

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1R

**RESPONSE OF GAMEFLY, INC.,  
TO COMMISSION ORDER NO. 1700,  
REPORT OF SETTLEMENT COORDINATOR,  
AND USPS LETTER AND NOTICE OF FILING  
(MAY 13, 2013)**

GameFly, Inc. ("GameFly") respectfully submits these comments on (1) the Report of the Settlement Coordinator filed May 6, 2013, (2) the potential remedies identified by the Commission in its April 16 order convening a settlement conference (Order No. 1700 at 9), and (3) the remedies proposed by the Postal Service in its May 3 letter to GameFly and May 6 Notice of Filing.

These recent filings confirm three facts. First, there is no realistic possibility that a negotiated settlement will avoid the need for the Commission to prescribe a remedy, or the Commission can devise a compromise remedy that "will be satisfactory to both parties." Cf. Order No. 1700 at 10. The parties are too far apart. Rather, the Commission needs to prescribe a remedy that satisfies 39 U.S.C. §§ 403(c) and 3662(c) and the Court of Appeals' decision in *GameFly, Inc. v. PRC*, 704 F.3d 145, 148-149 (D.C. Cir. 2013). Second, neither the Commission nor the Postal Service has identified any alternative to the rate equalization remedy proposed by GameFly that comes close to satisfying Sections 403(c) and 3662(c), and the D.C. Circuit mandate. Third, the Postal Service, despite trying to discredit the rate equalization remedy in two

separate pleadings since GameFly proposed it on March 4, has failed to offer any legitimate objection to it.

This case has been pending since April 2009—more than four years ago. At GameFly’s current volume of more than 12 million shipments per year, continued delay in prescribing relief is costing the company about \$470,000 per month, or \$5.6 million per year. These amounts exceed GameFly’s net income. This financial injury will continue to mount until the more complete remedy mandated by the Court of Appeals becomes effective. Moreover, the 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.

The success of the Postal Service’s delaying tactics has already undermined the credibility and perceived fairness of the Commission’s complaint process. The time has come to prescribe an adequate remedy without further delay.

**I. THE COMMISSION SHOULD NOT DELAY PRESCRIBING A REMEDY IN THE HOPE THAT THE PARTIES MIGHT SETTLE.**

In Order No. 1700, the Commission stated that it had “no desire” for settlement discussions “to delay unnecessarily the resolution of the outstanding issues in this docket.” *Id.* at 11. The Commission ordered its settlement coordinator to file a progress report within 20 days, and to “notify the Commission as soon as possible if he determines that negotiations between the parties are unlikely to be fruitful.” *Id.* The settlement coordinator filed his report on May 6. In it, he stated that “it does not appear that the Postal Service and GameFly will mutually agree upon a resolution to the issues

on remand within any predictable timeframe. A settlement at this time appears unlikely.” Report at 2.

This assessment is, if anything, an understatement. The parties are no closer to agreement on a remedy than they were two, four or six years ago. Further negotiations are unlikely to break this impasse. The Postal Service has refused to agree to any remedy that actually eliminates the Postal Service’s freedom to discriminate against GameFly, and GameFly will not agree to any “remedy” that leaves the Postal Service free to continue discriminating. While GameFly appreciates the efforts of the settlement coordinator, the Postal Service has offered nothing in the way of proposed solutions, “operationally-based” or otherwise, that one could fairly consider “encouraging,” either now or for the future.

The Postal Service’s May 6 “Notice of Filing” underscores this reality. The notice, and the May 3 letter attached to it, state that only two remedies are acceptable to the Postal Service: (1) the same package of incomplete remedies from Order No. 718 that the D.C. Circuit rejected as arbitrary and capricious four months ago; and (2) a warmed-over version of the non-binding and purely aspirational commitment to manual processing that the Postal Service previously proposed in its counsel’s letter to Gamefly on May 17, 2010, and which the Commission correctly dismissed in Order No. 718 as “illusory” because it “lacks any quantitative commitment.” Order No. 718 at ¶¶ 4078 & 4085. These are not the offers of a party that is seriously trying to settle a case. Indeed, the Postal Service insists that its May 3 letter setting forth the Postal Service’s current position “is not a settlement offer” at all. Notice of Filing (May 6, 2013) at 1.

This state of affairs is hardly new. GameFly's senior management, consultants and counsel met and conferred repeatedly with Postal Service managers and counsel at Postal Service headquarters in Washington, D.C., between 2007 and April 2009 in an attempt to resolve the DVD breakage issue without litigation. Moreover, between the filing of the complaint in April 2009, and the filing of GameFly's "Motion to Adopt Standards And Procedures to Govern Proceedings on Remand" on March 7, 2013, GameFly made eight settlement overtures to various officials within the Postal Service, including its general counsel, senior marketing officials, and the Postmaster General. These efforts were fruitless.

