

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**UNITED STATES POSTAL SERVICE REPLY IN OPPOSITION TO MOTION OF  
GAMEFLY, INC., TO ESTABLISH STANDARDS AND PROCEDURES TO GOVERN  
PROCEEDINGS ON REMAND**  
(March 14, 2013)

On April 20, 2011, the Postal Regulatory Commission (Commission) issued its Order in PRC Docket No. C2009-1, finding that the United States Postal Service (Postal Service) failed to establish reasonable and legitimate reasons for the different mail processing methods applied to GameFly, Inc. (GameFly) and other round-trip DVD mailers, and that its mail processing decisions regarding round-trip DVD mail violated 39 U.S.C. § 403(c).<sup>1</sup> As a remedy, the Commission established a “reduced rate for round-trip flat-shaped DVD mailers weighing up to two ounces” equal to the one ounce flat rate.<sup>2</sup> On May 20, 2011, GameFly filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit (Court) challenging the Commission’s remedy in PRC Docket No. C2009-1.<sup>3</sup> On January 11, 2013, the Court issued its opinion vacating the Commission’s order and remanding the case.<sup>4</sup>

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<sup>1</sup> Order on Complaint, Order No. 718, PRC Docket No. C2009-1, at 108, ¶¶ 5004-5005 (April 20, 2011).

<sup>2</sup> *Id.* at 113-115, ¶¶ 5022, 5027-5028.

<sup>3</sup> *GameFly, Inc. v. PRC*, Petition for Review, Case No. 11-1179 (May 20, 2011).

<sup>4</sup> *GameFly, Inc. v. PRC*, 704 F.3d 145, 149 (D.C. Cir. 2013).

On March 7, 2013, GameFly filed a motion seeking to establish standards and procedures governing proceedings on remand (Motion).<sup>5</sup> Despite its title, the Motion does not focus on remand proceedings, or standards and procedures applicable to expected future proceedings. Instead, the Motion presents GameFly's request that the Commission impose GameFly's new, preferred "default" remedy – one never before presented to the Commission, the Court or the Postal Service: that GameFly pay the one ounce letter rate for its two ounce flats – a remedy more extreme and self-serving than the remedies proposed and considered during PRC Docket No. C2009-1 proceedings – without reopening the record or holding any evidentiary hearings that might produce a record on its new proposal. GameFly contends, falsely, that the Court's opinion has eliminated virtually all of the Commission's remedial authority, and that its preferred remedy is the only feasible option for the Commission. Although GameFly leaves open the possibility of an alternative remedy, it would impose burdensome restrictions on any alternative remedy, thereby impugning the capability of the Commission or anyone else to help craft another response to the Court's remand. In particular, GameFly would bypass the Court's directive that the Commission better explain the remedy it previously chose.

The Motion thus embodies GameFly's preference to eliminate the Commission's discretion and remedial authority, and prevent it from opening the record or otherwise collecting input of guidance regarding the steps necessary to make an informed decision on remand.

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<sup>5</sup> Motion of GameFly, Inc., to Establish Standards and Procedures to Govern Proceedings on Remand, PRC Docket No. C2009-1 (March 7, 2013).

As explained below, the establishment of a new rate-based remedy would require reopening the record; an order directing establishment of GameFly's preferred remedy or another new rate-based remedy on the current record would increase the likelihood of another appeal or additional litigation at the Commission to the point of near certainty. The preferred remedy would also enshrine an unacceptable principle, namely, that any mailer who chooses to avail itself of the handling, processing, and cost incurrence associated with a particular category of mail or type of mail service is entitled to the lower rate available for a completely different category of mail, with different handling, processing and costs. The eligibility for this rate treatment would rest on Postal Service decisions to treat the mailings of different mailers, with different physical characteristics and mailing patterns, differently, even if those differences are fully justified according to local decisions regarding costs and operational requirements and feasibility.

