

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1(R)

COMPETITIVE PRODUCT LIST
ADDING ROUND-TRIP MAILER

Docket No. MC2013-57

COMPETITIVE PRODUCT LIST
ADDING ROUND-TRIP MAILER

Docket No. CP2013-75

UNITED STATES POSTAL SERVICE RESPONSE TO COMMENTS
(September 23, 2013)

On April 20, 2011, the Postal Regulatory Commission issued Order No. 718 in PRC Docket No. C2009-1, finding that the United States Postal Service failed to establish reasonable and legitimate reasons for the different mail processing methods applied to GameFly, Inc. and other round-trip DVD mailers, and that its mail processing decisions regarding round-trip DVD mail violated 39 U.S.C. § 403(c). Order No. 718, Order on Complaint, PRC Docket No. C2009-1, at 108, ¶¶ 5004-5005 (Apr. 20, 2011). As a remedy, the Commission specified a “reduced rate for round-trip flat-shaped DVD mailers weighing up to two ounces” equal to the one ounce flat rate. *Id.* at 113-115, ¶¶ 5022, 5027-5028. On May 20, 2011, GameFly filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit challenging the

Commission's remedy in PRC Docket No. C2009-1.¹ On January 11, 2013, the Court issued its opinion vacating the Commission's order and remanding the case.²

On June 26, 2013, the Commission issued Order No. 1763, specifying a new remedy that required the Postal Service "to equalize the rates for letter-shaped and flat-shaped round-trip DVD mailers either by establishing new equalized rates for such letter-shaped and flat-shaped round-trip DVD mailers, or by 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, Order on Remand, PRC Docket No. C2009-1R (June 26, 2013), at 1. On July 26, 2013, the Postal Service provided notice of the creation of a new competitive product, tentatively titled Round-Trip Mailer, to replace the existing Round-Trip Mailer option on the Market-Dominant product list.³ On August 15, 2013, GameFly and Netflix filed comments in response to the Postal Service's notice.⁴ On August 22, 2013, the Postal Service,⁵ the Public Representative,⁶ and Netflix⁷ replied to comments submitted by the other parties.

On August 26, 2013, GameFly filed a motion requesting that the Commission deny the Postal Service's July 26 Request, or, in the alternative, strike the Postal Service Reply Comments, or, in the alternative, allow GameFly the opportunity to

¹ Petition for Review, *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013) (No. 11-1179).

² *GameFly*, 704 F.3d at 149 (D.C. Cir. 2013).

³ Request of the United States Postal Service Under Section 3642 To Create Round-Trip Mailer Product ("Request"), PRC Docket No. C2009-1R (July 26, 2013).

⁴ Comments of GameFly, Inc. On USPS Proposal to Reclassify DVD Mailers as Competitive Products ("GameFly Comments"), PRC Docket No. C2009-1R (Aug. 15, 2013); Comments of Netflix, Inc. ("Netflix Comments"), PRC Docket No. C2009-1R (Aug. 15, 2013).

⁵ United States Postal Service Reply to Comments ("Postal Service Reply"), PRC Docket No. MC2013-57 (Aug. 22, 2013).

⁶ Reply Comments of the Public Representative in Response to Commission Order No. 1794, PRC Docket No. MC2013-57 (Aug. 22, 2013).

⁷ Reply Comments of Netflix, Inc., PRC Docket No. MC2013-57 (Aug. 22, 2013).

respond to the Postal Service Reply Comments.⁸ On September 4, 2013, in PRC Order No. 1827, the Commission denied GameFly's motion with respect to denial of the Postal Service's July 26 Request and striking of the Postal Service Reply Comments, but granted GameFly leave to file additional comments by September 11, 2013.⁹ On the same day, the Commission issued Order No. 1828, which imposed a new rate on the Postal Service, requiring "prices for two-ounce First-Class flat-shaped round-trip DVD mail equal to the prices for one-ounce First-Class letter-shaped round-trip DVD mail [effective September 30, 2013]."¹⁰

Pursuant to Order No. 1827, on September 11, 2013, the Public Representative¹¹ and Netflix¹² filed additional comments. On September 12, 2013, GameFly filed comments in response to Order No. 1827.¹³ On September 17, 2013, the Federal Express Corporation filed comments in this docket.¹⁴ On September 18,

⁸ Motion of GameFly, Inc., for Relief with Respect to the August 22 "Reply" Comments of the Postal Service, PRC Docket No. MC2013-57 (Aug. 26, 2013).

⁹ PRC Order No. 1827, Order Granting Motion for Leave to File Additional Comments, PRC Docket No. MC2013-57 (Sept. 4, 2013).

¹⁰ PRC Order No. 1828, Order Prescribing Remedy, PRC Docket No. C2009-1R (Sept. 4, 2013).

¹¹ Comments of the Public Representative in Response to Order No. 1827, PRC Docket No. MC2013-57 (Sept. 11, 2013).

¹² Additional Comments of Netflix, Inc. Submitted Pursuant to Order No. 1827, PRC Docket No. MC2013-57 (Sept. 11, 2013).

¹³ Supplemental Comments of Gamefly, Inc. on USPS Proposal to Reclassify DVD Mailers as Competitive Products, PRC Docket No. MC2013-57 (Sept. 12, 2013) ("GameFly Supplemental Comments").

¹⁴ Federal Express Corporation Comment on the Scope of the Postal Monopoly, PRC Docket No. MC2013-57 (Sept. 17, 2013).

2013, GameFly filed more comments in this docket.¹⁵ This pleading replies to the comments submitted in response to Order No. 1827.

As discussed in more detail below, the comments submitted in these dockets fail to provide compelling reasons why the Commission should not approve the new Competitive product. Section I below reinforces the Postal Service's earlier pleadings by explaining that the Round-Trip Mailer Product falls outside of the Private Express Statutes, and rebutting Netflix's contrary assertions. Section II below clarifies that the appropriate focus of this proceeding is on whether the Postal Service has a threshold degree of market power over the Round-Trip Mailer Product, and not on the Postal Service's reason for the competitive classification. Section III below reiterates that the Postal Service's mail delivery of digitized entertainment content, including the DVDs shipped by GameFly and Netflix, faces competition from multiple physical delivery alternatives – including kiosks and retail outlets – and digital delivery alternatives – including streaming through the internet and cable, and downloading over the internet, and rebuts GameFly's opposing arguments. And finally, Section IV below describes why the cost evidence submitted in this docket should be considered by the Commission, and rebuts GameFly's contrary assertions.