Under the circumstances, further attempts to bridge the unbridgeable will simply compound the irreparable financial injury that GameFly has suffered, and continues to suffer, from each day of delay in obtaining relief. Continuing to delay the prescription of a remedy in the vain hope that the Postal Service might be willing and able to enter into a settlement voluntarily would be an abdication of the Commission's responsibilities under 39 U.S.C. § 3662(c).

**II. NONE OF THE ALTERNATIVE REMEDIES IDENTIFIED BY THE COMMISSION IN ORDER NO. 1700 OR SUPPORTED BY THE POSTAL SERVICE IN ITS MAY 6 NOTICE COULD LAWFULLY BE ADOPTED.**

In an appendix to Order No. 1700, the Commission identified, without endorsing any particular one, several remedies that the Commission is "at least preliminarily" considering as alternatives to the rate equalization proposed by GameFly in its March 7 Motion to Establish Standards and Procedures. Order No. 1700 at 9. These options included pricing remedies, operational remedies, and the alternative of standing pat with the remedies rejected by the Court of Appeals in January 2013. The Postal Service's

May 6 Notice endorses two of these alternatives. None of these alternatives, however, satisfies the requirements of 39 U.S.C. §§ 403(c) and 3662(c) as construed by the Court of Appeals in its January 2013 decision.

The governing legal standards impose several constraints on the Commission's choice of remedy. First, the Commission, having "properly [found] that discrimination has occurred," is "obligated to remedy that discrimination . . ." *GameFly*, 704 F.3d at 149; *accord*, 39 U.S.C. § 3662(c).

Second, the remedy adopted by the Commission must eliminate the discrimination completely unless the Commission provides a "reasonable explanation" for any "residual discrimination its order [leaves] in place." *Id.*, 704 F.3d at 148, 149.

Third, the Commission may not satisfy this requirement by invoking the cost and operational differences between letter- and flat-shaped DVD mailers, since GameFly's use of flat-shaped mailers resulted from "the Postal Service's terms of service discrimination against GameFly, not GameFly's free choice." *Id.* at 148-149.

## **A. Alternative Pricing Remedies**

### **1. Prescribing rates for letter- and flat-shaped DVD mailers that provide equal contribution per piece**

The first alternative remedy identified by the Commission in Order No. 1700 is a pricing remedy—specifically, an "equal contribution remedy" that "would reduce rates for flat-shaped DVD mail to a level that would produce an equal contribution for letter- and flat-shaped DVD mail." Order No. 1700, appendix at 1, item I.b. This remedy would not comply with the January 2013 Court of Appeals decision. The premises of the equal

contribution remedy are that (1) the cost of processing flat-shaped DVD mailers may differ from the cost of processing letter-shaped DVD mailers, and (2) charging GameFly more to reflect this putative difference may be appropriate. See Order No. 1700, appendix at 1 & n. 8 (explaining that the Commission rejected this alternative in Order No. 718 because of perceived inadequacies in the record evidence offered to quantify the shape-based cost differences). As noted above, however, the Court of Appeals held that cost and operational differences between letter- and flat-shaped mailers cannot justify charging GameFly more than Netflix for the same avoidance of automated letter processing, because GameFly would not use flat-shaped mailers but for the Postal Service's discriminatory service in handling letter-shaped mailers. 704 F.3d at 148-149; GameFly Response (March 18, 2013) at 6-8.

Because the cost differences between letters and flats are irrelevant as a matter of law to the design of a remedy for GameFly, reopening the record "to develop supplemental or revised cost data to address the deficiencies in the then-record data" on those cost differences (Order No. 1700, appendix at 1 & n. 8) would be arbitrary and unlawful. The Administrative Procedure Act requires the Commission, "as a matter of policy," to "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"). This requirement is especially important in this case, given the irreparable injury that GameFly suffers from each day of further delay in obtaining relief.

Finally, the remedy of contribution equalization cannot be upheld on the ground that GameFly supported it in the initial phase of this case. GameFly previously

proposed the equal contribution remedy in an effort to compromise between the parties' positions. The Postal Service, however, vigorously opposed the remedy, and the Commission rejected it. GameFly is not proposing it again.

**2. Imposing a non-machinable surcharge on all letter-shaped DVD mail and reimposing the second-ounce charge on flat-shaped DVD mail that weighs more than one ounce**

Order No. 1700 identifies another possible pricing remedy: “eliminating all special treatment of DVDs” by “collect[ing] a non-machinable surcharge on all letter-shaped DVD mail” and “impos[ing] the full charge for the second ounce of First-Class DVD flats mail.” Order No. 1700, appendix at 2 (item III.b). Although the Order describes this remedy as an “operational” remedy, the Commission’s has not specified any operational component, and it is unclear whether the Commission intended to include one. *Id.* Accordingly, we analyze this remedy under two alternative assumptions: (1) it includes no operational requirement, or (2) it includes a requirement that all DVDs entered as letters receive manual processing, at least to the same extent received by Netflix DVDs.