GameFly understandably relies principally on the Commission's findings and conclusions in PRC Docket No. C2009-1, as well as the Court's reliance on those findings, and the Postal Service's failure to appeal the Commission's finding of unreasonable discrimination. Nevertheless, the Postal Service submits that it has never conceded that the Commission's decision in that regard was correct, either factually or as a matter of law.<sup>6</sup> The decision not to appeal was influenced predominantly by the practical acceptability, both financially and operationally, of the original remedy. That remedy has now been nullified by the Court, barring a successful attempt by the Commission to explain and justify it, in light of the standards in 39 U.S.C. § 403(c). In

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<sup>6</sup> *GameFly*, Brief of Intervenor of the United States Postal Service, Case No. 11-1179, at 4 (March 5, 2012).

this regard, the Postal Service emphasizes that any alternative remedy fashioned by the Commission on remand must be supported by applicable law, including the provisions and policies of the PAEA and the Commission's regulations, as well as the evidentiary record before the Commission in PRC Docket No. C2009-1. Material departures from those standards will inevitably be subject to challenge in a further appeal. Perhaps more importantly, the Commission's determinations on remand should respect the practical and policy implications of its remedial decision. Any result which does not respect the prerogatives of the Postal Service and its Governors in making sound decisions to meet current financial and operations challenges, even if subsequently determined to be within the Commission's authority to impose, would be unwise. If only because GameFly's preferred remedy would result in sustained revenue loss based on the incomplete and flawed record before the Commission in the complaint proceeding, permitting GameFly to mail reinforced flats at single-piece letter rates would be ill-advised.

If the Commission decides that consideration of a new, rate-based remedy is appropriate on remand, it should schedule proceedings to the extent necessary for the collection of information that will enable an informed decision. In any event, it should not be deterred by GameFly's inaccurate and self-serving representations regarding the significance of the Court's opinion, nor GameFly's assertion that facts found not to justify discrimination are therefore barred from consideration in fashioning a remedy.<sup>7</sup> If, instead, the Commission decides to consider the Court's invitation to provide additional justification for the original remedy, there is sufficient evidence in the existing

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<sup>7</sup> See GameFly Motion at 8. In more stark terms, the fact that GameFly continues to mail flats, when Netflix mails letters, cannot be ignored in fashioning a remedy.

record to support the original remedy, and the Commission has the authority to conduct proceedings for that purpose, if necessary. Finally, if the Commission decides to consider alternative remedies, its consideration should not be limited by the restrictions proposed by GameFly; it should instead welcome information that contributes to the establishment of a realistic and acceptable remedy. This is especially true given that the Postal Service, and its financial operating capabilities, have changed in significant and substantial ways since the Commission first fashioned a remedy.

The Postal Service respectfully requests that the Commission reject the recommendations and restrictions proposed by GameFly, and respond to the Court's remand in a manner that either seeks approval of the original remedy, or encourages informed consideration of a diverse set of alternative remedies and justifications.

**I. A NEW RATE-BASED REMEDY CANNOT BE ESTABLISHED WITHOUT REOPENING THE RECORD.**

As described in section I.A. below, a new rate or classification must comply with the provisions and policies of the PAEA and the Commission's own regulations.<sup>8</sup> Failure to determine whether a remedial rate complies with applicable standards could lead to harm greater than that alleged by GameFly, and invite further litigation. To meet the appropriate substantive standards, as well as procedural requirements, and to produce a workable solution, it would be necessary to reopen the record. Despite GameFly's false representations regarding the constraints embodied in the Court's opinion, the Commission has the authority to reopen the record or establish any other

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<sup>8</sup> See generally 39 U.S.C. § 3622.

procedure with a scope sufficient to enable the development of a reasonable, supportable remedy.

**A. A Remedy Must Be Supported by Record Evidence and Comply with Applicable Regulations.**

The establishment of a new rate, classification, or operational policy must be consistent with applicable laws and regulations. At a minimum, a remedy should observe the statutory and regulatory provisions governing the establishment of rates and classifications under the PAEA, and respect the Postal Service's authorities in directing postal operations. A failure to determine that a remedy ordering a new rate, classification, or operational policy complies with applicable law and sound policy could lead to a reversal of the remedy on appeal, collateral attacks or negative implications for other products or operational policies.

In this case, the record contains no evidence to support GameFly's newly preferred remedy, and the absence of record support would make an order establishing that remedy ill-considered and vulnerable to challenge based on various legal theories. GameFly did not pursue its preferred remedy at any time during the PRC Docket No. C2009-1 proceedings, hence no party had cause to address it in the record. In fact, GameFly's original complaint appeared to seek a letter-based operational remedy, "the same prices and terms of service, including the same degree of manual processing, that the Postal Service provides to Netflix and Blockbuster."<sup>9</sup> GameFly's first request for a flat-based rate remedy did not appear until November 8, 2010, in the Post-Hearing Brief

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<sup>9</sup> Complaint of GameFly, Inc., PRC Docket No. C2009-1, at 13-14, ¶ 57 (April 23, 2009).