Accordingly, the Postal Service requests that the Commission approve its Request.

¹⁵ Reply Supplemental Comments of GameFly, Inc. on USPS Proposal to Reclassify DVD Mailers as Competitive Products, PRC Docket No. MC2013-57 (September 18, 2013).

I. THE CONTENT TARGETED BY THE ROUND-TRIP MAILER PRODUCT DOES NOT FALL WITHIN THE PRIVATE EXPRESS STATUTES.

Netflix contends that the postal monopoly covers the proposed Round-Trip Mailer product, thus prohibiting its classification as a competitive product. It bases its assertion on two principles: (1) DVDs sent through the mail for rental and/or sale are not “merchandise,” and (2) DVDs containing electronically encoded information for decoding and display by an appropriate computer device are not a computer program pursuant to 39 C.F.R. § 310(a)(7)(xii). These two arguments, however, are counter to logical analysis and a plain reading of the Private Express Statutes (PES).

In its Reply Comments, the Postal Service described in detail why the Round-Trip Mailer product was exempt from the postal monopoly and not covered by the PES. A primary basis of its analysis was that the DVDs contained in the mailing were merchandise and not letters subject to the PES. Netflix countered that the DVDs are not merchandise based on the Oxford Dictionary definition of “a good to be bought or sold” because Netflix only sends short-term rentals of movie content to its members. This shortsighted analysis by Netflix raises a host of issues.

First, the distinction between sales and rentals is inconsequential. Netflix’s argument is essentially that the content of the DVD is of no consequence as to whether or not the item is covered by the PES; instead, argues Netflix, the Commission is supposed to look to the use, payment, and contract between the mailer and the end user to determine if the item is covered by the PES. Whether the DVD is being rented or being sold is a distinction without a difference, however. The PES hinge upon content, and the content of a DVD mailing is still the same – and therefore is covered by the PES – no matter whether the mailer expects the recipient to send it back someday.

Second, while Netflix's business plan is the short-term rental of DVDs, other users of the proposed Round-Trip Mailer product have business plans that include the sale of products. GameFly, for example, permits and encourages users who enjoy a video game to keep and pay for the game. GameFly also sells used games directly to its customers. Indirectly, Netflix also offers "sales," as a Netflix member who fails to return a DVD and closes an account is charged the price of the DVD, essentially a sale of the DVD to the user. While sales may not be the primary business of Netflix, Netflix may end up "selling" discs to customers and GameFly promotes sales as an active part of its business. Thus, what begins as a Netflix rental may turn into a sale, and a GameFly mailpiece may contain a rented or sold item. It would make a mockery of the PES to expect the Postal Service or anyone else to determine whether a mailpiece is covered or not based on the terms of third parties' contracts. Fortunately, the PES do not call for such divination. They focus on the inherent content and nature of an item, matters eminently within the Postal Service's or anyone else's ability to determine from the physical mailpiece at hand.

Netflix also argues that the DVDs, which contain electronically encoded information to be used for direct input by the computers in DVD players and video game consoles, are not computer programs covered under the PES exclusion in 39 C.F.R. § 310.1(a)(7)(xii). In doing so, Netflix attempts to combine computer programs and data processing materials to mean the same thing, thereby creating one hybrid exclusion when really two exist. Using this hybrid exclusion, Netflix argues that computer programs must be limited to those that are "procedural materials," in that they process data, and that computer programs cannot include other types of electronically encoded

information for use by direct input into a computer. This analysis is based on a misreading of the regulations and an unreasonably narrow view of the scope of the exclusion. It appears that Netflix's confusion is based on its attempt to intertwine two distinct PES rules: section 310.1(a)(7)(xii), which addresses computer programs, and section 320.2, which addresses data processing materials. Section 310.1(a)(7)(xii) clearly sets forth an exclusion for computer programs, but then it goes further to distinguish and remind the reader that another suspension from the PES also exists for data processing materials. The two are not the same. As the name suggests, data processing materials consist of materials with data to be processed, possibly by a computer program but possibly also by analog means. See 39 C.F.R. § 320.2(c)(2)-(3).

The program that performs the processing cannot, therefore, itself be a "data processing material," and the Postal Service reflected that distinction by dealing with computer programs in a separate provision. Of course, section 310.1(a)(7)(xii) can also cover computer programs beyond those involved in the sort of data processing activities described in section 320.2. To the extent that there may be some ambiguity as to whether one computer program or another is excluded by virtue of section 310.1(a)(7)(xii), the footnote to section 320.1 clarifies that the PES are suspended with respect to those computer programs.¹⁶ Therefore, to the extent that Netflix might quibble about a DVD that contains a computer program that, when read by the appropriate device, displays a movie, video game, or some other content, a plain

¹⁶ The footnote reads, "Several of the items enumerated in § 310.1(a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b)."

reading of section 310.1(a)(7)(xii), in light of the guidance in the footnote to section 320.1, makes abundantly clear that the mailing of any such DVD is excluded from the PES.

Netflix's reliance on Advisory Opinion 85-3 is also misplaced. In that Advisory Opinion, the Postal Service was addressing only the limited facts before it. There, the Postal Service opined that computer programs were excluded from the PES and therefore eligible for private carriage, but that messages recorded on the media, beyond the computer programs operated by direct input, would not be permitted. Netflix apparently understands Advisory Opinion 85-3 to be drawing a distinction between the "message" of computer-readable program code and a "message" displayed in the output when that code is read (e.g., the on-screen display of a movie or video game). This reads too much into Advisory Opinion 85-3. Particularly in light of when the Advisory Opinion was issued, the phrase "other substantive information recorded on magnetic media" is entirely capable of relating to content that has nothing to do with computer programs, such as audio cassettes or videocassettes to be played on analog devices.