Without a requirement of parity in manual processing between GameFly and Netflix DVDs entered as letters, the remedy would be unlawful, because it would not fully eliminate the effects of the Postal Service’s discrimination between GameFly and Netflix. The Postal Service would be free to continue giving a high level of manual processing to Netflix letter-shaped DVD mailers, while continuing to withhold manual processing from letter-shaped DVD mailers entered by GameFly and other DVD rental

companies, despite their payment of non-machinable surcharges.<sup>1</sup> If this were to occur, GameFly would still be forced to pay a substantial premium in postage over Netflix to receive the same avoidance of automated letter processing. While the rates paid by Netflix would increase by 20 cents per piece (the amount of the nonmachinable surcharge), GameFly would have to pay both the letter-flat differential (46 cents per piece) *and* the second-ounce charge (20 cents per piece)—or 46 cents more per trip than Netflix would pay—to obtain the same avoidance of automated letter processing.

To eliminate this residual discrimination, the Commission would need to enforce equality in the level of manual processing of DVDs entered as letters by Netflix and GameFly. As we discuss next, however, the Postal Service has represented on the record, and the Commission has held, that effective enforcement of parity in manual processing is infeasible.

## **B. Operational Remedies**

Order No. 1700 describes two remedies that are explicitly operational—i.e., that include purported commitments that GameFly and Netflix DVDs entered as letters would receive the same, or similar, avoidance of machine processing. The first of these remedies (remedy III.a) would “impose a requirement that the Postal Service manually process all letter-shaped DVD mail, and establish an enforcement mechanism to ensure manual processing is occurring at a certain level.” *Id.*, appendix at 2.

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<sup>1</sup> GameFly has encountered a similar problem before. The company began including a protective cardboard insert in its mailers, despite the resulting need to pay a second-ounce charge, because the Postal Service otherwise continued to process GameFly mailpieces as letters despite the extra postage paid by GameFly to mail them as flats.

The second operational remedy identified by the Commission (remedy III.c) would *not* require strict parity in manual processing, and might not involve any active enforcement role by the Commission at all:

While manual processing of DVD letter mail would be made available to all mailers on a non-discriminatory basis, it nevertheless would recognize that operational factors can affect the feasibility of providing manual processing at any point in time and that individual mailers cannot be guaranteed the exact same level of manual processing. This recognition that manual processing levels may fluctuate and vary from mailer to mailer distinguishes this operational remedy from the GameFly operational remedy that would require that each mailer receive the same level of manual processing. Enforcement of the requirement that such manual processing be provided on a non-discriminatory basis could be facilitated by requiring the Postal Service to monitor and report manual processing levels, *e.g.*, based on IMb scans.

*Id.* at 3.

The Postal Service's May 3 letter and May 6 Notice propose a variation of the latter remedy. They set forth a warmed-over version of the terms set forth in the Postal Service's letter to GameFly on May 17, 2010 (reproduced at Tr. 5/950-51). Like the 2010 proposal, the Postal Service's current operational proposal includes no commitment that GameFly DVDs mailed as letters would actually receive the same avoidance of automated processing as Netflix, no quantifiable performance metrics, no mechanism for enforcing any specified level of manual processing, and no penalty for noncompliance. To the contrary, the Postal Service emphasizes that the "actual processing treatment afforded any DVD letter mail will remain within the discretion of local management," "it is unrealistic to expect that precise levels of machine processing will be matched for each mailer"; and that effective enforcement of equality in avoidance of machine processing "would be difficult, if not practically impossible, or exceedingly

costly.” The only real difference between the Postal Service’s current proposal and its 2010 predecessor is that the current one requires GameFly to jump through fewer hoops in exchange for the same illusory commitment that the Postal Service offered before.

The Achilles heel of all of these operational remedies is enforcement. Leakage of return DVD mailers into the automation letter mailstream at higher-than-specified rates 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). Conversely, allowing the Postal Service to establish a purportedly uniform rate of manual processing that was relatively low, while tacitly providing a higher actual rate of manual processing to Netflix under the rubric of “local discretion,” would enable the Postal Service to continue its preferential treatment of Netflix: Netflix could continue mailing its DVDs as letters, while DVD breakage would continue to prevent GameFly from doing so.

