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

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

**RESPONSE OF GAMEFLY, INC., TO
MARCH 14 USPS OPPOSITION TO GAMEFLY MOTION
TO ESTABLISH STANDARDS AND PROCEDURES
TO GOVERN PROCEEDINGS ON REMAND
(March 18, 2013)**

GameFly, Inc. submits this response to the March 14 reply of the United States Postal Service in opposition to GameFly's March 7 motion for adoption of the standards and procedures proposed in this Motion to govern the remanded phase of this complaint proceeding. The March 14 Opposition is a frivolous and unserious pleading.

(1)

GameFly proposed in its March 7 motion (1) a default pricing remedy that would fully alleviate the discrimination against GameFly, and could be adopted on the existing record, or (2) an alternative remedy of the Postal Service's choosing, if the Postal Service could establish that its alternative would be equally effective in remedying the discrimination found by the Commission, and would satisfy the other pricing standards of Title 39. The purpose of offering these dual alternatives was to limit the further irreparable injury that delay would inflict on GameFly, while preserving the Postal Service's flexibility to adopt an alternative remedy upon a showing that the alternative is

as effective in remedying the discrimination as the default remedy proposed by GameFly.

(2)

The Postal Service's March 14 reply rejects both of these proposals, but proposes nothing in their place. What the Postal Service offers, after four years of litigation and two years of fruitless negotiations before that, is additional delay.

The Postal Service proposes to reopen the record to relitigate the Commission's findings in Order No. 718 on every basic element of a discrimination case under 39 U.S.C. § 403(c):

- that GameFly and Netflix are similarly situated (Opposition at 3, 11 n. 17, 12 and 13);
- that the discrimination cannot be justified by differences between the two customers' mail volume, volume density, mailpiece design and color or "local decisions regarding costs and operational requirements" (id. at 3, 11-13);
- that the discrimination is therefore unreasonable (id. at 3, 12-13); and
- that 39 U.S.C. § 3662(c) authorizes the Commission to prescribe a pricing remedy for the discrimination (*id*. at 4).

The Postal Service seeks to reopen these issues despite admittedly having "fail[ed] to appeal the Commission's finding of unreasonable discrimination" within the 30-day jurisdictional window established by 39 U.S.C. § 3663. Opposition at 3.

With respect to the specific choice of remedy, the Postal Service likewise proposes to relitigate the relative costs of processing letters and flats, and the asserted existence of operational and value-of-service differences between letters and flats (Opposition at 4 & n. 7, 8-13), despite the Court of Appeals' holding that any differences of this kind between letter- and flat-shaped DVD mailers are irrelevant here because GameFly's "choice" to use flats is an involuntary one, compelled by the Postal Service's unlawful discrimination in processing letters. *GameFly, Inc. v. PRC*, 704 F.3d 145, 148-149 (D.C. Cir. 2013). The Postal Service seeks to relitigate these issues despite having failed to seek further appellate review of the Court of Appeals' decision.

Similarly, after failing to propose any meaningful remedy for the discriminatory processing of DVD mailers during four years of litigation (and, before that, despite seven years of objections by others within and without the Postal Service to the same discrimination), the Postal Service asks the Commission to delay relief for GameFly for a further indefinite period to allow the "exploration of creative, alternative remedies," including the "entire universe of potential operational remedies" (Opposition at 7 and 15)—none of which the Postal Service bothers, even at this late date, to identify.

Finally, the Postal Service offers no remedy for the further financial injury that continued delay would inflict on GameFly. Indeed, the Postal Service does not even acknowledge that further injury would occur.