In contrast, Advisory Opinion 85-3 recognizes that computer programs, i.e., software, "suitable for direct input" into a digital playing device are excluded from the PES, without regard to the content output of those programs. In the present context, one must not look to the content of the DVDs, but to the method of inscription. Those included in the Round-Trip Mailer product contain, as defined in the proposed MCS language, "encoded computer data to be run on compatible computer devices." The proposed MCS language requires the content of the disc to be encoded computer data,

which is excluded from the PES, and does not permit other sorts of non-digital data alluded to in Advisory Opinion 85-3.

Finally, Netflix's attempts to compartmentalize the exceptions are also misguided. The references to the exclusion for public dissemination of sound recordings, films, and photography, 39 C.F.R. § 310.1(a)(7)(xi), have no relevance to the questions at issue. Indeed, that exclusion pertains expressly to public dissemination, and not to the sending of such content for use at a particular address, as is more often than not the case with Netflix and GameFly DVDs. Obviously, the inapplicability of one exclusion does not affect the applicability of another exclusion. In the instant case, DVDs are excluded from the PES based on their status as computer programs, regardless of whether those computer programs run sound recordings, films, or photography and whether the DVDs are used to publicly disseminate that content. Therefore, the Commission can readily determine that DVDs are excluded without embarking on an exhaustive tour of the PES's other exclusions and suspensions.

The evidence presented in the Postal Service's initial filing provided sufficient evidence and analysis that the Round-Trip Mailer product was outside the realm of the PES. Netflix's comments regarding the scope of the PES do nothing to challenge this conclusion and instead highlight that the DVDs at issue are in fact not letters under the PES but are merchandise, similar to those in the Postal Service's already competitive package products.

II. THE ELIGIBILITY OF A PRODUCT FOR COMPETITIVE CLASSIFICATION DEPENDS UPON WHETHER THE POSTAL SERVICE HAS A THRESHOLD DEGREE OF MARKET POWER OVER THE RELEVANT CATEGORY OF PRODUCTS, AND THE REASON FOR SEEKING COMPETITIVE CLASSIFICATION IS NOT RELEVANT TO THE ELIGIBILITY DETERMINATION.

As stated in 39 U.S.C. 3642(b)(1), the relevant consideration for the Commission is whether “the Postal Service exercises sufficient market power that it can effectively set the price of [the Round-Trip Mailer] product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.” The reasons that motivate the Postal Service to seek competitive classification are not relevant.

Despite the clear focus of the statute, the Public Representative contends that the Postal Service’s reasons for seeking competitive classification demonstrate that it has market power over the Round-Trip Mailer Product. Comments of the Public Representative in Response to Order No. 1827, PRC Docket No. MC2013-57, at 6 (Sept. 11, 2013). GameFly acknowledges that “the only question legally before the Commission under Section 3642(B)(1) is whether the Postal Service has market power over DVD mail.” GameFly Supplemental Comments at 5. Like the Public Representative, however, GameFly alleges that the potential for the Postal Service to raise prices and increase competition through a competitive Round-Trip Mailer Product “give[s] away the game” and demonstrates that the Postal Service has market dominance. *Id.* at 54.

As described above, 39 U.S.C. § 3642(b)(1) focuses on the existence of market power, and not the reasons for seeking competitive classification pursuant to section 3642. Thus, other parties’ characterizations of the Postal Service’s motives for filing its

Request in this docket do not demonstrate whether the Postal Service has market power with respect to the Round-Trip Mailer Product. There are, however, reasons for seeking the competitive clarification that are consistent with a finding that the Postal Service does not have market power with respect to the Round-Trip Mailer Product. The competitive classification would provide the Postal Service with flexibility to deal with future changes in volume. The Postal Service has a legitimate concern about a future decline in volumes due to recent trends, and it faces the risk of a future exodus of DVD mail, and a change in the distribution of DVD mail between flats and letters. These potential future changes would create changes in costs for which the Postal Service could respond adequately only within the context of a competitive product.

The Commission should focus its analysis of the Postal Service's Request on the issue of whether the Postal Service has market power with respect to the Round-Trip Mailer Product, and not on other parties' characterizations of the Postal Service's motives for seeking the competitive classification.

III. THE POSTAL SERVICE DOES NOT HAVE MARKET POWER WITH RESPECT TO THE DELIVERY OF ACCESS TO DIGITIZED ENTERTAINMENT CONTENT, AND IT FACES INTENSE COMPETITION FROM OTHER DELIVERY METHODS.

A. The Relevant Market for Purposes of this Docket Is the Market for Access to Digitized Entertainment Content.

The Postal Service described the relevant market for purposes of this docket in its earlier pleadings.¹⁷ GameFly's focus on "product" and "downstream" markets injects unnecessary complexity into the Commission's analysis.

¹⁷ United States Postal Service Reply to Comments, PRC Docket Nos. MC2013-57, CP2013-75, at 10-20 (August 22, 2013).

Consumers access digitized entertainment content, including video and video game content, through numerous channels, including rental services offered by GameFly, Netflix, Redbox, and other firms (“rental service firms”), and purchases from Amazon, Best Buy, and other firms (“retail sales firms”). The rental service firms compete with each other, the retail sales firms, and other similar firms for consumers’ business. Two important inputs for the business of providing access to digitized entertainment content are access to content and delivery of that content to consumers.

Access to digitized entertainment content is available from a number of sources, including movie and television studios, video game developers, intellectual property rights holders, and content distributors. These firms compete with each other to provide content to rental service firms, retail sales firms, and other similar firms (collectively “ADEC Competitors”). One method of competition for GameFly, Netflix, Redbox, Amazon, Best Buy, and other competitors is the differentiation of entertainment content. For example, these firms need to determine whether to offer customers video DVDs and Blu-Ray discs and/or video game DVDs, and whether to offer entertainment content from only one studio or source or from multiple sources.

Delivery service is secured from numerous competing firms and channels, including mail delivery, kiosk delivery, retail delivery, and streaming delivery. These firms and channels have different costs and advantages, and they compete with each other to provide delivery service to ADEC Competitors. For example, ADEC Competitors that utilize mail delivery incur the cost of rates and the cost of developing internal processing operations that enable mail delivery; ADEC Competitors that utilize kiosk delivery incur the cost of rent for a kiosk location and the cost of the kiosk; ADEC

Competitors that utilize retail delivery incur the cost of employees and the cost of rent for the retail location; and ADEC Competitors that utilize streaming delivery incur the cost of digital licensing fees and the cost of establishing IT network operations that enable streaming. In addition to the collection of content, the type of delivery utilized by ADEC Competitors is another aspect in which these firms compete, and ADEC Competitors must decide which delivery methods to utilize.