Accordingly, effective enforcement of any operational remedy is crucial. A purported commitment to provide the same avoidance of automated letter processing to GameFly and Netflix DVDs mailed as letters, unless embodied in an objective national standard and accompanied by effective mechanisms for measuring actual performance and enforcing compliance with the standard, is illusory. *GameFly Post-Hearing Brief* 87-88 (November 8, 2010) (identifying necessary performance standard and measurement and enforcement mechanisms); *GameFly Reply Post-Hearing Brief* 30-31

(November 18, 2010) (explaining why the omission of binding standards and effective measurement and enforcement mechanisms made the Postal Service's May 2010 proposal unacceptable); Glick Rebuttal (GFL-RT-1) at 15 (Tr. 11/1921, 12/2024) (same); Glick cross-ex (Tr. 11/1960-61) (same); Motion of GameFly to Establish Standards and Procedures to Govern Proceedings on Remand (March 7, 2013) at 15-18 (identifying showings required to support adoption of operational remedy on remand). The record, however, shows that no realistic means of achieving effective enforcement exists.

When GameFly proposed an operational remedy in the initial phase of this case, the Postal Service insisted that an operational remedy would be impossible or economically impractical to monitor or enforce. See Brief of the USPS in D.C. Cir. Docket No. 11-179 (March 5, 2012) at 7-14; accord, USPS Reply in Opposition to Motion of GameFly, Inc., to Establish Standards and Procedures to Govern Proceedings on Remand 14-15 (March 14, 2013).

The Commission, echoing these claims in its own findings, declined in Order No. 718 to impose an operational remedy. “[E]fficient 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 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 exclusively 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.<sup>2</sup> As the Commission later informed the Court of Appeals, the "Commission concluded that this operational remedy is inappropriate because it would require the Commission to involve itself in day-to-day managerial decisions that have historically been the exclusive responsibility of the Postal Service, potentially impose significant additional costs on the Postal Service, tax the Commission's limited enforcement resources, and would be difficult to enforce in practice." Brief for Respondent PRC in Docket No. 11-1179 (Feb. 17, 2012) at 24-39 (citing Order No. 718 at ¶¶ 5014-5016).

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<sup>2</sup> 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.

These findings are devastating because the Commission also found that, absent a workable and cost-effective enforcement mechanism, an ostensible commitment by the Postal Service to provide GameFly with Netflix-like levels of manual processing would be meaningless. In particular, the Commission dismissed the Postal Service's May 2010 offer of "hand processing"—essentially the same operational "commitment" that the Postal Service resurrects in its May 3 letter and May 6 Notice—as "illusory" because the offer "lack[ed] any quantitative commitment to hand processing." Order No. 718 at ¶¶ 4078 & 4085. "Indeed, the terms contained in the Postal Service's May 17 [2010] letter support the conclusion that it was GameFly's refusal to accept what it viewed was a far lower likelihood that its mail would receive hand processing by the Postal Service that led GameFly to continue purchasing flats service." *Id.* at ¶ 4085.

Neither Order No. 1700 nor the Postal Service's filings on March 14 and May 6 provide any reason to believe that these findings no longer hold. Indeed, neither the Commission nor the Postal Service even mentions the Commission's prior findings about the impracticality of enforcing an operational solution. The only nod to the issue of enforcement is a brief suggestion that verification of the rate of manual processing given to Netflix vs. GameFly and other mailers "could be facilitated by requiring the Postal Service to monitor and report manual processing levels, *e.g.*, based on IMb scans." Order No. 1700, Appendix at 3. *Accord*, USPS letter to GameFly (May 3, 2013) at 2 ("GameFly will be able to use Intelligent Mail barcode (IMb) tracing data to identify the mail processing received by its DVD mail").

The interest of the Commission and the Postal Service in IMb data as an enforcement mechanism is baffling. When *GameFly* suggested the use of IMb data as

a verification tool to the D.C. Circuit a year ago, the Postal Service and the Commission rejected the idea out of hand. The Postal Service informed the court:

Even if it were possible, as GameFly alleges, to use barcoding technology to document the frequency at which a customer's mail is passed through the automated processing equipment, that would not avoid the PRC's obligation under the proposed remedy to ensure that the Postal Service is following the eight components for manual processing [that Netflix receives] and reaching the minimum level of manual processing. . . . The record supports the PRC's decision that GameFly's proposed remedy would have been impractical and unduly burdensome.

USPS Brief in Docket No. 11-1179 (March 5, 2012) at 13. The Commission's brief to the court was equally negative. The Commission questioned that how "information on the number of times mailpieces pass through *automated* processing equipment sheds light on the proportion of mailpieces processed *manually*," and "how barcode scan data would show whether the Postal Service employed the eight specific processing steps GameFly demanded be included as the required elements of [a] Commission-mandated remedy."). Brief for Respondent PRC in Docket No. 11-1179 (Feb. 17, 2012) at 36.

Neither the Postal Service nor the Commission has even acknowledged, let alone tried to overcome, these objections. Nor have the Postal Service or the Commission explained away their many other objections to the enforcement of an operational remedy. Given this record, an operational remedy is unlikely to survive judicial review. See *LePage's 2000, Inc. v. PRC*, 642 F.3d 225, 229-34 (D.C. Cir. 2011) (overturning Phase 2 decision as inconsistent with Phase 1 findings).

