

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

COMPETITIVE PRODUCT LIST)	Docket No. MC2013-57
ADDING ROUND-TRIP MAILER)	
COMPETITIVE PRODUCT PRICES)	Docket No. CP2013-75
ROUND-TRIP MAILER (MC2013-57))	

**MOTION OF GAMEFLY, INC., FOR
OPPORTUNITY TO COMMENT ON JANUARY 17, 2014,
RESPONSES TO CHAIRMAN'S INFORMATION REQUESTS**

(December 24, 2013)

Pursuant to 39 C.F.R. §3001.21(a), GameFly, Inc. ("GameFly") requests that the Commission allow the parties to this proceeding to comment on the responses, currently due on January 17, 2014, to Chairman's Information Requests 1 through 3 to the USPS (issued December 18, 2013). In support of this motion, GameFly respectfully states:

1. This is an unprecedented case. It is the first in which the Postal Service seeks to have a market-dominant mail category reclassified as competitive despite the absence of any alternative point-to-point service from a private carrier such as UPS or FedEx. And it is the first case that relies solely on competition between the *mail matter* carried by the Postal Service and goods and services offered by third parties through the Internet or self-service retail stores.

2. The Commission has recognized the novelty and precedential importance of the Postal Service's proposal. In Order No. 1827, the Commission granted GameFly's request to allow the parties to respond to the Postal Service's Reply Comments (and for the Postal Service to respond, in turn, to further comments filed by GameFly or other parties). Order No. 1827 at 14. The Commission reached this conclusion "[i]n light of the complexity and novelty of the issues raised by the Postal Service's Request, and their potential application in important future dockets." *Id.* at 13. The Commission added that it would "evaluate whether further proceedings consistent with 39 C.F.R. § 3020.35 are necessary" after reviewing the comments and Postal Service response, *id.* at 13, and would "take such further action as it deems appropriate pursuant to 39 C.F.R. § 3020.34." *Id.* at 15.

3. The December 18 Information requests appear to reflect a judgment by the Commission that the record is still insufficient to justify the approval of the proposed reclassification proposal without more information on the competitive issues it raises.

4. The Information Requests do not provide any opportunity for any party to respond to the new information that the Commission has asked other parties to submit on January 17. If any new and relevant information is submitted, however, due process entitles other parties to have an opportunity to respond to it. As the Postal Rate Commission explained in 1979:

An adequate opportunity to rebut an opponent's case by evidence of one's own has always been considered a requirement of due process. *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio*, 301 U.S. 292,

301-303 (1937); *Northeast Airlines, Inc. v. CAB*, 345 F.2d 484 (1st Cir. 1965), *cert. denied sub nom. Eastern Airlines, Inc. v. Northeast Airlines, Inc.*, 382 U.S. 845 (1965).

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts. . . Davis, *Admin. Law Treatise*, § 7.02 (1958).

Order No. 280, Docket No. MC78-1, *Parcel Post Proposal, 1978* (May 18, 1979) at 27 n. 2.

6. The importance of an opportunity for rebuttal is heightened by the likelihood that the parties' January 17 responses to the Information Requests will take divergent positions on disputed material issues of fact. For example, Questions 3 and 4 of Information Request No. 1, and each of the questions in CHIR No. 2 and No.3, seek information bearing on the costs, usage and substitutability of various channels by which electronic media can be delivered.

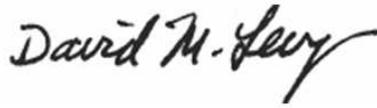
7. The importance of an opportunity for rebuttal is further heightened by the far-reaching consequences of the requested product transfer. Reclassifying round-trip DVD mail as a competitive service would effectively exempt its prices from maximum rate regulation by the Commission under 39 U.S.C. § 3622. *Compare* 39 U.S.C. §§ 102(8) and 102(9).

8. Accordingly, GameFly requests that the Commission allow each party to respond to the information produced by other parties in response to the information

requests. Because much of the information solicited by the three information requests is commercially sensitive, and therefore likely to be filed under seal, GameFly proposes the following procedural schedule:

Filing	Due Date
Motions under 39 C.F.R. § 3007.40 for access to nonpublic material filed on January 17, 2014.	January 24, 2014
Comments responding to material filed by other parties on January 17, 2014	30 days after commenting parties gain access to nonpublic material

Respectfully submitted,



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