To be effective, ADEC Competitors must make efficient choices regarding their inputs, including content and delivery, and maintain the flexibility necessary to compete as competitive markets expand. For example, Amazon responded to competitive market conditions by expanding its content from books to other products, and Netflix responded to changing market conditions by adapting its business model to multiple forms of delivery (mail and streaming). By advocating for an unnecessarily narrow definition of the relevant market for the Round-Trip Mailer Product, GameFly seeks to protect itself from the evolving competitive market and avoid the innovation and flexibility necessary to compete effectively. The harm identified by GameFly – the potential for an increase in postage – would affect itself as a single competitor, but not to competition in the relevant market as a whole. GameFly’s competitors have acted reasonably in taking action to maintain flexibility and protect itself from negative conditions affecting a single method of delivery. For example, Netflix utilizes mail and streaming delivery options, and Redbox delivers access to digitized entertainment content through kiosks and streaming.¹⁸ To a lesser extent, GameFly’s purchase of Direct2Drive reflects recognition of the importance of multiple delivery options for

¹⁸ Redbox’s collaboration with Verizon to offer streaming demonstrates how ADEC Competitors can expand their delivery options in the short-term. <http://www.redboxinstant.com/welcome/>

competition in the relevant market. ADEC Competitors will continue to utilize multiple delivery channels, and have the flexibility to use mail delivery when it is most efficient.

Differences in content offered through different channels reflects business decisions regarding the most efficient methods of delivery. Access to most types of digitized entertainment content can be provided through all delivery channels. Mail, streaming, kiosk, and cable compete for delivery of all content, but each delivery method is more efficient for different content. Competition will continue, and as delivery methods become more efficient, the distribution of content among delivery methods will change. For example, it is possible that the development of technology that enables time-limited access to streamed and downloaded digitized entertainment content¹⁹ could lead to the reduction in licensing fees, making streaming and downloading less costly for newer content. In addition, overall kiosk size and kiosk space allocation to video games is adjustable to account for changes in competitive market conditions.

GameFly's insistence that the relevant market for purposes of this docket be limited narrowly based on the method of delivery conflicts with the recognition of broader markets revealed through historical innovation. Just like buggy whip manufacturers considered their relevant market the horse and buggy industry rather than the personal transportation industry, GameFly considers it relevant market to be the DVD-by-mail industry rather than the access to digitized entertainment content industry.²⁰ The recognition of more expansive markets is even more appropriate today,

¹⁹ For a description of limited-time rentals available from Amazon, see <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000739191>.

²⁰ See generally Levitt, Theodore, *Marketing Myopia*, Harvard Business Press (1960).

with the increase in technological innovation enabled by the Internet.²¹ GameFly's reasons for viewing Postal Service delivery and other methods of delivery as non-substitutable address limitations based on GameFly's business decisions, and not on consumer preferences. GameFly's perception of its relevant market is inconsistent with the conventional understanding of market definition, and if accepted by GameFly, could lead it to the same fate as the buggy whip.

B. Consumers View Delivery of Access to Digitized Entertainment Content through the Mail and Delivery of Access to Digitized Entertainment Content through Other Methods as Interchangeable Substitutes and as Competing Services.

The evidence presented by the Postal Service demonstrates that customers view digitized entertainment content delivered through the mail, streaming, kiosks, and other delivery methods as interchangeable and substitutable.²² GameFly attempts to exclude this unavoidable fact from the Commission's analysis by characterizing the competition recognized by customers as "downstream" or "product" competition. GameFly Supplemental Comments at 5-13. But whether the competition recognized by customers is characterized as "downstream," "product," or some other form of competition, the concept is the same – firms that provide access to digitized entertainment content through mail delivery compete with firms that provide access to

²¹ See Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermine the Antitrust Case Against Google*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES (2013), <http://jolt.law.harvard.edu/antitrust/articles/ManneRinehart.pdf> (discussing potential assumptions regarding the relevant market for the FTC's investigation of certain Google activities regarding search functions and advertising). On January 3, 2013, the FTC announced its decision to close the portion of its investigation relating to "allegations that Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results. Statement of the Federal Trade Commission Regarding Google's Search Practices, *In the Matter of Google Inc.*, FTC File Number 111-0163 (January 3, 2013), <http://ftc.gov/os/2013/01/130103googlesearchstmttoftcomm.pdf>.

²² See Postal Service Reply, Attachment A (Declaration of Mark Schoeman).

digitized entertainment content through other forms of delivery, and consumers seeking access to digitized entertainment content view different methods of accessing this content as interchangeable substitutes even if they utilize different types of delivery. It follows that because the access provided by the different firms is substitutable, the Postal Service delivery method and other delivery methods are interchangeable substitutes.

This understanding is supported by the elements of the “product” at issue in this docket, digitized entertainment content. Digitized entertainment content is the same whether it is transmitted through a DVD delivered in the mailstream, transmitted through a DVD obtained from a kiosk, streamed through a broadband connection and an AppleTV box, streamed through a cable wire and a cable box, or delivered through some other method. Regardless of delivery method, the customer seeking digitized entertainment content seeks to watch video content or play video game content on the same screen.

The consumer behavior described by GameFly indicates that consumers view access to digitized entertainment content delivered through the mail and other methods as interchangeable and substitutable. Specifically, GameFly describes customers “who have already abandoned DVD-by-mail for content distribution via the Internet or Redbox” as excluded for the relevant market in this docket. GameFly Supplemental Comments at 28. But as recognized by GameFly, this shift in consumer behavior “almost tautologically ‘proves’ that the Internet and Redbox kiosks compete with DVDs-by-mail as distribution channels.” *Id.* This example shows that consumers who once obtained access to digitized entertainment content through mail delivery discovered that

they could obtain that access through competitors, even if they used different forms of delivery. Similarly, consumers who currently receive access to digitized entertainment content through DVDs delivered by mail might decide in the future to receive access through another form of delivery, either because of a change in their personal circumstances, a change in technology, or a simple change in preferences. GameFly has not supported its claim that no similar future abandonment will occur.

