

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1R

**REPLY OF GAMEFLY, INC.,
IN OPPOSITION TO JULY 19 USPS MOTION TO STAY
(July 23, 2013)**

On June 26, 2013, after more than four years of litigation (and three years of fruitless private negotiations before that), the Commission ordered the Postal Service to equalize its rates for letter- and flat-shaped DVD mail, and to comply with this order by filing a notice of rate adjustment setting forth the equalized rates on or before July 26. Order No. 1763 at 39-40. The Postal Service has responded with open defiance.

On Friday afternoon, July 19—more than three weeks after the issuance of Order No. 1763 and only one week before the July 26 compliance deadline—the Postal Service filed a “Motion for Extension of Time in Which to Comply with Order No. 1763.” The motion informs the Commission that the Postal Service does not plan to comply with the July 26 deadline. The Postal Service asserts that it “has determined that it cannot” do so because of the complexity of “financial” issues and “operational contingencies” raised by the Commission’s order; the need to “evaluate” how to avoid undue discrimination against “mailers that have not participated” in this case; the failure of the Board of Governors to schedule a meeting before July 26; and the unavailability of “important stakeholders” because of “summer vacations.” The Postal Service urges the Commission to accept the Postal Service’s noncompliance as a *fait accompli* by

postponing the deadline from July 26 until 30 days after the Commission rules on a future Postal Service request for “clarification and possibly reconsideration” of Order No. 1763—i.e., indefinitely. (The Postal Service has not filed any request for clarification; and has not stated when such a request will be filed, what issues the Postal Service will ask the Commission to clarify—or “possibly reconsider”—or on what grounds.)

(1)

The July 19 motion is an act of contempt. Order No. 1763 is administratively final. The impetus for the order, the Court of Appeals’ remand in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013), is also final. The deadline for seeking a stay of Order No. 1763 by the Court of Appeals pending judicial review has passed.¹ Hence, the Postal Service, including its Board of Governors, is under a legal duty to comply with the order whether or not the Postal Service or the Governors agree with the order. The Commission’s prescriptive authority in complaint cases under 39 U.S.C. § 3622(c) is self-executing. 39 U.S.C. §§ 3662(c) and (d). In this regard, the current version of Section 3662 departs from the pre-2006 version of Section 3662, which left the Postal Service free to comply (or not) as it saw fit. Order No. 1763 also contrasts with advisory

¹ The D.C. Circuit requires that motions for stay and other emergency relief be filed with the court at least seven days before the date on which court action is necessary—here, by July 19—except when the moving party received too little notice from the lower tribunal to file sooner (a circumstance absent here). Circuit Rule 27(f); D.C. Circuit Handbook of Practice and Internal Procedures (Dec. 1, 2011) at 32. Moreover, before seeking a stay from the court, the moving party must have sought a stay from the agency that issued the order under review, except when insufficient time was available to seek an administrative stay (a circumstance also absent here). Fed. R. Civ. P. Rule 18(a)(2)(A).

Commission opinions under 39 U.S.C. § 3661, which the Postal Service also has discretion to accept or reject.

(2)

The Postal Service gains nothing with its claim that compliance with the July 26 deadline is impossible. The Commission, like federal courts, “must scrutinize carefully claims of impossibility, and ‘separate justifications grounded in the [substantive federal law] from the foot-dragging efforts of a delinquent agency.’” *Sierra Club v. EPA*, 444 F.Supp.2d 46 (D.D.C. 2006) (quoting *Natural Resources Defense Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975)). The Commission, like a court of equity, “can never exclude claims of inability to render absolute performance [with a deadline], but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.” *Id.* Hence, an agency bears “a heavy burden to demonstrate the existence of an impossibility,” and “must demonstrate that it exercised ‘utmost diligence’ in its efforts to comply with the statute.” *Sierra Club*, 444 F.Supp.2d at 53 (citations omitted). “If the administrator could possibly have” met the deadline, “but did not because of competing concerns or other decisions on his part, then he is not acting ‘in good faith.’” *Id.* (quoting *New York v. Gorsuch*, 554 F.Supp. 1060, 1065 n. 4 (S.D.N.Y. 1983)). Nor may an agency be excused from a nondiscretionary deadline on the theory that “additional time is needed” to “improve the quality or soundness of the regulations to be enacted.” *Id.* (quoting *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 899 (N.D. Cal. 1984)).