(3)

The regulatory Mulligan that the Postal Service seeks would make a travesty of the complaint remedy. Behind "the musty veil of regulatory sophistry," the result would be an updated version of "*Jarndyce v. Jarndyce*, the fabled interminable litigation of Dickens' *Bleak House*." *Arizona Electric Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1368 (9th Cir. 1987). The Postal Service seems to have lost sight of some of the most basic duties of a litigant before the Commission: to help "secure just and speedy determination of issues" (Rule 1), and to refrain from filing pleadings "for purposes of delay" (Rule 11(e)).[1]

The law, however, does not require GameFly to continue "suffer[ing] the arcane rigors of the regulatory process," 816 F.2d at 1368, as the Postal Service proposes. The issues that it seeks to relitigate are settled, and may not be reopened on remand. The Postal Service had a full opportunity to assert its defenses under § 403(c) at the Commission and the D.C. Circuit; the Postal Service exercised that right vigorously; and

[1] In this context, the Postal Service's casual use of the pejorative term "self-serving" as a substitute for analysis of its adversary's arguments (Opposition at 2, 4 and 7) is ironic. The remedy proposed by GameFly would take the form of a DMM classification that other DVD rental companies could also use. The Postal Service, by contrast, seeks to preserve for a single favored customer an arrangement that two federal tribunals have now found to be illegal under 39 U.S.C § 403(c).

Equally ironic is the Postal Service's criticism of GameFly for supposedly blocking the Postal Service from the "exploration of creative, alternative remedies," including the "entire universe of potential operational remedies" (Opposition at 7 and 15). GameFly tried repeatedly before and after the filing of this complaint to settle the company's dispute with the Postal Service through negotiations. The Postal Service had multiple opportunities to explore creative solutions. The settlement efforts were fruitless.

the Postal Service lost. Basic policies of finality and repose entitle the Commission's findings, except where overturned by the Court of Appeals, to preclusive effect.

First, the Postal Service may not relitigate before the Commission the factual issues that it resolved in Order No. 718. As Restatement (2nd) of Judgments explains:

> Where an administrative forum has the essential procedural characteristics of a court . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court. Hence, the rule of claim preclusion is properly applied to administrative adjudications of legal claims. The public economy and private repose resulting from the rule of issue preclusion generally are also as important when an issue has been determined by an administrative tribunal as when it has been determined by a court.

Restatement (2nd) of Judgments § 83 (comment b); *see also University of Tennessee v. Elliott*, 478 U.S. 788, 797 (1986) ("it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity"); *United States v. Utah Construction & Mining Co*., 384 U.S. 394, 421-422 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."). These policies serve "both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Elliott*, *supra*, 478 at 798.

Second, the Postal Service may not relitigate before the Commission the findings of the Court of Appeals in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013). Neither the Postal Service nor the Commission has sought further appellate review of the court's decision, and it is binding on the Commission as the law of the case.

Deviation from the order on remand would be legal error, subject to reversal on further judicial review. *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Office of Personnel Management v. FLRA*, 905 F.2d 430, 434 (D.C. Cir. 1990). "An appellate court cannot efficiently perform its duty to provide expeditious justice to all 'if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal." *Id*.

Third, the Postal Service may not challenge the Commission's adverse findings in Order No. 718 in a *future* Court of Appeals case. The Postal Service's failure to cross-petition for judicial review of the Commission's findings of undue discrimination within the 30-day window allowed by 39 U.S.C. § 3663 precludes further challenge to those findings. *Bowles v. Russell*, 127 S.Ct. 2360, 2363-2366 (2007) (citing cases recognizing jurisdictional effect of statutory deadlines for appeals).

(4)

These principles dispose of the Postal Service's assertion that the Commission may not adopt the default pricing remedy proposed by GameFly without reopening the record. *Cf*. Opposition at 8-10. The Commission's findings in the first 108 pages of Order No. 718 establish all of the key elements of a *prima facie* claim of undue discrimination under 39 U.S.C. § 403(c): similarly situated customers, discriminatory treatment of those customers by the Postal Service, and the absence of any reasonable basis for the discrimination. The Postal Service likewise does not dispute that the default pricing remedy proposed by GameFly will remedy the Postal Service's discrimination among DVD rental companies. The only objections offered by the Postal Service and the Commission to a pricing remedy were predicated on the existence of

operational, cost or marketing differences between letters and flats that the Court of Appeals has ruled are legally immaterial in the specific context of prices for DVD mailers. GameFly Motion at 148-149 (discussing 704 F.3d at 148-149). Due process does not require an evidentiary hearing on an immaterial fact. To the contrary, an "agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d); accord, Rule 24(d)(7) (directing presiding officer to limit "the scope of the evidence . . . to eliminate irrelevant" and "immaterial . . . evidence").