Finally, the Postal Service's assertion in its May 3 letter that GameFly may (1) trust the Postal Service to "monitor" its own compliance and (2) "work with the Postal Service to resolve any [enforcement] concerns" is absurd. The litany of excuses and

rationalizations for discrimination against GameFly that the Postal Service advanced in Phase 1 of this case, nearly all of them falsified by the Postal Service's own documents and rejected by the Commission in the first 108 pages of Order No. 718, make clear that the Postal Service cannot be trusted to monitor its own compliance. And "working with the Postal Service to resolve any concerns" is precisely what GameFly tried in 2007-2009, when GameFly sought in vain to resolve the DVD breakage issue through discussions with the Postal Service, and from 2009 until earlier this year, when GameFly made eight settlement overtures—all of them fruitless—to multiple levels within the Postal Service bureaucracy. These efforts yielded only additional delay and financial injury, all irreparable. A Commission order that relegated GameFly to the exercise of discretion by the Postal Service instead of prescribing a binding remedy with an effective enforcement mechanism would invite summary reversal by the Court of Appeals as an abdication of the Commission's regulatory duties.

### **C. Reaffirming The Commission's Original Remedies**

The remaining alternative identified by the Commission is to adopt the same remedies prescribed by the Commission in Order No. 718, albeit with "a more extensive and persuasive explanation of the rationale for any remaining discrimination in order to withstand further appellate review." Order No. 1700, Appendix at 1. The Postal Service specifically invites the Commission to choose this course. USPS Notice at 2 (second paragraph).

No additional findings by the Commission, however, would enable these remedies to pass muster on further judicial review. The problem is inherent in the remedies themselves. They give the Postal Service *carte blanche* to continue its

operational discrimination between Netflix and GameFly, and remedy only about 1/3 of the financial injury that GameFly incurs as a result from having to pay the letter-flat rate differential. This residual injury cannot possibly be justified as “due or reasonable under § 403”—not when the Commission can prescribe a pricing remedy, rate equalization, that completely eliminates the financial injury, and requires no operational changes by the Postal Service or operational oversight by the Commission.

### **III. NEITHER THE COMMISSION NOR THE POSTAL SERVICE HAS IDENTIFIED ANY VALID OBJECTION TO THE REMEDY OF RATE EQUALIZATION.**

In contrast to the alternative remedies identified by the Commission or proposed by the Postal Service, no legitimate objections have been raised to the remedy proposed by GameFly in its March 4 motion—equalization of rates for letter-shaped and flats-shaped DVD mailers. Rate equalization neutralizes the financial injury resulting from the Postal Service’s operational discrimination; does not require any operational changes by the Postal Service; and does not require any ongoing operational oversight by the Commission. Motion at 9-13.<sup>3</sup>

The Postal Service, in its pleadings on March 14 and May 6, has asserted (or suggested) four objections to this remedy: (1) rate equalization would usurp the Postal Service’s pricing flexibility; (2) GameFly has no standing to seek relief because it “has

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<sup>3</sup> At the risk of belaboring the obvious, the Postal Service, if it chooses to equalize rates for letter-shaped and flat-shaped DVD mailers at a level above the rate for generic letter-shaped First-Class Mail, must clarify its eligibility rules to render DVDs ineligible those generic rates. Otherwise, the Postal Service could reintroduce discrimination through the back door by allowing Netflix to mail its DVDs at the generic letter rate, while requiring other DVD rental companies to use the higher DVD-specific letter rate.

never mailed a DVD letter”; (3) equalization of rates for letter- and flat-shaped DVD mailers could “lead to litigation from a universe of mailers much larger and less confined than the distinct mailer segment involved in this docket”; and (4) “the operating environment and DVD mailers expectations regarding mail processing have evolved” so much since the close of the record that prescription of rate equalization “would raise serious due process concerns.” USPS Reply in Opposition (March 14, 2013); USPS Notice (May 6, 2013) at 2-3. These objections are baseless.

(1)

The notion that rate equalization would improperly infringe on the Postal Service’s statutory pricing flexibility is at odds with the Commission’s decision in Order No. 718 to require the Postal Service to eliminate the 20-cent second-ounce charge for flat-shaped DVD mailers, and the other Commission decisions that have prescribed rate adjustments to remedy undue discrimination since the enactment of the Postal Accountability and Enhancement Act of 2006. Order No. 718 at ¶¶ 5025-5027, 5032-5034; Docket No. R2009-2, *Notice of Price Adjustment* (Order No. 191, March 16, 2009) at 69-73; Docket No. R2011-5, *Notice of Market Dominant Adjustment for First-Class Mail and Standard Mail* (Order No. 731, May 17, 2011) at 8. Any remaining doubts about the Commission’s prescriptive authority were put to rest by the D.C. Circuit decision, which made clear that pricing remedies were open to the Commission on remand. *GameFly*, 704 F.3d at 147. The Postal Service did not seek judicial review of Order No. 718 or further appellate review of the Court of Appeals’ decision. Accordingly, the interpretation of the Commission’s remedial powers adopted by the two

tribunals is the law of the case, and may not be challenged collaterally by the Postal Service on remand.

