

ORDER NO. 1807

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Complaint of GameFly, Inc.

Docket No. C2009-1R

ORDER ON RECONSIDERATION AND CLARIFICATION

(Issued August 13, 2013)

On July 25, 2013, the Postal Service filed a motion requesting reconsideration and clarification of Order No. 1763.¹ Responses were filed by GameFly, Inc. (GameFly) and the Public Representative.² The request for reconsideration is denied. The request for clarification is granted.

¹ United States Postal Service Motion for Reconsideration and Clarification of Order No. 1763, July 25, 2013 (Motion). See *also* Order No. 1763, Order on Remand, June 26, 2013.

² Response of GameFly, Inc., to USPS Motion for Reconsideration and Clarification of Order No. 1763, August 1, 2013 (GameFly Response); Response of the Public Representative to USPS Motion for Reconsideration and Clarification of Order No. 1763, August 9, 2013 (Public Representative Response).

I. REQUEST FOR RECONSIDERATION

The Postal Service asserts two grounds for seeking reconsideration of the Commission's selection of a rate-based remedy in Order No. 1763. First, the Postal Service argues that a rate-based remedy is inconsistent with the Court's decision in *GameFly, Inc. v. Postal Regulatory Commission*, 704 F.3d 145 (D.C. Cir. 2013). Motion at 2-5. Second, the Postal Service claims that even if the Commission is permitted to impose a rate-based remedy, the particular rate-based remedy chosen in Order No. 1763 fails to comply with the policies and provisions of the Postal Accountability and Enhancement Act (PAEA), Pub.L. 109-435, 120 Stat. 3198 (2006). *Id.* at 6-7.

A. The Court's Opinion

The Postal Service argues that the *GameFly* decision contemplates an operational remedy and that the Commission erred in adopting a rate-based remedy. The Commission disagrees. In its opinion, the Court expressly noted the Commission's finding in Order No. 718 that GameFly had been subject to both rate and service discrimination. 704 F.3d at 147 ("It [the Commission] found that the Postal Service had discriminated against GameFly in rates and terms of service.").³ The Court also noted that GameFly had sought two remedies—an operational remedy to remedy the service discrimination and a rate remedy that would have reduced the rate for flat-shaped DVD mailers. 704 F.3d at 147. In remanding to the Commission, the Court stated its expectation that the Commission would consider both of GameFly's proposed remedies—the operational remedy and the rate remedy—as well as other possible remedies. *Id.* at 149 ("Upon rehearing, the Commission will surely consider those remedies, but there may be a range of other possible remedies which would withstand appellate review."). The Court placed no limitations on the types of "other possible remedies" that the Commission was free to consider. *Id.* Accordingly, the Commission considered both operational and rate-based remedies following remand by the Court.

³ See Order No. 718, Order on Complaint, April 20, 2011, at 108 ¶ 5003.

The Postal Service uses selected excerpts from the *GameFly* opinion in an effort to overcome these clear indications that the Court expected the Commission to consider both types of remedies on remand. The attempt fails.

The *GameFly* excerpts cited by the Postal Service address the adequacy of the Commission's explanation for adopting a rate-based remedy that provided only partial rate relief to GameFly when it mails DVDs as flats.⁴ The Court concluded that the Commission's explanation was based upon an unstated and erroneous assumption that GameFly's decision to mail DVDs as flats was voluntary. It was in this context—the context in which GameFly continued to face service discrimination, but received only *partial* relief from discriminatory rates—that the Court concluded that the terms of service left in place had not been justified. 704 F.3d at 149. The appropriate conclusion to be drawn from the excerpts cited by the Postal Service is not, as the Postal Service argues, that it was improper for the Commission to consider a rate-based remedy on remand. Rather, it is that the Commission must consider and adequately justify a remedy, whether operational or rate-based, that is more responsive to the undue discrimination found by Order No. 718.

