

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman;
Robert G. Taub

Competitive Product List:
Adding Round-Trip Mailer

Docket No. MC2013-57

**COMMENTS OF NETFLIX, INC.
SUBMITTED PURSUANT TO ORDER NO. 2011**

(March 21, 2014)

Netflix, Inc. (Netflix) submits these Comments pursuant to Order No. 2011.¹ We address the following issues raised by the parties' Responses to the Chairman's Information Requests of December 18, 2013 (CHIRs), submitted January 16 and 17, 2014:²

1. CHIR No. 1, Question 5: Netflix agrees with the Postal Service that the Round-Trip Mailer category on the Market-Dominant side would no longer exist if it were transferred to the Competitive Product side. However, the Postal Service's Response does not suggest closing off future use of the generic First-Class letter product to send DVDs so long as the prohibition

¹ Order No. 2011, Order Establishing Comment Dates, Docket No. MC2013-57, March 7, 2014.

² Response of the United States Postal Service to Chairman's Information Request No. 1, Docket No. MC2013-57, January 17, 2014; Answers of GameFly, Inc. to Chairman's Information Request No. 2, Docket No. MC2013-57, January 17, 2014; Answer of GameFly, Inc. to Chairman's Information Request No. 1, Question 5(c), Docket No. MC2013-57, January 17, 2014; and Response of Netflix Inc. to Chairman's Information Request No. 3, Docket No. MC2013-57, January 16, 2014 (portions of responses were submitted under seal). Unless otherwise indicated, all pleadings cited herein were filed in Docket No. MC2013-57.

against discrimination is honored and all applicable specifications are met. Nor would the generic First-Class letter rate constrain in any meaningful way the rate of the Competitive Round-Trip Mailer (RT Mailer).

2. CHIRs No. 1, 2, and 3, Question 4: Other than the disputed Declaration of Mark Schoeman and IBISWorld Industry Report,³ the Postal Service has not conducted any “surveys, studies [or] analyses” showing that the competitive pressures of the digital marketplace would function effectively to limit the market power of the Postal Service in pricing the RT Mailer. The Postal Service has thus failed to show that its market power is limited, as required by 39 C.F.R. §3020.32(d). The Commission should require a much stronger record to support a finding of digital competition because of the far-reaching precedential effect such a finding might have.

3. CHIRs No. 2 and 3, Questions 2 and 3: The responses show that the RT Mailer is not used to deliver merchandise, as the USPS has contended in support of its argument that DVDs are not covered by the postal monopoly. To determine whether DVDs are exempt from the Private Express Statutes,⁴ as required by 39 U.S.C. §3642(b)(2), the Commission must address certain threshold questions that involve the scope of the postal monopoly.

I. THE COMMISSION SHOULD NOT BAR MAILERS FROM SENDING DVDS AT SOME FUTURE TIME USING THE GENERIC FIRST-CLASS LETTER CATEGORY; THOSE MAILPIECES WOULD BE PROCESSED LIKE ORDINARY LETTERS ON AUTOMATION AND WITHOUT DISCRIMINATION.

In Question 5 of CHIR No. 1, the Commission asked “whether DVD customers eligible for the [proposed] Round Trip Mailer product will also be able to send DVDs round-trip via First-Class Mail.” In its response, the Postal Service clarifies that if the RT Mailer product is transferred to the Competitive Products list, “there would be no market-dominant round-trip

³ United States Postal Service Reply Comments, Attachment A: Declaration of Mark Schoeman, Docket No. MC2013-57 (August 22, 2013); USPS-LR-MC2013-57/NP6: IBISWorld Industry Report, Docket No. MC2013-57 (August 26, 2013).

⁴ See 18 U.S.C. §§1693-1696 and 39 U.S.C. §§601-606 (PES).

mailer product.” That is, the remedial “market-dominant round-trip” category, now housed in First-Class, would no longer exist. Netflix agrees.

This response, however, leaves undisturbed the basic generic letter offerings in First-Class,⁵ with their associated regulations. The Postal Service does not suggest closing off future use of these offerings to send DVDs, nor could it do so legally under the Filed Rate Doctrine and the prohibition against discrimination.⁶ Qualifying pieces containing DVDs could thus be sent as generic First-Class letters, so long as the prohibition against discrimination is honored; these pieces would be processed on automation.