The *Whole Foods* case cited by GameFly does not support the market proposed by GameFly in this docket. This case considered the existence of a submarket involving competition among multiple competitors. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1032-1033 (D.C. Cir. 2008). GameFly seeks to define a market as limited to a single firm, itself, where interbrand competition is limited or nonexistent. As explained in the Postal Service's earlier pleadings, a market cannot be defined to include a single firm. United States Postal Service Reply to Comments, PRC Docket No. MC2013-57 (August 22, 2013) at 18-19. And, the "antitrust laws' primary purpose is to protect interbrand competition." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007). Thus, the market proposed by GameFly does not share the same characteristics as the market adopted in *Whole Foods*, and inconsistent with the purposes of antitrust law.

[Begin Proprietary]

[End Proprietary]

C. GameFly's Assertion that It Would Be Forced to Absorb any Increase in Postal Service Rates Indicates that the Relevant Market Includes Firms that Provide Access to Digitized Entertainment Content but Do Not Deliver Access through the Postal Service.

GameFly contends that it would be forced to absorb any increase in Postal Service rates. Supplemental Declaration of David Hodess, PRC Docket No. MC2013-57 at 2 (September 12, 2013). This contention is inconsistent with its narrow definition of the market as limited to customers who obtain access to digitized entertainment content through DVDs delivered by the Postal Service, and supports the broader relevant market recognized by the Postal Service and customers of GameFly and its competitors.

Repeatedly, GameFly contends that a core group of customers does not view access to digitized entertainment content provided through streaming, downloads, kiosks, and other delivery methods as a substitute for access to digitized entertainment content provided through the mail, and that this core group defines the relevant market for purposes of this docket. GameFly Supplemental Comments at 4, 28, 31, and 36. GameFly's theory regarding the relevant market in this relies upon its position that the core group of customers in its hypothetical market access digitized entertainment content only through DVDs delivered by the mail. *Id.* at 31-48. GameFly asserts that only the Postal Service offers this method of delivery. *Id.* at 6. If GameFly's theory about the need to absorb any Postal Rate increase was true (and it is not), then GameFly and Netflix would have market power and they could pass on any Postal Service rate increase to their customers. According to GameFly, the core group of customers that compose the relevant market have no substitutes for DVDs delivered by the Postal Service. *Id.* at 31-48. Even if GameFly and Netflix had competitors who

offered access to digitized entertainment content through the Postal Service, they would be subject to the same Postal Service rates as GameFly and Netflix.²³ Thus, if GameFly passed through Postal Rate increases to these customers, the customers could obtain access to digitized entertainment content only by paying the increased prices.

The cases cited by GameFly do not apply to the issues considered in this docket for a number of reasons. First, the “downstream” competitors in the *Coal Exporters* case were subject to a price cap that prevented them from passing on any rate increase from the railroads to the coal shippers’ customers. *Coal Exporters Ass’n of U.S., Inc. v. U.S.*, 745 F.2d 76, 92 (D.C. Cir. 1984). GameFly is not subject to a price cap for its services and, according to GameFly’s definition of the market, GameFly’s customers are captive to the Postal Service. Thus, GameFly does not face a constraint on its prices like the coal shippers in the *Coal Exporters* case.

Second, all of the “downstream” competitors in the *Coal Exporters* case used the same delivery method – railroads. Here, the “downstream” competitors that compete with GameFly – firms that provide access to digitized entertainment content through streaming, kiosks, or other methods other than Postal Service delivery – utilize different delivery methods. Accordingly, the diversity of delivery methods available for consideration by the Court in the *Coal Exporters* case was narrower than in this docket.

²³ Smaller competitors such as CafeDVD and MMAVault would not qualify for the Round-Trip Mailer and thus could theoretically have access to lower rates if the Postal Service raised rates for the competitive Round-Trip Mailer Product. But if they reached the volume necessary to compete effectively with GameFly and Netflix, these firms would be subject to the same rates as GameFly and Netflix.

Similarly, the factual situation at issue in the *Telecor* case renders that case inapplicable here. In *Telecor*, a group of independent pay phone service providers alleged that a competing pay phone service provider attempted to freeze its competitors out of the market by purchasing access to “every possible pay phone location.” *Telecor Communications v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1128-1130 (10th Cir. 2002). In determining how to define the relevant product market, the court applied the standard of “reasonable interchangeability,” which it explained “does not depend upon product similarity.” *Id.* at 1131-1133. The court declined to define the market based on the perspective of the end-user, and instead defined it in terms of where the alleged anticompetitive harm occurred. *Id.* This analysis resulted in a product definition that was limited to the owners of locations for pay phones, and excluded cellular phones. *Id.* at 1130-1136.

In dissent, one judge expressed his disagreement with the majority’s conclusion regarding market definition. *Id.* at 1145. In his view, “[the] court’s holding that end-users of phone services do not matter is in considerable tension with the Supreme Court’s holdings that the relevant product market is made up of ‘commodities reasonably interchangeable by consumers for the same purposes.’” *Id.* at 1146 (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). The dissenting opinion reflected an understanding of the market as pay phone service providers providing service to end users, with the location owners providing the method of distribution. *Id.* at 1146-1147. The dissenting judge explained that, based on this understanding of the market, “the relevant product market must be defined by interchangeability of products from the perspective of consumers, not distributors.”

Finally, he recognized that “the purpose of the antitrust laws is the promotion of consumer welfare,” and that “[a]ny definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.” *Id.* (citing *Westman Com’n Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1220-1221 (10th Cir. 1986)).

The dissenting opinion is more consistent with the current understanding of market definition. See *U.S. v. Microsoft Corp.*, 253 F.3d 34, 51-54 (D.C. Cir. 2001) (rejecting proposed market definitions that did not reflect consumer views of substitutability); *PepsiCo, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243, 249-250 (S.D.N.Y. 2000) (rejecting a market confined to fountain syrup delivered through independent foodservice distributors based on consumer views regarding acceptable substitutes), *aff’d*, 315 F.3d 101 (2d Cir. 2002). When applied to this docket, the dissent’s reasoning supports the adoption of a product market that includes multiple methods of delivering access to digitized entertainment content. GameFly and the ADEC Competitors provide a service, access to digitized entertainment content, to end users, and mail, streaming, kiosks, and other channels provide methods of distribution. GameFly has admitted that it would have to absorb any postal price increases by accepting smaller margins. Supplemental Declaration of David Hodess, PRC Docket No. MC2013-57 at 2 (September 12, 2013). This indicates that GameFly customers would switch to substitutes in response to a price increase by GameFly, and suggests that consumers view GameFly and ADEC Competitors as competitors in the same market.