Moreover, even if—contrary to fact—the scope of the Commission’s remedial authority were somehow open for reconsideration, the D.C. Circuit and the Commission have interpreted 39 U.S.C. §§ 403(c) and 3662(c) correctly. Although 39 U.S.C. § 3622 and other provisions of Title 39 indeed give the Postal Service broad pricing flexibility, Section 403(c) requires the Postal Service to exercise this flexibility in a manner that does not discriminate unreasonably between similarly situated mailers, and Section 3662(c) gives the Commission broad authority to prescribe rate adjustments—and to override the Postal Service’s pricing flexibility—to the extent necessary to remedy unlawful discrimination.

These propositions are not novel or disputed. The relationship between the nondiscrimination obligation of a regulated common carrier or utility, and the regulatee’s right to exercise its pricing flexibility, has been settled for a century: the regulatee is entitled to set its rates anywhere within the zone of maximum and minimum rate reasonableness established by the statute, but the resulting rates (and terms of service) must be offered to all similarly situated ratepayers without undue discrimination. See *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933); *American Express Co. v. State of South Dakota*, 244 U.S. 617, 624 (1917). The authority of federal regulatory commissions to prescribe rate adjustments—and to override the otherwise-broad pricing flexibility of the regulated carrier or utility—to enforce statutory prohibitions against undue discrimination under similar remedial statutes has likewise been recognized for nearly a century. 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).

Nothing in the Postal Accountability and Enhancement Act of 2006 ("PAEA") warrants a different result. None of the pricing provisions added to 39 U.S.C. § 3622 (or any other sections of Title 39) by PAEA even mention discrimination, let alone purport to override, modify or restrict Section 403(c). *That* subject is specifically governed by Section 403(c), which has remained unchanged in Title 39 for more than 30 years. Moreover, even if (contrary to fact) the provisions of Sections 3622 could somehow be construed to conflict with Section 403(c), the latter would trump the former, as the Commission recognized in Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16-17.<sup>4</sup>

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<sup>4</sup> This result is also warranted by the rule of statutory construction that gives specific statutory provisions priority over general provisions. Section 403(c) deals specifically with undue discrimination; the provisions of section 3622 are more general in scope. To read them as implicitly repealing or restricting Section 403(c) would violate the basic rule of construction that "the specific governs the general," particularly where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-72 (2012) (citations omitted). Moreover, "[w]hile a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v.*

(2)

The Postal Service's suggestion that GameFly has no standing to raise concerns about the service provided to letter-shaped DVD mail because the company currently mails its DVDs as flats (USPS Notice at 2 & n. 3) is frivolous. This Commission considered and rejected this claim in the initial phase of this docket. Order No. 718 at ¶¶ 4003-4008, 4074-4087, 4094; Reply Post-Hearing Brief of GameFly (Nov. 18, 2010) at 3-7. Likewise, the D.C. Circuit held that, because GameFly's use of flat-shaped mailers was compelled by the Postal Service's discrimination in processing letter-shaped mailers, the cost and operational differences between the two shapes were irrelevant to the choice of a remedy. *GameFly*, 704 F.3d at 149. The Postal Service did not seek judicial review of the Commission's adverse findings or further appellate review of the court's holding. Accordingly, these rulings are the law of the case. Restatement (2<sup>nd</sup>) of Judgments § 83 (comment b); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966); *University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986).

(3)

The Postal Service's assertion that rate equalization between flat-shaped and letter-shaped DVD mailers "could lead to litigation from a universe of mailers much larger and less confined than the distinct mailer segment involved in this docket" (USPS

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*Defenders of Wildlife*, 127 S.Ct. 2518, 2532 (2007) (citations omitted). No such intention appears in the text or legislative history of PAEA.

Notice at 3) is equally without merit. The thrust of this argument appears to be that reducing the rate for flat-shaped mailers that contain DVDs arguably would discriminate unduly (or could be claimed to discriminate unduly) against non-DVD matter that is currently mailed in First-Class flats. The Postal Service, while asserting this objection several times, has never explained why it is true.

As GameFly noted in its March 18 Response (at 8), a required element of any discrimination claim is that favored and disfavored mailers be similarly situated. The Postal Service has never identified any non-DVD mail matter that could be regarded as similar to DVDs in this sense. In fact, no other mail matter that is currently mailed in flats appears to have the same demand, cost and operating characteristics of DVDs, is small enough to be mailed as a letter, and suffers from discrimination by the Postal Service as flagrant and systematic as that suffered by GameFly.