of GameFly, Inc. filed after the close of discovery.<sup>10</sup> Neither GameFly's preferred remedy, nor any other flat-based rate remedy, was raised, considered, or addressed in PRC Docket No. C2009-1, and the record does not support a rate-based remedy for flats. Indeed, GameFly has now abandoned its original position before the Commission seeking a rate remedy that would equalize contribution between letters and flats.<sup>11</sup>

**B. The Establishment of a Remedy Without Record Evidence Would Be Ill-Advised and Risk Conflict with Applicable Law.**

The proposals in the Motion might serve the interests of GameFly, but they do not serve the interests of the postal community and do not represent a long-term solution to the issues presented in PRC Docket No. C2009-1. As described above, GameFly seeks a remedy that has no evidentiary support, and proposes restrictions that would discourage the consideration of alternative remedies and creative solutions. GameFly initiated its dispute over five years ago, and, despite an extensive commitment of resources, the parties and the Commission have failed to develop a solution that satisfies GameFly. Accordingly, if the Commission decides to reconsider the appropriate remedy for GameFly's alleged discrimination, it should establish procedures that encourage creativity and the development of a full and accurate record and avoid unnecessary restrictions.

GameFly's self-serving proposal for a restricted response to the remand order conflicts directly with the appropriate response in this case. It is likely that an order allowing GameFly to pay the one-ounce letter rate for two-ounce flats will cause great concerns for not only the Postal Service, but also other mailers who recognize the

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<sup>10</sup> Post-Hearing Brief of GameFly, Inc., PRC Docket No. C2009-1, at 4-6, 86-88 (November 8, 2010).

<sup>11</sup> GameFly Motion at 11-12.

arbitrariness and lack of justification for such a rate. Adoption of the principle advocated by GameFly would, at a minimum, complicate design and administration of reasonable and equitable classifications of mail and reasonable and equitable rates. In this regard, the principle embodied in GameFly's approach would inevitably lead to questions about the presence and effects of discrimination embodied in all rates, and the Mail Classification Schedule in general.

Summary adoption of the rate GameFly advocates would lack reliable evidentiary support, while creating a procedural vacuum that would be difficult to defend on appeal. In its original Order the Commission found that "[GameFly's estimates of cost differences between Netflix and GameFly round-trip mailers] are not sufficiently accurate to be used to design a rate for flat-shaped round-trip DVD mailers . . ." <sup>12</sup> Without further exploration on the record, reversal of this conclusion would be without legal and factual support.

The circumstances require that the Commission pursue a reasoned, defensible, and long-term solution to PRC Docket No. C2009-1. Because GameFly's proposals would prevent the achievement of this objective, the Commission should decline to adopt the standards and procedures presented in the Motion.

**C. GameFly Offers an Inaccurate Interpretation of the Appellate Opinion and Proposes Unsupported Restrictions on the Commission's Jurisdiction.**

GameFly asserts that the Court of Appeals decision "has left no material issue of fact that must be resolved before awarding relief."<sup>13</sup> It further implies that only one potential remedy would be proper, stating that the Postal Service "must offer

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<sup>12</sup> Order at 112, ¶ 5019.

<sup>13</sup> GameFly Motion, at 11.



GameFly... 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.”<sup>14</sup> This is a misreading of the Court’s opinion. In remanding this matter to the Commission, the Court stated:

We need not, and do not, address GameFly’s argument that its proposed remedies should have been adopted by the Commission. Upon rehearing, the Commission will surely consider those remedies, but there may be a range of other possible remedies which would withstand appellate review.<sup>15</sup>

The Court contemplated a potential range of remedies that would be proper, in addition to contemplating that the Commission may simply explain why the residual discrimination in its original remedy is reasonable. To properly craft a new remedy, it is inevitable that the Commission would have to make certain factual inquiries. This would occur as part of the rehearing contemplated by the court.

For example, if the Commission seeks to craft a remedy that equalizes the contributions made by GameFly and Netflix’s differing mail pieces (a solution that GameFly has now apparently abandoned), it would need a factual record that would establish the actual costs and contributions under a specific classification and set of operational procedures. Such a determination on an expanded record would not, as GameFly implies, disturb the Order No. 718 finding that GameFly is, as a legal matter, similarly situated to Netflix for purposes of evaluating compliance with 39 U.S.C. § 403(c). Rather, it would be an essential part of fashioning an acceptable remedy.