Like the example of the buggy whip cited above, the *Telecor* case provides another example of past tendencies to define markets too narrowly and past failures to recognize competition in broader markets and from unconventional sources. Five years after the *Telecor* decision, the iPhone was introduced, greatly accelerating, along with comparable offerings, the movement from landline to wireless communication. The consequences for pay phones were devastating. Where there were two million payphones across the country around the turn of the century, there are only about 500,000 today.²⁴ It is questionable whether the circumstances underlying the *Telecor* decision obtain anywhere today, and whether the Court would define the market as narrowly as it did if it was aware of future events.

D. The Postal Service Has Demonstrated that the Round-Trip Mailer Product Would Face Competition from Numerous Substitutes.

1. The Schoeman Declaration identifies numerous alternative methods of delivering access to digitized entertainment content.

Gamefly's counsel begins with an unwarranted attack on the credibility of Mr. Schoeman. This argument addresses not the substance or value of the information presented in his report, but instead his background. GameFly seeks to compare Mr. Schoeman to its own CEO by touting Mr. Hodess's years in the industry as if that were the only qualification necessary for a witness speaking to the position of the overall market. GameFly simultaneously maligns Mr. Schoeman (and Mr. Chiang, author of the IBIS report), stating, "[n]either individual is employed by a firm that engages in the sale or rental to consumers of DVDs or any other form of 'digital entertainment content.' Rather, the two individuals, and their employers, earn their livings by writing reports on

²⁴ American Public Communities Council, Inc. website, <http://www.apcc.net/i4a/pages/index.cfm?pageid=40>.

other people's businesses."²⁵ Though presented as a slight to these two professionals, this is instead one of their most important assets. As an outside company with no stake in the current proceedings, they are best suited to give an accurate and unbiased view of the industry and the competitiveness of the market as a whole. They are able to honestly assess the strength of GameFly's business model as well as the role of competitors without their view being clouded by a conscious effort to uphold the reputation of GameFly, or an unconscious impulse to defend the results of years of their own labor.

The purpose of the declaration is to identify alternative delivery methods, not to address issues concerning economics, antitrust law, market definition, or elasticities. As a result, market research firms are much better suited to assess the industry and substitutability than someone in the market who has had experience mainly with only one specific delivery method. Furthermore, both of these professionals work for established, well-regarded firms that specialize in the assessment of markets, which is exactly what the Commission is attempting to do in these proceedings. GameFly, on the other hand, makes no effort to look for a second evaluation of the market and simply asserts Mr. Hodess's opinion as fact. In an attempt to discredit the information that Mr. Schoeman cites, GameFly simply attacks the author of the IBIS report. IBIS is an internationally recognized company that has been in the business of providing market research for decades. As a firm whose business depends on the accuracy of its information, it should be apparent to Mr. Hodess that IBIS would naturally exercise editorial control over any publication in order to ensure quality. Simply criticizing the

²⁵ Gamefly Comments at 20 (emphasis in original).

age of the author is a frivolous argument. Mr. Hodess's criticisms of Mr. Schoeman's report reflect his clear bias and GameFly's overall distorted picture of what competition the company truly faces.

First, Mr. Hodess criticizes Mr. Schoeman's assertion that Massive Multiplayer Online (MMO) gaming is growing in popularity. Mr. Hodess's singular focus on one example (*World of Warcraft*) overlooks that similar, competitive titles including online, free-to-play MMOs are thriving, showing that competition among these various types of media is strong. This fact supports both the proposition that the market for such games is strong, but also that casual, console, and PC games are all close competitors, a fact that Mr. Hodess also disputes.

Mr. Hodess claims that Gamestop's Impulse service was shut down,²⁶ which it was not; it appears to have simply been re-named. As of September 19, 2013, the website was still accessible and offering video games for purchase.²⁷ The site includes a number of newly released titles that are also offered and prominently displayed by GameFly, such as *Saints Row IV*. Additionally, Impulse has a section of "upcoming" games, similar to GameFly, that are as yet unreleased but will be offered in the future, indicating that the service has no plans to cease activity or stop offering new titles.²⁸

Mr. Hodess alleges that there is a distinct difference between the casual game market (e.g., Kongregate) from the console and PC game markets.²⁹ This is another

²⁶ Hodess Declaration point 48.

²⁷ Gamestop PC Downloads, <http://www.impulsdriiven.com> (last visited Sept. 19, 2013).

²⁸ Gamestop PC Downloads, sorted by "Coming Soon," <http://www.impulsdriiven.com/explore/games/availability;preorder?om=csoonmore> (last visited Sept. 19, 2013).

²⁹ Hodess Declaration point 48.

instance of Mr. Hodess winnowing down the definition of the relevant market so narrowly that there's really only one actor left: GameFly. GameFly's own website describes its own PC title offerings as "everything from mega-hit games like Assassin's Creed to *casual titles* like World of Goo."³⁰ To claim that such casual gaming is a completely separate market while simultaneously offering the same content is deceptive at best.

Mr. Hodess dismisses some competitors, such as Gaikai, OnLive, Ciinow and G-cluster, as not commercially viable.³¹ What GameFly fails to recognize is that there is an important difference between absence of competition and expensive but improving competition. Gaikai, for example, was recently acquired by Sony and their services are being directly integrated into the new Playstation 4 console.³² The fact that such an established leader in the gaming industry would invest so heavily in this technology is a clear sign of its viability.³³ Claiming that the technology is not currently a strong competitor may offer GameFly a momentary excuse, but the Postal Service must consider future market developments when classifying new products. To dismiss them so easily shows that GameFly is blinded with regard to how much competition it truly faces and the trouble that the business will face in coming months. Additionally, Mr. Hodess has implicitly acknowledged that, if these services carried more titles or

³⁰ Gamefly "Unlimited PC Play" description, <http://www.gamefly.com> (last visited Sept. 19, 2013).

