(d), is within the Postal Service's discretion. To minimize the irreparable injury that the further delay entailed in review of an alternative pricing remedy will inflict on GameFly, however, the Commission should require the Postal Service to identify within 30 days of the Commission's order the alternative level (if any) at which the Postal Service prefers to equalize rates for DVD mailers. Moreover, the Postal Service should be required to submit the following documentation simultaneously with any alternative rate proposal:

- (a) A general description of the alternative rate remedy and how it complies with the Court of Appeals' decision.
- (b) The proposed rate schedule(s), with relevant MCS and DMM language.
- (c) Price cap calculations (if necessary) or an explanation of why they are unnecessary.

If the Postal Service does not submit an alternative proposal for relief, including the required supporting documentation, within 30 days of the Commission's order, the default rate described in section II.A, *supra*, should take effect immediately. If the Postal Service proposed and documents an alternative rate remedy within 30 days of

the Commission's order, GameFly should be allowed a further 30 days to comment on the Postal Service filing.

In theory, an alternative remedy for the discrimination against GameFly might be operational. As previously discussed in this case, an operational remedy could involve either: (1) extending the same high level of manual processing that Netflix receives to GameFly mailpieces, if mailed at machinable letter rates, or (2) discontinuing the manual processing of Netflix letters. If the Postal Service proposes an operational remedy for the discrimination against GameFly, GameFly should have 60 days to comment.

The existing record, however, imposes a heavy presumption against any operational remedy. The Postal Service claimed repeatedly during the initial phase of this case that an operational remedy would be infeasible to monitor or enforce. See USPS Post-Hearing Brief (November 8, 2010) at 76-93; USPS Reply Brief (November 18, 2010) at 117-119. The Commission, crediting these claims, declined to impose an operational remedy. An "efficient and effective processing of mail requires operational flexibility at the local level," the Commission stated, and it "will not interfere with that operational flexibility by attempting to dictate how mail is physically processed." Order No. 718 at ¶ 4135. An operational remedy, however, would require "day-to-day oversight" of Postal Service "mail processing operations," "could cause the Postal Service to incur potentially significant administrative costs," and would be of "unclear" effectiveness:

GameFly's proposed operational remedy would require the Postal Service to achieve very high percentages of manual culling and processing of DVD mailers from a variety of companies. [footnote omitted] Such a remedy has at least two potentially serious drawbacks. First, it

necessarily requires the Commission to involve itself in operational matters which have, to date, been almost extensively the prerogative of the Postal Service. The Commission is reluctant to assume responsibility for the kind of day-to-day oversight of mail processing operations envisioned by GameFly's proposed operational remedy. This is not to suggest that an operational remedy may never be warranted. On this record, however, the Commission will not impose it.

Second, in addition to requiring the collection and reporting of a significant amount of data on the extent to which Netflix, GameFly, and other DVD mailers' return mail is processed on the various types of letter processing equipment, and manually, it is unclear how an operational remedy could reasonably be enforced. Thus, that remedy could cause the Postal Service to incur potentially significant administrative costs.

For these reasons, the Commission does not find it appropriate to impose the operational remedy proposed by GameFly, nor is it able to develop modifications to protect against the imposition of potentially large costs on the Postal Service, mailers, and the Commission itself..

Opinion No. 718 at ¶¶ 5014-5016.²

These statements cannot be lightly ignored. Leakage of return DVD mailers into the automation letter mailstream would be catastrophic for GameFly and other DVD rental companies: the record shows that subjecting return DVD mailers to automated letter processing produces "an epidemic of cracked and shattered DVDs." *GameFly*, 704 F.3d at 149; Order No. 718 at ¶¶ 2003, 3004, 4006, 4084, 4093, 4102-4103, 4161; GameFly Brief (November 8, 2010) at 10-21 (citing record). Moreover, the gravity of these risks is heightened by their absence from the pricing remedy, which requires no monitoring or enforcement of manual processing at all. No remedy with a non-trivial risk of heightened disk breakage may be considered reasonable and lawful under Sections

² The Commission found that a supposed "settlement offer" from the Postal Service that purported to offer GameFly "hand processing" was "illusory" because the offer "lack[ed] any quantitative commitment to hand processing." Order No. 718 at ¶¶ 4078 & 4085.