Furthermore, this Postal Service contention is inconsistent with its initial filing in the remanded proceeding that urged the Commission to make another attempt to provide an adequate justification for the original rate-based remedy that had been vacated by the Court.⁵

Given its duty to consider “a range of...possible remedies”, see 704 F.3d at 149, the Commission carefully reviewed both operational and rate-based remedies on remand. Order No. 1763 at 10-35. Included were remedies proposed by GameFly and

⁴ In Order No. 718, the Commission rejected an operational remedy proposed by GameFly and adopted instead a remedy that offered “a reduced rate for round-trip flat-shaped DVD mailers weighing up to two ounces.” Order No. 718 at 113, ¶ 5022. Specifically, the base rate for such DVD mailers was to be the one-ounce single-piece First-Class Mail flat rate. *Id.* at 114-115, ¶ 5027. By eliminating only the second-ounce charge for DVDs sent as flats, the Court found that the Commission provided GameFly only partial rate relief.

⁵ See 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, at 10-14.

the Postal Service, as well as additional potential remedies identified by the Commission. *Id.* at 12, 20-21, 21-24. The Commission concluded that none of the operational remedies before it would provide an effective, enforceable, and timely remedy to GameFly.⁶ *Id.* at 25.

The Postal Service objects to the Commission's rejection of an operational remedy. Motion at 4-5. It alleges that the Commission gave only "scant consideration" to an operational remedy identified by GameFly (*i.e.*, GameFly's Second Operational Remedy) that "would have treated similar mailings similarly, thus fully addressing the D.C. Circuit's concerns." *Id.* at 4.⁷

The central problem with GameFly's Second Operational Remedy, as well as all of the other operational remedies considered by the Commission, is the likelihood that all of these remedies will "prove [to be] prohibitively difficult to enforce." *Id.* at 21; *see generally* 21-24. The Postal Service seeks to minimize the importance of enforcement difficulties by asserting that "enforcement may be accomplished through a simple comparison of the number of machine scans and the number of mail pieces...." Motion at 4. However, the Postal Service's sudden endorsement of this "simple

⁶ The Postal Service takes issue with the Commission's statement that it has "three responsibilities on remand", *viz.*, to impose a remedy that is effective, enforceable, and avoids undue delay. Motion at 3 n.5. In Section III, Analysis, of Order No. 1763, the Commission explains the "nature and origin of each of its three responsibilities." See Order No. 1763 at 14-15 (effectiveness of remedy), 15-16 (enforceability of remedy), and 16-18 (avoidance of undue delay). The Postal Service fails to offer any justification, on the facts of this case, for ignoring the remedy's effectiveness, enforceability, or timeliness. Nor is any such justification apparent.

⁷ GameFly's Second Operational Remedy was first identified on remand by GameFly as a possible alternative to its preferred rate-based remedy. Motion of GameFly, Inc., to Establish Standards and Procedures to Govern Proceedings on Remand, March 7, 2013. at 14-18 (March 7 GameFly Motion). As described by GameFly, this remedy would require the Postal Service either to provide Netflix and GameFly the same level of manual processing or to discontinue manual processing of Netflix mail. *Id.* at 15. The Postal Service's suggestion that the Commission should have given greater attention to GameFly's Second Operational Remedy is surprising in light of GameFly's observation that there would be serious practical difficulties in monitoring and enforcing this remedy. *Id.* at 15-18. The Postal Service itself acknowledged such practical difficulties in the May 3, 2013 letter that it filed with the Commission on May 6, 2013 ("...it would be difficult, if not practically impossible, or exceedingly costly, to maintain an ongoing enforcement mechanism that would ensure that every mailer's DVD letters will receive exactly the same levels of manual processing...either locally or nationally."). See Order No. 1763 at 8 n.10 (citing the May 3, 2013 Postal Service letter).

comparison” as the key to the enforcement of an operational remedy is contradicted by its previous claims regarding the infeasibility of relying upon machine scans to ensure enforcement. See Order No. 1763 at 22 n.20 (and accompanying text). Reliance upon machine scans is further contradicted by the Postal Service’s more general opposition to operational remedies, including in particular, its repeated expressions of concern that operational remedies result in an unnecessary interference with its right to make operational decisions. *Id.* at 21-24.

B. Compliance with the PAEA

The Postal Service reiterates prior assertions that even if the Commission has the authority to impose a rate-based remedy, its decision in Order No. 1763 to adopt an equalized rate remedy is precluded by the ratemaking policies of the PAEA and title 39, United States Code, as well as applicable Commission regulations. Motion at 6-7. The Postal Service’s supporting arguments were previously considered by the Commission in Order No. 1763. They do not need to be re-examined in detail.