The Postal Service argues that the court's holding was limited to the choice of operational remedies, and that cost differences between letter- and flat-shaped DVD mailers may still be considered in designing a *pricing* remedy. Opposition at 11 (discussing 704 F.3d at 149); *accord*, *id*. at 2, 5, 7. This construction ignores the two immediately preceding paragraphs of the court's opinion, which quoted in full paragraphs 5029 and 5030 of Order No. 718:

> 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.

704 F.3d at 148. It was those two paragraphs—paragraphs that dealt specifically with discrimination in *pricing*—that the court found to be arbitrary and capricious because of the involuntariness of GameFly's "choice" to use flat-shaped mailers. *See* 704 F.3d at 148-149.[2]

(5)

Unlike the default remedy proposed by GameFly, consideration of an alternative remedy proposed by the Postal Service may very well require reopening the record for additional evidence. But the need for more evidence and fact-finding will depend on the particular remedy (if any) that the Postal Service proposes. Whether (and, if so, how much) to reopen the record are therefore decisions best deferred until after the Postal Service proposes an alternative remedy (or not).

In particular, the alternative remedy of price equalization at a higher level than the current letter rate, if proposed by the Postal Service, would require little further record support. The only additional factual issue would likely be whether the average First-Class revenue per piece after the rate changes would comply with the CPI-based

[2] Nor is a reopening of the record warranted by any change in factual circumstances since the close of the record in 2010. *Cf*. Opposition at 9-10. The only "change in circumstances" that the Postal Service actually identifies is the possibility that, if the record is reopened, the Postal Service may induce its consultant, Christensen Associates, to produce an "updated" cost study that generates estimates of the relative costs of processing letters vs. flats that are more to the Postal Service's liking. *Id*. As discussed above, the Postal Service would gain nothing by manipulating the numbers in this way, given the Court of Appeals' finding that the involuntariness of GameFly's "choice" of flat-shaped DVD mailers renders irrelevant any cost differences between letter-shaped and flat-shaped DVD mailers. 704 F.3d at 148-149.

price cap of 39 U.S.C. § 3622(d). But that is an essentially computational issue, and one that the Postal Service and the Commission handle every year for a much larger universe of rates. This routine issue does not begin to justify a wholesale reopening of the record for all issues.

A proposed *operational* remedy may very well require more elaborate fact-finding and perhaps even discovery. Unless and until the Postal Service actually offers such a proposal, however, the issue of what procedures should be adopted for evaluating the merits of the proposal is premature. The speculative possibility that the Postal Service *might* offer an operational remedy provide no justification for a broad reopening of the record *regardless* of whether the Postal Service offers an operational remedy. Nor, if it came to that, would reopening the record to consider a proposed operational remedy warrant reopening the record to relitigate *all* proposed remedies, including pricing remedies.

(6)

The Postal Service's objections to the evidentiary showings that GameFly would require the Postal Service to make to justify alternative remedies are equally without merit. *Cf*. GameFly Motion at 15-18; USPS Opposition at 5, 7, 14-15.

First, the required showings are information *filing requirements*, not substantive "restrictions": if the Postal Service establishes the required showings, it gets to implement its preferred alternative remedy.

Second, the information required to justify an alternative pricing remedy is minimal: (1) a general description of the alternative rate remedy and how it complies

with the Court of Appeals' decision; (2) the proposed rate schedule(s), with relevant MCS and DMM language; and (c) price cap calculations (if necessary) or an explanation of why they are unnecessary. These information requirements are straightforward and modest.