403(c) and 3662(c) when the Commission has the straightforward and fully effective alternative of the default pricing remedy discussed above. *Cf. GameFly*, 704 F.3d at 148-149.

Accordingly, before considering any proposed operational remedy, the Commission should require the Postal Service to produce (in addition to the showings required to support an alternative pricing remedy) the following supporting information:

- (a) A detailed description of the terms of service that DVD letters and flats would receive (and a description of any difference in service that would be offered to different mailers using the same shape).
- (b) If the service offered would differ between mailers in any material way, a demonstration that the quality of service (in terms of exposure to automated letter processing and any other respect that a reasonable mailer would consider material) would be similar.
- (c) A description of how the Postal Service would ensure the proposed terms of service would be provided, monitored and enforced by the Postal Service. This showing must include, where relevant, draft SOPs and field instructions, and a plan for monitoring compliance.
- (d) A description of how the Postal Service would monitor the breakage rates of DVD mailers, including a baseline of expected breakage and a description of the contingency plan to be followed if a DVD rental company experiences higher-than-expected breakage.

- (e) A description of how the Commission would be able to monitor and enforce the proposed terms of service, including at each of the local facilities where Netflix DVDs receive manual culling and processing.
- (f) A detailed explanation of why the Commission should disregard the Postal Service's previous representations, and the Commission's previous findings, that an operational remedy would be impractical to monitor and enforce.

CONCLUSION

GameFly respectfully requests that the Commission adopt the standards and procedures proposed in this motion for the remanded phase of this case.

Respectfully submitted,

/s/

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PROPOSED MCS LANGUAGE

1115 Flats

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1115.3 Price Categories

The following price categories are available for the product specified in this section:

* * * * *

- Flat Round-Trip Mailer

* * * * *

Flat Round-Trip Mailer

- Flat Round-Trip Mailer service allows a mailer to send a flat-shaped mailpiece to a subscriber at the applicable³ one (1) ounce ~~Flats~~ machinable Letter price and pay postage for the return of the contents of that mailpiece at the one (1) ounce Single-Piece ~~Flats~~ Letter price.
- A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.
- Qualifying pieces must contain a standard 12 cm or smaller optical disc.
- Pieces weighing no more than two (2) ounces qualify for the one (1) ounce rate.
- Returned pieces must be picked up by the mailer at designated Postal Service facilities.

³ That is, 5-digit automation flats qualify for 5-digit automation letter rates, 3-digit automation flats qualify for 3-digit automation letter rates, and ADC automation flats qualify for AADC automation letter rates.

PROPOSED DMM LANGUAGE

333.2.7 Round-Trip Mailings with One Optical Disc

When a flat-size mailpiece weighing no more than 2 ounces in round-trip mailings includes one standard optical disc no larger than 12 centimeters in diameter per mailpiece, the mailpiece will be subject to the applicable price for a one-ounce First-Class Mail ~~flat~~ letter as long as the disc is not put in a rigid container and the envelope itself is not rigid and all other standards in 2.7 are met. The disc itself is not considered to be rigid for purposes of the flexibility test in 301.1.3. BRM or PRM pieces that meet the standards will be charged the applicable 1-ounce First-Class Mail ~~flat~~ letter price for pieces that weigh no more than 2 ounces. For the purpose of this standard, round-trip mailings are mailings entered under these conditions:

- a. The mailing is presented at a BMEU or other acceptance facility as a single-piece mailing using a permit imprint or as a presort mailing at presort or automation First-Class Mail ~~flat~~ letter prices.
- b. The mailpieces are addressed to subscribers and include either a BRM (under 505.1.0) or PRM (under 505.2.0) envelope designed for return of the disc to the permit holder.
- c. A sample of the return envelope is provided to the acceptance employee at the time of mailing for verification that the mailing is designed for round-trip purposes.
- d. BRM or PRM pieces must be picked up by the mailer at designated postal facilities, upon payment of all applicable postage and fees.