In prescribing an appropriate remedy, the Commission must consider not only generally applicable ratemaking policies and provisions. It must also satisfy its obligation to enforce the prohibition against unlawful discrimination contained in 39 U.S.C. 403(c). In Order No. 718, the Commission based its decision to give GameFly only partial rate relief upon the same type of ratemaking policy considerations (*i.e.*, cost differences and general pricing differences between First-Class Mail flat and letter products) that the Postal Service now argues should prohibit adoption of an equalized rate remedy. Order No. 718 at 115, ¶ 5029. The Court ruled that, on the facts of this case, the Commission’s reliance upon these generally applicable ratemaking policies did not justify the residual discrimination left in place by its partial rate remedy and therefore did not provide an adequate basis for denying GameFly more complete relief. The Commission cannot find, and the Postal Service has not offered, grounds to deny GameFly less than the complete rate relief adopted by Order No. 1763. By giving the Postal Service the opportunity to select a level of equalized rates for

letter-shaped and flat-shaped mail, Order No. 1763 provides the Postal Service the opportunity to exercise pricing flexibility and balance statutory ratemaking policies as part of its duty to eliminate the undue discrimination found to exist in this case.

Finally, the Postal Service alleges that the equalized rate remedy creates the potential for a new form of discrimination by creating “a niche classification (for DVD mailers) based solely on the content of a mail piece.” Motion at 7. It argues that such a classification would be unprecedented and would create the potential for discrimination by establishing rate differences for flats mailers without justification of those rate differences. *Id.*

Contrary to the Postal Service’s assertions, the creation of a niche classification based on content of the mailpiece is not unprecedented. In Order No. 718, the predecessor of Order No. 1763, the Commission created a special niche classification for DVD letter-shaped and flat-shaped mail. Order No. 718 at 113-115, ¶¶ 5021-5030. Not only did the Postal Service support this niche classification on appeal, on remand it urged the Commission to “defend its original remedy,” which was predicated on the establishment of a niche classification.⁸

Niche classifications based on content are wholly consistent with title 39, United States Code. That title establishes reduced rates or free mailing for several types of mail based on its contents. For example, 39 U.S.C. § 3626(b)(1)(B) defines “periodical publication” for purposes of determining eligibility for a reduced rate to include “any looseleaf page or report...which is designed as part of a looseleaf reporting service *concerning developments in the law or public policy.*” (Emphasis added). Section 3626(a)(6) provides for reduced rates for “mail matter under former sections 4452(b) and (c),” which included parcels “containing baby fowl, live plants, trees, shrubs, or agricultural commodities” and parcels “consisting of books, films, and other materials

⁸ Brief of the United States Postal Service at 18-21, *GameFly, Inc., v. Postal Regulatory Commission*, No. 11-1179 (D.C. Cir. March 5, 2012); 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, at 16.

mailed under [former] section 4554.”⁹ Former section 4554 provided preferred rates for books that did not contain advertising, films sent between commercial theaters, printed music, test materials used by educational institutions, sound recordings, playscripts and other manuscripts, educational reference charts, and medical information, among other items. 39 U.S.C. § 4554(a). Furthermore, 39 U.S.C. § 3403 provides that certain items may be mailed free of postage if their contents are for the use of the blind or other handicapped persons and consist of reading matter, musical scores, sound reproductions, or Braille typewriters, among other things. These special rates established by Congress on the basis of content indicate that classifications based on content are consistent with the modern system for regulating rates and classes established pursuant to the PAEA.¹⁰

Finally, the equalized rate remedy adopted by Order No. 1763 does not lack justification. The justification for that remedy is provided by the *GameFly* opinion and by the Commission’s analyses in Order Nos. 718 and 1763.

II. REQUEST FOR CLARIFICATION

The Postal Service requests clarification regarding two aspects of Order No. 1763. First, it requests guidance regarding the rate cap implications of the equalized rate remedy ordered by the Commission. Motion at 7-10. Second, it seeks clarification of the scope of the remedy. *Id.* at 10-11.