Third, the filing requirements for an operational remedy are more extensive, but entirely reasonable in the circumstances. *See* Motion at 17-18 (proposed information requirements). The Postal Service does not—and cannot—dispute the findings of the Commission and the Court of Appeals that leakage of return DVD mailers into the automation letter mailstream would lead to "an epidemic of cracked and shattered DVDs." *Id*. at 16 (quoting 704 F.3d at 149; citing Order No. 718 at ¶¶ 2003, 3004, 4006, 4084, 4093, 4102-03, 4161). The information that GameFly would require the Postal Service to provide is designed to answer common-sense questions that any reasonable person would ask in these circumstances about *any* operational remedy. If the Postal Service finds the information requests overly burdensome, it has only itself to blame: it was the Postal Service that first raised practicality-based objections to operational solutions, in an aggressive (and successful) effort to persuade the Commission to reject the operational remedy proposed by GameFly. *See* GameFly Motion at 15-16 (citing record). If the Postal Service now believes that an operational remedy—until now unidentified by the Postal Service—is practical to implement and enforce, then fairness calls for the Postal Service to demonstrate that its previous objections are no longer operative.

(7)

The notion that GameFly somehow deprived the Postal Service of adequate notice by abandoning GameFly's initial support for an operational remedy in favor of a pricing remedy is an inversion of reality. *Cf*. Opposition at 6-7. GameFly supported an operational remedy from the outset of the case through post-hearing briefs. It was the opposition of the Postal Service that killed the proposal. GameFly Motion at 15-16. In any event, the Postal Service still can have an operational remedy if it can refute its own prior objections and comply with reasonable monitoring and reporting requirements.

The Postal Service's assertion that GameFly did not request a pricing remedy (what the Postal Service dubs a "flat-based rate remedy") in the initial phase of this case (Opposition at 7) is an outright falsehood. GameFly submitted testimony on the cost differences between Netflix and GameFly mail in the *initial* testimony of Sander Glick (GFL-T-1) (April 12, 2010), and used the testimony to calculate a pricing remedy. GameFly Initial Post-Hearing Brief (Nov. 8, 2010) at 88 (citing Glick testimony on point). The Postal Service clearly understood that GameFly could use Mr. Glick's testimony to support a pricing remedy, and subjected Mr. Glick to extensive discovery and cross-examination. *See* Tr. vols. 3 & 4.

(8)

The remaining objections offered by the Postal Service to GameFly's default remedy are empty makeweights.

Nothing requires reopening the record to consider the Postal Service's suggestion that equalizing the prices of letter-shaped and flat-shaped DVD mailers

might create undue discrimination between flat-shaped DVD mailers and *other* First-Class flats. Opposition at 11. If equalization of the prices charged for letter- and flat-shaped DVD mailers constituted undue discrimination against other flat-shaped mail, however, so would the Commission's decision in Order No. 718 to eliminate the second-ounce charge for DVDs mailed as flats: both produce lower net rates for flat-shaped DVD mailers than for other First-Class flats. The Postal Service, however, never challenged Order No. 718 as unduly discriminatory against other flat-shaped mail. There is an obvious reason for this: no other flat-shaped mail matter appears to have has the same demand, cost and operating characteristics of DVDs, let alone suffers from discrimination comparable to that suffered by GameFly. The Postal Service certainly has identified no such mail matter.

The Postal Service's suggestion that its current financial distress argues against full relief for GameFly (Opposition at 4, 5 and 10) is equally without merit. The revenue leakage from the default remedy proposed by Gamefly would equal less than 1/100 of one percent of total revenue. The Postal Service could easily offset this leakage by raising slightly the current rate for DVDs mailed as letters. That is one of the reasons that GameFly has proposed allowing the Postal Service this alternative remedy. Moreover, if the Postal Service wants to avoid needless and wasteful costs, a good way to begin would be to stop squandering the Postal Service's resources—and the resources of mailers and the Commission—with frivolous objections to legitimate requests for relief for a customer that the Commission and the Court of Appeals have found to be a victim of undue discrimination.

CONCLUSION

GameFly respectfully requests that the Commission adopt the standards and procedures proposed in its March 7 motion for the remanded phase of this case.

Respectfully submitted,

/s/

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