On this point, the Postal Service notes that the processing of mail pieces containing DVDs, as well as major parts of the operating environment, have changed since the existing record in PRC Docket No. C2009-1 was established. Indeed,

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<sup>14</sup> *Id.* at 13.

<sup>15</sup> *GameFly*, 704 F.3d at 149.

generally, postal operations are evolving substantially, in light of changing policies and operational requirements associated with the need to adapt, financially and operationally, to declining volumes. In this regard, and specifically in connection with the processing of round-trip DVDs, Postal Service costing analysts have recently made exploratory mail processing site visits to observe the processing of round-trip DVDs, and the Postal Service is considering with Christensen Associates the possibility of updating the Christensen Associates study that was relied upon in PRC Docket No. C2009-1.

As noted, GameFly attempts to prevent an alternative remedy by stating that it “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.”<sup>16</sup> Any such withdrawal by GameFly, in itself, changes the landscape and context of any further consideration by the Commission of an acceptable remedy, and demands further proceedings, if GameFly’s new proposal is to be fairly evaluated.

## **II. THE RECORD CONTAINS SUFFICIENT INFORMATION TO SUPPORT THE COMMISSION’S ORIGINAL REMEDY.**

In its opinion vacating the Commission’s original order and remanding the case for reconsideration of the remedy, the Court gave the Commission the option of providing additional support for its original remedy. The Commission should consider this option, and evaluate evidence from the existing record to support its remedy. It is not bound by the unsupported constraints concocted by GameFly; while the fact that GameFly mails flats when Netflix mails letters may not justify the discrimination the

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<sup>16</sup> GameFly Motion, at 11.

Commission found, ignoring that fact when fashioning a better justification for the existing remedy or crafting a new one would be inappropriate.<sup>17</sup>

The Commission's original remedy, which, most importantly, waived the second ounce fee for inbound two-ounce round-trip DVD flats, was narrowly tailored to benefit GameFly, while having only a minor impact on the postal community and Postal Service operations. In contrast, GameFly's preferred remedy would impose a deep, preferential discount for GameFly, with a significant impact on the greater postal community. Despite GameFly's representations, for purposes of the Commission's consideration of issues on remand, the Court's opinion imposes few restrictions.

The Court's opinion addresses the "terms of service discrimination [the Commission's original] remedy leaves in place (providing manual letter processing to Netflix but not to GameFly)" and not any residual discrimination with respect to the different rates paid by GameFly and Netflix.<sup>18</sup> Accordingly, the Court's opinion does not restrict the Commission's ability to explain the rate differences in its original remedy based on GameFly's use of flats processing and other DVD mailers' use of letter processing; it addresses only the Commission's justification of a remedy that retains different operational treatment in the form of manual processing for Netflix but not GameFly.

On remand, the Commission can rely on evidence in the PRC Docket No. C2009-1 record to conclude that the original remedy's allowance of manual culling for Netflix but not GameFly is based, not on GameFly's decision to mail its DVDs as flats,

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<sup>17</sup> The same would also be true of other facts the Commission once found did not justify discrimination.

<sup>18</sup> *GameFly*, 704 F.3d at 149.

but on the practical operations choices through local decisions that are dictated by characteristics such as Netflix' mail's volume and density and distinctive mail piece color. In this regard, the Commission might provide an expanded explanation, while continuing to assert that the rate differences in its original remedy reflect the different methods of mail processing purchased by GameFly and Netflix.

With respect to the Commission's decision in its original order not to eliminate manual processing for Netflix, or require it for GameFly, the Commission stated that it "is persuaded by the Postal Service's argument that a distinctive mailpiece design is a relevant factor in its ability to hand process DVD mail."<sup>19</sup> Although it found (incorrectly) that Netflix's immensely larger volumes "have not been shown to produce cost differences" that justify processing decisions regarding GameFly, it did not determine that the effect of volume and density had no effect on the operational feasibility of manual processing for all DVD mailers.<sup>20</sup> A reexamination of the record in PRC Docket No. C2009-1 would reveal numerous statements explaining how volume and density impacts the operational feasibility of manual processing.<sup>21</sup> A conclusion that, for example, volume, density, or mail piece color – and not mail piece shape or processing method – make a certain type of mail processing more feasible and practical, from an operational standpoint, would provide support for the original remedy that permits processing differences to continue; it would thus not conflict with the Court's views on the effect of processing differences based on GameFly's choice of mailer.

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<sup>19</sup> Order at 58, ¶ 4107.

<sup>20</sup> See *id.* at 79-80, ¶ 4174.