³¹ Hodess Declaration point 48 (emphasis added).

³² Mike Snider, *Sony Acquires Online Company Gaikai for Cloud Game Strategy*, USA TODAY, July 2, 2012, <http://usatoday30.usatoday.com/tech/gaming/story/2012-07-02/sony-gaikai-streaming-games/55989860/1>.

³³ Josiah Renaudin, *PS4 Expected to Dominate Console Market by 2018, Hold 55% Market Share*, Gameranx.com, Sept. 12, 2013, <http://www.gameranx.com/updates/id/17367/article/ps4-predicted-to-dominate-console-market-by-2018-hold-55-percent-share>.

made other changes unrelated to their streaming delivery method, they would be competitors to GameFly, showing that he recognizes that his company is in the same market as downloadable and streaming games.

Mr. Hodess claims that Mr. Schoeman doesn't understand the particular terms "cloud gaming" and "streaming" by selectively editing quotes and cherry-picking examples.³⁴ He ignores, for example, the context in many of the quotes that are discussing both games and video or even entertainment media in general, which all use different terminology. He also appears to ignore the section titled "Cloud/Streaming services,"³⁵ which clearly uses the terms interchangeably. Mr. Hodess's semantic distinctions do not amount to an actual challenge to the clear conclusions drawn by Mr. Schoeman's expert report.

Mr. Hodess' final point about Twitch is irrelevant, as it was corrected prior to his comments in the errata filed September 5, 2013.³⁶

GameFly's comments further allege that the availability of video games through streaming or downloading from the Internet proves nothing about their substitutability for DVD-by-mail.³⁷ Given how significantly Netflix's business has expanded into the streaming video market, one wonders whether Mr. Hodess would say the same about video streaming. Indeed, the issues he raises (need for a fast internet connection, licensing of the media product, etc.) are also applicable to video but that has done nothing to slow the meteoric rise of streaming and downloadable video services.

³⁴ Hodess Declaration at ¶ 48.

³⁵ Schoemen Declaration at 5.

³⁶ United States Postal Service Notice of Errata to Reply Comments, PRC Docket Nos. C2009-1R, C2013-75, & MC2013-57 (Sept. 5, 2013).

³⁷ Gamefly Comments at 37.

GameFly also notes that expanding into that market would require significant investment, suggesting that market entry would be nigh-impossible. This contention ignores the fact that Netflix, Hulu, and Amazon have already done so for video, that Sony has already invested large amounts into its new streaming game service, and that companies like Steam, which sells more than half of all digital games, are well established in the marketplace. GameFly's inability to raise capital to expand into growing sectors of the market does not hinder other competitive businesses.

GameFly's complaint makes a number of mistakes in assessing the competition offered by downloadable games. First, the complaint states "the file size of many console games causes very long downloading times, creates storage problems, and *requires the use of a PC with above average processing power.*"³⁸ A company that is well-versed in the world of gaming should understand, however, that download times and file sizes are all very dependent on the specific game as well as the connection of the user. What is more, the most egregious claim, that it requires the use of a PC, is outright false. The major consoles (Nintendo Wii and WiiU, Xbox 360, and Playstation 3) all allow and support direct downloading of games from their respective Internet marketplaces directly to the console, and often at a lower cost than buying a physical copy. Nintendo offers both modern and classic games through its virtual console service;³⁹ Microsoft offers games downloadable through its Xbox Live Marketplace including games that are not released on physical disks;⁴⁰ and Sony offers games

³⁸ Gamefly Comments at 38 (emphasis added).

³⁹ Nintendo Virtual Console Store, <http://www.nintendo.com/wii/enhance> (last visited Sept. 19, 2013).

⁴⁰ Xbox Live Marketplace, <http://marketplace.xbox.com/en-US> (last visited Sept. 19, 2013).

through its Playstation Store.⁴¹ None of these services require use of a PC, a fact of which GameFly must surely be aware.

GameFly attempts to rebut Mr. Schoeman's claim that consumers do not need expensive specialized equipment to play streamed games, calling it "uninformed."⁴² GameFly further claims that for the two to be comparable, the computer must be hooked up to a TV (despite the fact that computers have monitors) and must use a special wireless controller (despite the fact that PC games are designed to use a keyboard and mouse as controller). Finally, GameFly asserts that the number of titles available for PCs is limited because it requires recoding. This statement is deliberately misleading; the selection of PC games is actually much wider than the number of those available for video game consoles. The Playstation 3 has 793 games, the Xbox 360 platform has 958 games, and the Nintendo Wii has 1222 games. Furthermore, many of these numbers overlap: for example, 635 of the 793 games available for the Playstation 3 were "multiplatform" games, meaning they are also available on other consoles or on the PC. This pales in comparison to the number of PC games available: there are 1161 titles for PC *just beginning with the letter A*.⁴³ For GameFly to assert that PC titles are limited is a gross mischaracterization of the market.

GameFly asserts a number of other claims related to the size of games, the speed of Internet bandwidth, and other technical considerations that have an impact on the market for downloadable games. The Postal Service notes that, like all business

⁴¹ Playstation Store, <http://us.playstation.com/psn/playstation-store/purchasing/index.htm> (last visited Sept. 19, 2013).

⁴² Gamefly Declaration at 39.

⁴³ IGN List of All PC Game Titles, <http://www.ign.com/games/pc?sortBy=title&sortOrder=asc&startIndex=1200> (Sept. 12, 2013).

models, digital game distribution is affected by external factors, but the results of the industry speak for itself. Digital distribution companies like Steam are thriving, and console manufacturers are following suit by integrating new consoles more closely with online markets. A report from market research group DFC predicted that the market share of digital distribution could jump to 66 percent of the market for all games by 2017.⁴⁴

Finally, GameFly assesses the various streaming game companies, finding ways to dismiss each as being unsupported, unpopular, or unproven, including its own Direct2Drive program. GameFly seeks to show the unpopularity of that entire method of delivery using its own product as an example. GameFly claims that, “[i]ndeed, only 6.5 percent of current GameFly DVD-by-mail subscribers have ever bought a PC download game from GameFly,”⁴⁵ while neglecting to mention that Direct2Drive only has roughly 5 percent of the market share for digital distribution.⁴⁶ The various claims about the other market actors have been discussed at length and need not be reiterated. It is, however, notable that GameFly goes to such lengths to dismiss its potential competitors. GameFly dismisses any prospect of their success as “speculative,” and then cites predictions of failure as though they are fact. For those companies that have a proven track record of success, like the Xbox Live Marketplace or Steam, GameFly simply claims that they are not suitable substitutes with little explanation of why. GameFly also includes a survey of cancelling members of their service in which

⁴⁴DFC Intelligence, “DFC Intelligence Reports Video Game Software Revenues to grow to \$70 Billion by 2017”, <http://www.dfcint.com/wp/?p=338> (June 5, 2012).