A. Rate Cap Implications

In Order No. 1763, the Commission gave the Postal Service two basic options for equalizing the rates for letter-shaped and flat-shaped DVD mailers:

⁹ 39 U.S.C. § 4552(c)(2) and (3) (as in effect August 11, 1970).

¹⁰ See also 39 U.S.C. § 3622(c)(8) and (11) (requiring the Commission to take into consideration “the relative value to the people of the kinds of mail matter entered into the postal system” and “the educational, cultural, scientific, and informational value to the recipient of mail matter”).

1. The Postal Service shall equalize the rates for letter- and flat-shaped DVD mail either by: (1) establishing new equalized rates for letter-shaped and flat-shaped DVD mail; or (2) reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer.

Order No. 1763 at 39, Ordering Paragraph 1.

In its Motion, the Postal Service expresses uncertainty over the price cap implications of the Commission's order that the rates for letter-shaped and flat-shaped DVD mail be equalized. Motion at 7-10.¹¹ To resolve this uncertainty, the Postal Service poses three questions:

1. Whether it was the Commission's express intention to force the Postal Service to use available CPI pricing authority to implement its remedial order;
2. If so, whether a small decrease in prices would trigger a recalculation of available CPI pricing authority; and
3. Whether the Commission considered the impact that applying the CPI price-cap to its remedial order would have on the Postal Service's annual price change.

¹¹ Due at least in part to the alleged uncertainty, the Postal Service on July 26, 2013, filed a request to create a new product on the Competitive Product list. Request of the United States Postal Service under Section 3642 to Create Round-Trip Mailer Product, July 26, 2013 (Request). See Docket No. C2009-1R, Order No. 1794, Notice and Order on Request to Add Round-Trip Mailer Product to the Competitive Product List, July 30, 2013. In its Request, the Postal Service suggests that the Commission's action on the request for clarification in Docket No. C2009-1R could affect the Postal Service's ultimate decision regarding whether to equalize DVD Mailer rates on the market dominant or competitive product lists. See Request at 4-6. The Public Representative requests clarification that if the Postal Service's Request has not been resolved by September 30, 2013, "the Market-Dominant MCS language provided in Order No. 1763 will become active..." Public Representative Response at 3. The Public Representative Response was filed over one week late without any attempted showing of good cause. The response is therefore rejected. The Public Representative may nevertheless address any issues it has regarding the Postal Service's Request in comments it may file pursuant to the procedures established by Order No. 1794.

Order No. 1763 does not discuss CPI pricing authority, and it was not the intention of the Commission to cause the Postal Service to do anything other than fully remedy discrimination, as required by the *GameFly* Court. As explained below, previous Commission precedent resolves any uncertainty. The price cap implications of the Commission's remedial order depend upon how the Postal Service elects to respond to the alternatives made available to the Postal Service in Order No. 1763.

The alternatives for equalizing round-trip DVD mailer rates set forth in Ordering Paragraph 1 of Order No. 1763 would have permitted the Postal Service to formulate rates in a variety of ways. For example, under the first alternative, the Postal Service could have established new equalized rates that increased the current rates for letter-shaped DVD mail and decreased the current rates for flat-shaped DVD mail. The level at which the letter and flats rates were equalized would have been chosen by the Postal Service consistent with the policies of title 39. In that event, the increase in the rates for letter-shaped DVD mail would have required the filing of a notice of price adjustment that triggered a recalculation of available CPI pricing authority, notwithstanding the fact that the rates for flat-shaped DVD mail were decreased.¹²

The Postal Service chose to comply with Order No. 1763 by equalizing letter-shaped and flat-shaped round-trip DVD rates at the one-ounce First-Class letter-shaped round-trip DVD mailer rates. Had the Postal Service chosen to file a notice of market dominant rate adjustment rather than a request to establish a competitive product, the notice would have been subject to the Commission's price cap rules in 39 C.F.R. part 3010.

