Postal Regulatory Commission
Submitted 8/29/2013 3:39:28 PM
Filing ID: 87758
Accepted 8/29/2013

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

COMPLAINT OF GAMEFLY, INC.	)	Docket No. C2009-1R
COMPETITIVE PRODUCT LIST ADDING ROUND-TRIP MAILER	)	Docket No. MC2013-57
COMPETITIVE PRODUCT LIST ADDING ROUND-TRIP MAILER (MC2013-57)	)	Docket No. CP2013-75

RESPONSE OF GAMEFLY, INC.,
TO REPLY COMMENTS OF NETFLIX, INC.
(August 29, 2013)

GameFly Inc. respectfully submits these comments in further response to Section I (i.e., pages 2-7) of the August 22 reply comments of Netflix, Inc., in Docket No. MC2013-57.[1] In Section I of its reply comments, Netflix argues, contrary to GameFly and the Postal Service, that Netflix should continue to be free to enter its DVD mailers as generic First-Class letter mail rather than at whatever "round-trip DVD rate" that emerges from this docket. *Id*. at 2-7; *cf*. GameFly Response to USPS Motion for

[1] GameFly has separately filed a motion under 39 U.S.C. § 3001.21(b) for leave to file this further response.

Reconsideration (August 2, 2013) at 14; GameFly Comments (August 15, 2013) at 32-34; USPS Response to Order No. 1794 (August 5, 2013) at 2 n. 4. Netflix's pleading merely confirms the need to require that round-trip DVDs be excluded from generic First-Class or Standard Mail letter mail. Allowing Netflix to use a less expensive or more desirable product of mail that is unavailable to other DVD rental companies would readmit through the back door the very discrimination that the Court of Appeals banished in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013).

Netflix defends its contrary position on four grounds: (1) First-Class Mail, unlike the proposed new round-trip DVD product, has the valuable attribute of being sealed against inspection (Netflix at 5-7); (2) Netflix is entitled to "different service expectations and outcomes" than GameFly because Netflix's network is bigger and more complex than GameFly's (*id*. at 3); (3) the Postal Service might decide "in the not-to-distant future" to stop offering Netflix manual processing of its DVDs, or Netflix might decide that the benefits of getting Full Service IMb tracking (which requires use of machine processing) outweigh the costs of the resulting DVD breakage (*id*. at 3-4); and (4) "if and when" the alternative option of using generic First-Class letter mail to send DVDs is exploited with discriminatory effect by the Postal Service and Netflix, GameFly can raise its concerns with the Commission then (*id*. at 4). These defenses are unfounded. We respond to each one in turn.

(1)

GameFly agrees with Netflix that being sealed against inspection is a highly valuable attribute of First-Class Mail, especially for mail matter like DVDs. That is exactly the problem. Under the Postal Service's proposal, GameFly and other DVD

rental companies would be forced to choose among one of the following three options: (1) use the new round-trip DVD mail product, and forego having their DVDs sealed against inspection; (2) use generic First-Class letter mail, and suffer "an epidemic of cracked and shattered DVDs," *GameFly*, 704 F.3d at 149; or (3) pay the much higher alternative prices charged for generic First-Class flats or parcels. Netflix would be able to avoid this Hobson's choice because the special manual processing that the Postal Service offers Netflix to DVDs mailed as First-Class letters makes generic First-Class letter mail a viable alternative. *GameFly*, 704 F.3d at 146-147, 149. This is the precisely the kind of discrimination that the Court of Appeals' decision in *GameFly v. PRC* forecloses. *Id*. at 148-149. If Netflix is allowed to mail its DVDs in a mail product that is sealed against inspection, then all senders of round-trip DVD mail must be allowed to do likewise, and on nondiscriminatory terms.

(2)

The notion that Netflix is entitled to "different service expectations and outcomes" than GameFly because Netflix's network is bigger and more complex than GameFly's (Netflix at 3) was specifically considered and rejected by the Commission in its April 2011 final decision. Order No. 718 at ¶¶ 4108-4126, 4167-4176, 5002, 5004. The Commission's findings have preclusive effect, and may not be relitigated by the parties in Docket No. C2009-1R. Order No. 1763 (June 26, 2013) at 17 & n. 17; GameFly Response to USPS Opposition (March 18, 2013) at 5 (citing precedent). Netflix, which chose for tactical reasons to remain a nonparty throughout the four years of litigation in Docket No. C2009-1, likewise has no standing to relitigate the issue now.

(3)

Netflix also gains nothing by speculating that the Postal Service might decide "in the not-to-distant future" to stop offering Netflix manual processing of its DVDs, or Netflix might decide to stop accepting it (*id*. at 3-4). As of now, the Postal Service has *not* stopped giving Netflix DVD mailers manual processing, and Netflix has *not* stopped accepting this special treatment. Netflix concedes this, describing these changes only as future possibilities that may or may not occur. *Id*. at 3-4. This is not the stuff of which reopening is made.

Reopening the record in a fully litigated and concluded docket 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 (8th 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 (9th 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)). Netflix has not begun to satisfy these requirements.

Furthermore, the case against reopening the record is compounded by the irreparable injury that GameFly has suffered, and continues to suffer, as long as full relief from discrimination is withheld. That fact alone warrants rejection of reopening. Order No. 1763 (June 26, 2013) at 16-17, 22, 24-25.

(4)

Finally, the Commission may not defer confronting this new means of discrimination on the theory that GameFly may seek relief from the Commission "if and when" the alternative option of using generic First-Class letter mail to send DVDs can

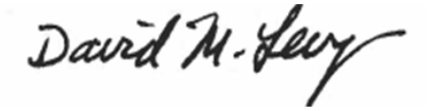
be exploited with discriminatory effect by the Postal Service and Netflix. Netflix at 4. The short answer is that the Postal Service has *already* crossed that bridge. As previously noted, the proposed DVD product, even at the outset, would discriminate against GameFly and other DVD rental companies in at least two significant respects. Unlike generic First-Class letter mail, the new product: (1) would not be closed to inspection, and (2) would lack a single-piece rate. The discrimination against GameFly resulting from the availability to Netflix of generic First-Class letter mail as an alternative to the round-trip DVD product thus is not a hypothetical possibility, but an imminent fact.

And this is entirely apart from the likelihood that the Postal Service, if DVD mailers were exempted from maximum rate regulation under 39 U.S.C. § 3642, would move quickly to price the new product substantially above the price of generic First-Class letter mail. Netflix would be able to avoid the price increases by entering its DVDs as generic First-Class letters, an alternative made feasible by the special manual processing that the Postal Service has fought for almost a decade to continue giving to Netflix. GameFly and other disfavored customers would be unable to avoid the price increases by switching to generic First-Class letter mail because the result would be "an epidemic of cracked and shattered DVDs." *GameFly*, 704 F.3d at 149. The discrimination ordered to be remedied by the Commission and the Court of Appeals would be back in full force.

GameFly should not be forced to relitigate again and again each year to retain the right to freedom from undue discrimination that the Commission and the reviewing court have already upheld. An administrative agency need not and should not "behave like Penelope, unraveling each day's work to start the web again the next day." *Toledo,*

Peoria & Western Ry. v. Surface Transportation Bd., 462 F.3d 734, 753 (7th Cir. 2006); *Western Coal Traffic League v. ICC*, 735 F.2d 1408 (D.C. Cir. 1984); *Utah Power & Light Co. v. ICC*, 764 F.2d 865, 874 (D.C. Cir. 1985).

Respectfully submitted,



David M. Levy
Matthew D. Field
Robert P. Davis
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4732

Counsel for GameFly, Inc.

August 29, 2013