The Postal Service has not begun to meet this standard. Even assuming (contrary to fact) that compliance with Order No. 1763 somehow requires formal action

by the Board of Governors, the notion that the Board cannot act before July 26 is frivolous. 39 C.F.R. § 6.2 expressly allows the Board to convene “special meetings” between regularly scheduled meetings; and 39 C.F.R. § 6.4 allows participation in meetings by telephone. Likewise, if “important stakeholders” outside the Postal Service care enough about this case to want the Postal Service to consider their views on the appropriate level of rate equalization, surely they can interrupt their “summer vacations” long enough to take a phone call from L’Enfant Plaza.

In any event, the Postal Service was on notice that rate equalization was a possibility long before June 26, when the Commission issued Order No. 1763. GameFly proposed the specific version of rate equalization ultimately adopted by the Commission in April 2013—almost four months ago. The D.C. Circuit issued its remand two months before that. Other versions of rate equalization were proposed in this docket as early as 2010. And the general possibility of rate equalization was studied within the Postal Service several years before GameFly filed its complaint in April 2009. In sum, the Postal Service had ample time to consider how to implement rate equalization, solicit “stakeholder input,” and raise any concerns or questions with the Commission or GameFly (or both) long before July 19. Any time pressure now facing the Postal Service is of its own making, the result of its failure to deal with its compliance obligations seriously and in good faith.

(3)

The July 19 motion would also be unjustified if treated as a request for an administrative stay pending *administrative* review. The factors considered by the Commission and other agencies in ruling on requests for extraordinary relief of this kind

are similar to the criteria considered by appellate courts: (1) the likelihood that the moving party will prevail on the merits; (2) the extent of any irreparable injury that the moving party would suffer without a stay or injunctive relief; (3) the extent of any irreparable injury that the opposing party would suffer if a stay or injunctive relief is granted; and (4) the public interest.² The Postal Service's July 19 motion does not even pretend to satisfy these criteria.

The Postal Service is unlikely to prevail on the merits. The Postal Service offers no reason to believe that it will succeed in persuading the Commission to modify Order No. 1763 at all, let alone in a manner inconsistent with the compliance filing now required on July 26. Elimination of the longstanding discrimination between Netflix and GameFly was mandated by the Court of Appeals in its January 2013 remand order. The rate equalization prescribed in Order No. 1763 is a well-established remedy supported by ample precedent in rate discrimination cases. And the Commission's analysis of the remedies proposed by GameFly, and the alternative remedies proposed by the Postal Service (or raised by the Commission *sua sponte*), was thorough and meticulous. Against this analysis the Postal Service offers only squid ink: the "financial implications" of the Order "must studied and carefully considered"; the Postal Service is

² Docket No. C2012-2, *Complaint of American Postal Workers Union, AFL-CIO*, Order No. 1387 (June 29, 2012) at 3-4 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958), and other court precedent); Docket No. MC2012-14, *Valassis NSA*, Order No. 1455 (August 30, 2012) at 5 (first paragraph); *IATA Transpacific Cargo Rates*, 104 C.A.B. 365, 369 & n. 11, 1983 WL 35425 (C.A.B. 1983) (applying four-part criteria of *Virginia Petroleum Jobbers* and *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977), to request for administrative stay of agency decision); *San Joaquin Valley Railroad Co.—Abandonment Exemption—in Tulare and Kern Counties, CA*, 1998 WL 151294 (STB 1998) at *3 (same).

uncertain about “to whom the new rates will apply”³; and the Commission’s remedy, while couched purely in terms of rates, somehow raises unidentified “operational contingencies” that must be “assessed.” Whatever these empty generalizations mean, they do not establish any error *by the Commission*.