<sup>21</sup> Tr. 9/1604, lines 10-25; Tr. 9/1708, line 24 – 1709, line 17.

After satisfying the Court's concerns regarding the processing differences left in place by the Commission's remedy, the Commission could consider supporting the rate differences established by its remedy. As described above, the record in PRC Docket No. C2009-1 was developed in the context of GameFly's pursuit of a remedy that would enable it to obtain the same rate, terms of service, and processing as Netflix.<sup>22</sup> As a consequence, discovery did not focus on the evidence necessary to establish a new rate. The lack of record evidence regarding rate components reflects this fact. The Commission confirmed the unsuitability of the record for a new rate-based remedy when it rejected the evidence presented by GameFly in support of its request for a rate-based remedy that equalized contribution. Specifically, the Commission stated that "[GameFly's estimates of cost differences between Netflix and GameFly round-trip mailers] are not sufficiently accurate to be used to design a rate for flat-shaped round-trip DVD mailers."<sup>23</sup>

The Commission has multiple methods of developing evidence in support of its original rate-based remedy. As one option, it could use Permit Reply Mail cost information collected by the Postal Service. Or, it could reopen the record and invite participants to submit evidence regarding an appropriate remedy. Although it is likely that the Commission could satisfy the Court's remand order by explaining that volume, density, and mail piece color considerations justify a remedy that allows differences in mail processing to continue, it should consider developing additional support for the rate differences established in its original remedy.

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<sup>22</sup> Complaint at 13-14, ¶ 57.

<sup>23</sup> Order at 112, ¶ 5019.

As explained above, on remand the Commission has the option of defending its original remedy. The existing record provides a sound basis for the Commission to address the Court's concerns, and the Commission should strongly consider the feasibility of this approach.

**III. GAMEFLY'S PROPOSED RESTRICTIONS ON REMEDIES DIFFERENT FROM ITS PREFERRED REMEDY HAVE NO BASIS IN FACT OR LAW AND WOULD SERVE TO INTERFERE UNNECESSARILY WITH THE COMMISSION'S REMEDIAL AUTHORITY.**

Pursuant to its attempt to frame the Commission's remand procedures in a light most favorable to itself, GameFly proposes a number of restrictions that would apply to any alternative remedy submitted by a party other than GameFly, and that would exclude from their scope only GameFly's preferred remedy. These proposed restrictions have no legal basis, and, if adopted, would limit unnecessarily the Commission's options for resolving this long-running dispute by finding a long-term solution. The Commission should reject the restrictions on alternative remedies proposed by GameFly.

GameFly's justifications for the restrictions proposed in section B of the Motion are overly broad and unrelated to many alternative remedies that could be proposed in this docket. Notwithstanding the Postal Service's position on the feasibility of an operational remedy,<sup>24</sup> the statements cited by GameFly in support of its contention that "[t]he existing record . . . imposes a heavy presumption against any operational remedy" concern only the operational remedy proposed by GameFly in PRC Docket No. C2009-

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<sup>24</sup> See Tr. 10/GFL-CX-8 (proposing operational solution to GameFly).

1; that is, guaranteed manual processing.<sup>25</sup> They do not address the entire universe of potential operational remedies, or even any operational remedy other than the one proposed by GameFly. Many changes have occurred with respect to Postal Service operations, including changes to the mail processing and retail networks. In this regard, remedial possibilities unavailable during PRC Docket No. C2009-1 might be available now. For example, the Postal Service could establish requirements dictating round-trip DVD packaging, a new rate and classification, or a new policy regarding manual processing. These alternatives would not necessarily implicate the concerns raised in the Motion, yet they would be constrained by the unreasonable restrictions requested by GameFly.

The restrictions on alternative remedies proposed by GameFly are overly broad, unsupported, and serve no purpose, other than to discourage the exploration of creative, alternative remedies, and, in GameFly's estimation, impel the Commission to adopt GameFly's one preferred remedy. The Commission should reject GameFly's proposed restrictions on alternative remedies.

#### **IV. CONCLUSION**

For the reasons set forth above, the Postal Service requests that Commission deny GameFly's Motion. On remand, the Postal Service submits that the Commission can consider alternative remedies only if it reopens the record. Substantive and procedural legal standards, as well as sound policy, would support that approach.

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<sup>25</sup> Motion at 14-18.

Alternatively, the Commission should defend its original remedy by providing further explanation based on evidence already in the record.

Respectfully submitted,

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