In any event, the Postal Service's argument proves too much. If equalization of the prices charged for letter- and flat-shaped DVD mailers constituted undue discrimination against other kinds of flat-shaped mail, the Commission's decision in Order No. 718 to eliminate the second-ounce charge for DVDs mailed as flats—but not for any other matter mailed as flats—would likewise violate Section 403(c). The Postal Service, however, never challenged Order No. 718 as unduly discriminatory against other flat-shaped mail. Nor has any other sender of flat-shaped mail challenged the remedy as discriminatory.

(4)

The Postal Service's fourth objection to rate equalization—that prescribing rate equalization without reopening the record “would raise serious due process concerns”—is equally without merit. As GameFly explained in its March 7 Motion, the legal elements need to support a prescription of rate relief have already been established: the Postal Service is treating GameFly and Netflix differently; the two mailers are similarly situated; and the Postal Service has failed to establish any reasonable ground for the discrimination. *Id.* at 1-8. The Commission's findings on these points are final. *Id.*; see also Order No. 1700 at 10 n. 7. Prescription of rate equalization requires at most limited additional evidence: i.e., a projection of the resulting average revenue per piece of First-Class Mail in the aggregate, pursuant to the methodology prescribed by the Commission for the CPI-based price cap under 39 U.S.C. § 3622(d). Motion at 8-9, 13. As previously explained, this is a relatively straightforward exercise. *Id.* at 8-9.

The Postal Service, obviously aware of these facts, has recast its due process argument in its May 3 letter and May 6 pleading. Due process, the Postal Service now contends, forbids any further award of relief to GameFly until the record has been reopened, and the facts retried, because the “operating environment and DVD letter mailers expectations” have “evolved” since the close of the record in ways that “significantly affect[] the ability to cull letters to avoid all machine processing” and the “expectations of mailers.” *Id.* The Postal Service does not explain why an updated record about the Postal Service's letter processing equipment and practices is necessary for rate equalization, which imposes no restrictions on the Postal Service's operating practices at all. The necessary implication of the Postal Service's argument

goes beyond the choice of remedy: if the Postal Service no longer gives manual processing to anyone's DVDs, no undue discrimination, and therefore no basis for *any* remedy, remains. Because the Commission has already found the existence of undue discrimination, the finding is administratively final, and the period for seeking judicial review of the decision and finding has lapsed, the Postal Service is effectively asking the Commission to reopen the entire case.

Reopening the record in a fully concluded and litigated docket, however, is an extraordinary remedy, granted only in rare circumstances:

Typically, the Commission will reopen a record in a fully concluded and litigated docket only for the purpose of administrative corrections, or to make non-substantive changes. In extraordinary circumstances, the Commission could reopen a record if there is an acceptable demonstration of why material could not have been initially presented during the course of the proceeding, and why it should be considered late in the proceeding. The Commission also might reopen the record if the material was directly on point and there would be an injustice if the record were not reopened.

Order No. 1443, Docket No. MC2004-3, *Rate and Service Changes to Implement Functionally Equivalent Negotiated Service Agreement with Bank One Corporation* (Aug. 23, 2005) at 8. “[C]onsistent with well-established principles of federal administrative law,” motions “to reopen agency proceedings are disfavored, like petitions for rehearing and motions for new trial in judicial proceedings.” *Cermak v. United States ex rel. Dept. of Interior*, 478 F.3d 953, 956 (8<sup>th</sup> Cir. 2007). The presumption against reopening is particularly strong when “delay works to the advantage of” the party seeking reopening. *INS v. Doherty*, 502 U.S. 314, 323 (1992).

To overcome this presumption by showing that reopening is justified by changed circumstances, the movant must not only identify the circumstances with particularity,

but show that the changes “are so compelling as to require . . . modification” of the order to be reopened. *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372 (9<sup>th</sup> Cir. 1992). “The petition for reconsideration must present the allegedly new evidence to the agency; even if the party does so and even if the evidence is in fact newly discovered, a court will reverse an agency’s denial of reconsideration only ‘in the most extraordinary circumstances.’” *AT&T Corp. v. FCC*, 363 F.3d 504, 509 (D.C. Cir. 2004) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974), and other Supreme Court precedent). Moreover, [w]hen a party has not presented the evidence to the agency in its reconsideration petition, the evidence is not ‘new’: if ‘no new data . . . has been put forward as the basis for reopening,’ the agency’s denial of rehearing is not reviewable.” *AT&T Corp.*, 363 F.3d at 509 (quoting *ICC v. Bd. of Locomotive Engineers*, 482 U.S. 270, 279 (1987)). In any event, a tribunal may reject a request for reopening, without considering the weight of the additional evidence proffered, where the changed circumstances were the result of unwarranted delaying tactics by the movant. *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985); *Borokinni v. INS*, 974 F.2d 442, 445-446 (4<sup>th</sup> Cir. 1992).