⁴⁵ Gamefly Comments at Pg. 42

⁴⁶ Schoeman Declaration at Pg. 5

relatively few participants mentioned using downloadable or online games. This limited survey ignores large swathes of the population, like those who use both services, or those who have forgone purchasing a console in favor of a more powerful PC, or those who never signed up for GameFly's services because of available alternatives. The surveyed population reflects only a narrow sliver of the entire market and should hardly be used as any proof that there is little substitutability between products.

2. Evidence regarding the price elasticity of demand for the First-Class Mail class does not demonstrate the elasticity of demand faced by the Round-Trip Mailer Product.

In this docket, the Commission has not received a calculation of price elasticity of demand for the Round-Trip Mailer Product. Elasticity offers one basis for determining whether multiple products or services are reasonably interchangeable, and thus part of the same market, but there are other bases for this determination, including consumer views regarding whether different products and services are interchangeable substitutes. In this case, because there is no calculation of the price elasticity of demand for the Round-Trip Mailer Product, the Commission's determination of the relevant market should be based on other information submitted by the parties, including customer views regarding the substitutability of access to digitized entertainment content delivered through different methods.

GameFly submits data regarding the elasticity of First-Class Mail as a whole. GameFly Supplemental Comments at 13. It also submits data regarding the elasticity for categories of First-Class Mail used for DVDs. *Id.* at 13-14. But it does not submit data on the elasticity of demand for the Round-Trip Mailer Product.

As recognized in an article co-authored by A. Thomas Bozzo, an economist of the firm Christensen Associates,⁴⁷ some subclasses within First-Class Mail face elastic demand. Bozzo, A. Thomas, Kristen L. Capogrozzi, B. Kelly Eakin, John Pickett and Mithuna Srinivasan, “Is Demand for Market Dominant Products of the United States Postal Service Becoming More Own Price Elastic?” (May 30, 2013) at 7. The data submitted by GameFly does not demonstrate that the price elasticity of demand for the Round-Trip Mailer is elastic or inelastic. Specifically, the data regarding the elasticity of demand for categories of First-Class Mail used for DVDs does not reflect the elasticity of demand for the Round-Trip DVD Mailer Product because most of the mail included in the categories cited by GameFly is not eligible for shipment through the Round-Trip Mailer Product.

Because the Commission does not have data regarding the price elasticity of demand for the Round-Trip Mailer Product, the Postal Service’s identification of numerous alternative methods of delivering access to digitized entertainment content is the most compelling evidence retarding the numerous substitutes for the Round-Trip Mailer Product, the high degree of competition facing the Round-Trip Mailer Product, and the Postal Service’s lack of market power regarding this product.

E. The Purchase of Access to Digitized Entertainment Content Is a Substitute for Rented Access to Digitized Entertainment Content.

GameFly’s attempted exclusion from the relevant market of the sale, rather than rental, of access to digitized entertainment content is inconsistent with consumer views, and appears to ignore GameFly’s own business model. GameFly offers both rental and

⁴⁷ GameFly’s past reliance on the work of Christensen Associates in PRC Docket No. C2009-1 indicates that GameFly believes the work of this firm to be credible.

sale of video game DVDs. GameFly subscribers who purchase a video game from GameFly can do so after they have received a video game for rental and before they have returned that video game to GameFly. GameFly offers the sale of video game DVDs and the rental of video game DVDs to the same group of consumers, and when it rents a game to a particular consumer, it does not know whether that the consumer will remain a rental customer for the particular video game, or if it will become a sales customer for that game. This business model demonstrates the substitutability of the sale and rental of access to digitized entertainment content. GameFly subscribers who purchase a video game from GameFly have the initial intention of renting video game content and then purchase the video game content when they realize that purchase is a better substitute.

Even under GameFly's narrow definition of the market as limited to a single delivery or distribution method, the sale and rental of access to digitized entertainment content appear to reside in the same market. Video game DVDs sold by GameFly travel through the same delivery channel as video game DVDs rented by GameFly and video game DVDs sold by Amazon and other competing firms.

[Begin Proprietary]

[End Proprietary]

IV. THE POSTAL SERVICE COST EVIDENCE SUBMITTED IN THIS DOCKET DEMONSTRATES COMPLIANCE WITH THE REQUIREMENTS OF SECTION 3642 AND SHOULD BE CONSIDERED BY THE COMMISSION.

The Postal Service submitted cost data to demonstrate compliance of the Round-Trip Mailer Product with the cost coverage requirement. GameFly challenges the use of this data in this docket because of not only its accuracy, but also because no party has challenged whether the Round-Trip Mailer Product will cover its costs. GameFly Supplemental Comments at 54. The Postal Service has addressed GameFly's concerns regarding the accuracy of the data. See Postal Service Reply, Attachments B (Declaration of Virginia J. Mayes) and C (Declaration of A. Thomas Bozzo). Contrary to GameFly's position, the absence of any challenge to cost coverage does not eliminate the Postal Service's obligation to demonstrate compliance with the cost coverage requirement.

Finally, GameFly submits a vague, unsupported accusation that the Postal Service intends to use the cost data submitted in this docket for some other purpose, and that serves as a basis for excluding it. GameFly Supplemental Comments at 55. The cost coverage data submitted by the Postal Service is relevant to this docket, and GameFly has offered no evidence that the Postal Service intends to use it for some purpose, or that it should otherwise be excluded.

Conclusion

For the reasons stated above, the Commission should approve the Postal Service's Request.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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