As the Commission recently explained, under 39 C.F.R. part 3010, when the Postal Service proposes a mid-year rate decrease (that is, a decrease proposed between annual notices of Type 1-A or Type 1-B rate adjustment), the Postal Service

¹² See Docket No. R2011-1, Order No. 606, Order Approving Market Dominant Classification and Price Changes, and Applying Price Cap Rules, December 10, 2010, at 11-13 (describing the two options available to the Postal Service for implementing the Move Update Assessment, both of which required a recalculation of available CPI pricing authority).

has the option to exclude the rate decrease from the calculation of the price cap pursuant to the procedures described in 39 C.F.R. § 3010.24.¹³ The Postal Service has availed itself of this option on at least three occasions.¹⁴ If the Postal Service chooses to extend a price decrease into a future year, it may opt to incorporate the reduced price into the calculation of the percentage change in rates at that time.¹⁵ In subsequent rate adjustments, the Postal Service's notices and workpapers will reflect the previous 12 months of volumes for round-trip DVD mail and the then-current rate for round-trip DVD mail. See 39 C.F.R. §§ 3010.21, 3010.22, and 3010.23.

Thus, if the same equalized rate proposed by the Postal Service in its July 26, 2013 request for creation of a new competitive product had been filed as an equalized rate for market dominant round-trip First-Class letter-shaped and flat-shaped DVD mail, the Postal Service could have chosen to file its notice in accordance with 39 C.F.R. § 3010.24, which would not require an immediate recalculation of available CPI pricing authority. Alternatively, the Postal Service could have chosen to recognize the creation of additional price cap authority produced by the reduction of the two-ounce round-trip First-Class flat-shaped DVD mailer to the one-ounce letter-shaped rate in an immediate recalculation of available CPI pricing authority.

B. Scope of Remedy

The Postal Service expresses uncertainty over whether the equalized rate remedy ordered by Order No. 1763 is intended to apply to all round-trip DVD mailers that enter their mail as one-ounce letters or two-ounce flats. Motion at 10-11. In that

¹³ Docket No. R2013-6, Order No. 1743, Order Approving Technology Credit Promotion, June 10, 2013, at 16-17.

¹⁴ See Docket No. R2011-5, Order No. 731, Order Approving Market Dominant Price Adjustment, May 17, 2011; Docket No. R2012-6, Order No. 1296, Order Approving Market Dominant Price Adjustment, March 26, 2012; and Docket No. R2009-4, Order No. 236, Order Approving Price Adjustment for Standard Mail High Density Flats, July 1, 2009, at 6-9.

¹⁵ Order No. 1743 at 16; see *also* Docket No. R2013-1, Order No. 1541, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 16, 2012, at 17.

connection, the Postal Service suggests that Order No. 1763's remedy could extend to other DVD and flats mailers. *Id.* at 10. The Postal Service challenges the application of the remedy to mailers other than GameFly by repeating arguments considered above regarding the Commission's interpretation of the Court's *GameFly* opinion and the Commission's authority under the PAEA. *Id.* The remedy ordered by the Commission expressly applies to all one-ounce First-Class letter-shaped round-trip DVD mailers and to all First-Class flat-shaped round-trip DVD mailers weighing up to two ounces regardless of whether the mailers of these mailpieces participated in the proceedings in Docket Nos. C2009-1 or C2009-1R.¹⁶ A failure to extend the scope of the remedy provided for in Order No. 1763 to all such mailers would only perpetuate the unlawful discrimination found to exist in Order No. 718. The Commission's responses to the arguments presented by the Postal Service regarding the interpretation of the *GameFly* opinion and the Commission's legal authority under the PAEA and title 39 are set forth *supra* and need not be repeated here.

GameFly requests that the Commission "clarify that all DVD mailers, including Netflix, **must** mail their DVDs at the round-trip DVD rate." GameFly Response at 14 (emphasis added). The Commission is not prepared to impose such a requirement. If, in the future, the Postal Service proposes to adjust rates for round-trip DVD mail, it will be required to file a notice of rate adjustment with the Commission. Under the Commission's rules, a notice of rate adjustment must include sufficient information to allow the Commission to determine whether the planned rates are consistent with the policies of title 39, United States Code. See *generally* 39 C.F.R. part 3010. Interested persons may also submit comments on whether the proposed rates conform with Commission orders. 39 C.F.R. § 3010.11(c).

¹⁶ This is consistent with the remedy in Order No. 718, which established categories for round-trip DVD mailers that were available to all senders of qualifying mail.

It is ordered:

1. The Postal Service's motion for reconsideration is denied.
2. The Postal Service's motion for clarification is granted.

By the Commission.

Shoshana M. Grove
Secretary