The Postal Service has not begun to satisfy these preconditions. First, the description of changed circumstances alleged by the Postal Service would not support reopening *even if accepted as completely true*. The Postal Service seems to be trying to create the impression that the Postal Service has ended, or is about to end, manual processing of any DVDs mailed as letters, including those of Netflix. But a careful parsing of the Postal Service’s actual words reveals no such claim. Rather, the Postal Service states only that (1) the volume of DVD letters has declined, (2) the Postal Service is installing new letter-processing equipment at some (but not all) locations; (3)

the new equipment “significantly affects the ability to cull letters to avoid all machine processing”; and (4) further operational changes, with unspecified effect and timing, are “likely” to occur at some unspecified time in the future. The Postal Service does *not* state that it has stopped processing letter-shaped DVD mailers manually; that that it has stopped giving Netflix DVDs a higher rate of manual processing than other letter-shaped DVD mailers; that the older generation of letter processing equipment has been retired from service; that the new model of letter-processing equipment will prevent the Postal Service from continuing to “cull letters to avoid” *most* “machine processing” for Netflix; or that the new model of letter-processing equipment will replace the older equipment in the next year, two years, or ten years. To the contrary, the Postal Service admits that the changes in equipment and processes are still in progress (i.e., “are evolving”; are experiencing “continuing modifications”; are “are likely to have”). Moreover, even when the changes are complete, “local processing decisions . . . will likely continue to exhibit reasonable variations, in accordance with operating conditions, the character of each mailpiece, and the mailers’ expectations and needs.” Translation: the Postal Service will continue to discriminate.

Second, and in any event, the Postal Service’s claims cannot be accepted as true. The Postal Service has proffered no evidence whatsoever that the rate of manual processing of Netflix DVDs has changed significantly since 2010, or is likely to do so in the near future, let alone that the Postal Service has eliminated, or is about to eliminate, the disparity in manual processing between Netflix DVDs and other DVDs mailed as letters. This failure of proof would be fatal to the Postal Service’s request for reopening in any case. *AT&T Corp.*, 363 F.3d at 509. Moreover, the gravity of this omission is compounded by the Postal Service’s record in this case of making claims about its mail

processing operations that were later proven false after GameFly gained access to internal Postal Service documents through discovery. See Order No. 718 at ¶¶ 4096-4013 (rejecting claim that GameFly could reduce breakage to acceptable levels by changing the design of its DVDs); *id.* at ¶¶ 4108-4126 (rejecting claim that the discriminatory treatment of GameFly is justified by the differences between its mail volume, density patterns, number of return mail collection points, and length of transportation legs vis-à-vis Netflix); *id.* at 4127-4139 (rejecting USPS denial of the existence of a policy of giving Netflix more manual processing than GameFly); *id.* at ¶¶ 4141-4155 (rejecting USPS claim that mail processing decisions are made by local managers with no headquarters or regional oversight); *id.* at ¶¶ 4156-4166, 4177-4204 (rejecting USPS claim that manual processing is a “one touch” affair that maximizes efficiency and saves costs); *id.* at ¶¶ 4167-4171 (rejecting claim that giving GameFly the same level of manual processing would be infeasible for the USPS).

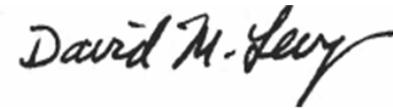
Third, the balance of equities was heavily against delaying the prescription of a remedy pending reopening. As previously discussed, the added postage costs incurred by GameFly in the absence of a more complete remedy are irreparable. Moreover, much of the delay between the close of the administrative record and the present was the result of the Postal Service’s own delaying tactics. By contrast, the Postal Service, if it ever assembles proof that its operations have changed enough to eliminate the discrimination at issue in this case, is free at any time to submit a better-documented case for a change in the remedies prescribed by the Commission (subject, of course, to GameFly’s right of discovery and rebuttal).

For all of these reasons, the Commission should prescribe a pricing remedy without reopening the record as the Postal Service demands. To withhold pricing relief that GameFly urgently needs now because the Postal Service *might* someday file a request for reopening based on changed circumstances, and the Commission *might* find such a request credible, would inflict irreparable injury upon GameFly, and would reward the Postal Service for its stonewalling tactics.

### **CONCLUSION**

Gamefly asks the Commission to 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) submit an alternative proposal for rate equalization at a level intermediate between the current First-Class price for a two-ounce letter-shaped round-trip DVD mailer to the current First-Class price for a one-ounce flat-shaped round-trip DVD mailer, with a showing that the result complies with 39 U.S.C. § 3622(d). If the Postal Service chooses the second option, GameFly should have 30 days to comment.

Respectfully submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

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