The Postal Service will not suffer irreparable injury if Order No. 1763 takes effect. The Postal Service’s showing of irreparable injury is equally empty. The Commission, like the courts of appeals, has stated that a stay is unwarranted without a persuasive showing of irreparable injury. *Valassis, supra*, at 5-7. The Postal Service, however, asserts only that compliance might “adversely impact” the Postal Service’s finances, by an unknown amount, if the Postal Service elects not to equalize DVD rates at a level higher than the current letter rates. These unqualified generalizations are entitled to no weight. If the Postal Service wants to take more time to decide where the point of equalization should fall, the Postal Service should comply with the Commission’s order by equalizing rates at the current level of rates for letter-shaped DVD mailers. Then, after complying with the order, the Postal Service can determine whether it would prefer to reset the point of equalization at a different level. (One obvious occasion would be when the Postal Service files its notice of CPI-based rate changes to take effect in January 2014.) But GameFly should not be held hostage and continue to suffer irreparable economic harm while the Postal Service contemplates a longer-term solution—not when there is a remedy that the Postal Service can implement immediately.

³ They presumably will apply to all round trip DVD mailers that currently qualify for the DVD flat mail rate.

Staying Order No. 1763 would irreparably harm GameFly. The Postal Service does not, and cannot, dispute that a stay of Order No. 1763 would inflict irreparable injury on GameFly. As the company has noted repeatedly, its injury from the higher rates that the company must continue to pay until the Postal Service finally ends its longstanding discrimination is indisputably irreparable. 39 U.S.C. § 3681 precludes any damages or retroactive relief for higher rates paid in the past. While 39 U.S.C. § 3662(d) authorizes the Commission to impose fines for deliberate noncompliance with Commission orders, any money collected must be “deposited in the general fund of the Treasury” and is unavailable to the injured mailer. *Id.*

The threatened injury to GameFly—after it has prevailed in lengthy litigation and after the time for seeking a judicial stay of the Commission’s recent decision has passed—is an independent and compelling ground for denying the requested delay. As the Commission emphasized in Order No. 1763, “the remedy [adopted by the Commission] should provide GameFly with timely relief. Delay in implementation of the remedy finally selected only adds to the injury already sustained by GameFly. To provide timely relief, the Commission must limit further administrative proceedings to those that are necessary to select an effective and enforceable remedy.” Order No. 1763 at 16; *id.* at 25 (“given the further injury that GameFly will endure from potentially protracted remand proceedings, the Commission declines to reopen the record in this docket to impose an operational remedy.”).

Staying Order No. 1763 would disserve the public interest. The Postal Service also fails to satisfy the public interest standard. The most obvious evidence is the very existence of 39 U.S.C. § 403(c). By enacting and reenacting this provision

over many decades, Congress has established the remediation of undue discrimination as a central element of the public interest.

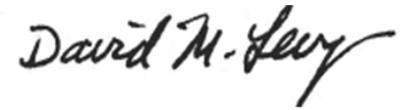
Likewise, the existence of 39 U.S.C. § 3662 establishes that the availability of timely and cost-effective complaint remedy is also an important element of the public interest. *Cf.* Docket No. RM2013-4, Order No. 1739, *Unfair Competitive Advantages: Enforcement of the Formal Complaint Process*, 78 Fed. Reg. 35826 (2013) at 35827 (noting that overly-protracted complaint proceedings could leave injured parties “without effective recourse” and “might not be financially viable even if the complainant were to ultimately succeed.”). Allowing the Postal Service to obtain yet further delay on grounds as flimsy as those asserted in the July 19 motion would make a mockery of the complaint remedy.

The Postal Service’s suggestion that compliance with Order No. 1763 might somehow cause undue discrimination against *other* mailers “that have not participated in” this docket is frivolous. The rate remedy prescribed in Order No. 1763 will be available to all qualifying DVD mailers, not just GameFly. And the notion that this relief might discriminate unreasonably against senders of *other* matter in flat-shaped mailers is without merit for the reasons previously explained by GameFly: 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. GameFly Response to Commission Order No. 1700 (May 13, 2013) at 21.

For the foregoing reasons, the Postal Service's latest attempt at delay should be denied. It is long past time for the Postal Service to comply with 39 U.S.C. § 403(c). The Commission should specifically state that, if the Postal Service fails to file an alternative rate schedule on July 26, the default remedy of reducing the rate for flat-shaped DVD mailers to the current level of letter-shaped DVD mailers will automatically take effect 45 days later. If the Postal Service continues to defy the Commission, or the Commission acquiesces in further delay by the Postal Service, GameFly will seek relief from the Court of Appeals under the All Writs Act.

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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