GameFly also responded to Question 5 of CHIR No. 1. GameFly’s response, however, assumes that “the Postal Service [would] continue[] to provide high levels of manual processing to Netflix DVD mail” sent as generic FCM letters, which is false.⁷ All of the scenarios GameFly develops are predicated upon this false assumption.⁸ As stated in Netflix’s Additional

⁵ “Generic First-Class Mail” consists of six categories currently designated as products. Three of these are of concern here: Presort Letters (used in the past by Netflix for outgoing pieces); Single-Piece Letters (used in the past by Netflix for return pieces); and Flats (used in the past by GameFly for all of its pieces). (The letter categories are referred to herein as “generic FCM letters.”) The First-Class Mail categories constitute the Postal Service’s basic service offering to the nation, satisfying 39 U.S.C. §404(c). All mailers meeting associated postal regulations are permitted to use these categories under the Filed Rate doctrine. See Additional Comments of Netflix, Inc. Submitted Pursuant to Order No.1827, Docket No. MC2013-57, September 11, 2013, at 4-5 (Netflix’s Additional Comments).

⁶ See Netflix’s Additional Comments at 3-5.

⁷ Answer of Gamefly, Inc. to Chairman’s Information Request No. 1, Question 5(c), Docket No. MC2013-57, January 17, 2014 (Gamefly Answer to 5(c)), at 2.

⁸ GameFly also argues that if Netflix could use First-Class and it could not, GameFly would be “depriv[ed] of the opportunity to obtain the same protection against inspection.” GameFly Answer to 5(c) at 4. However, if GameFly finds that aspect to be valuable, it continues to have access to the generic First-Class categories, just as any other mailer, and there is no reason to believe that a question of manual handling would arise. Ironically, GameFly seeks to prevent Netflix from any access to the sealed-against-inspection feature while arguing that it considers sealed-against-inspection a “valuable feature.” *Id.*

Comments, Netflix “has never maintained that it expects to receive manual culling for any future DVD mail entered as generic First-Class Mail.” *Id.* at 4.⁹

Question 5 also asked whether under certain conditions “the applicable First-Class Mail rates [would] constrain the price of the new Round-Trip Mailer product.” The answer is that no such constraint would exist. If future DVD mail were moved to the generic FCM letter category, they would be processed on automation, thus honoring the findings in the Gamefly Complaint case. Even if the Competitive RT Mailer rate were to increase over the generic FCM letter rate, a DVD mailer could not avail itself of the generic FCM product if it desired manual culling (whether to minimize breakage or for any other reason).

So long as discrimination is avoided and all MCS requirements are met – as they would be – Netflix should be free to choose which categories it purchases, just like other mailers, and, if the Competitive Product Request is granted, the Postal Service should be free to set rates for its competitive products under 39 U.S.C. §§3632-3633. Prohibiting a mailer from using generic FCM for DVDs at some future time might discourage mailers (and the Postal Service) from striving to improve the efficiency of mail processing operations. Freezing the operational status quo would inhibit innovation and interfere with the flexibility of the Postal Service and mailers to provide quick turnaround service.

Further, as noted in Netflix’s Additional Comments,¹⁰ the Commission properly found in Order No. 1807¹¹ that it would be premature to mandate that all DVDs mailers must use the RT Mailer. Since then, the rate for the RT Mailer remains the same as the rate for the generic FCM letter, and the Postal Service has not proposed to change that. Thus, the issue remains premature.

¹⁰ See Netflix Additional Comments at 3-4.

¹¹ Order No. 1807, Order on Reconsideration and Clarification, Docket No. C2009-1R, August 13, 2013 (Order No. 1807), at 11.

II. THE POSTAL SERVICE HAS NOT PRESENTED SUFFICIENT EVIDENCE TO SUPPORT ITS REQUEST; THE COMMISSION SHOULD REFRAIN FROM FINDING THAT COMPETITIVE PRESSURES FUNCTION EFFECTIVELY ACROSS THE MARKET ON THE BASIS OF THIS SPARSE RECORD.

In order to transfer a product to the Competitive Product list, the Commission must examine the market power of the Postal Service with respect to that product.¹² PRC Rule 3020.32(d) of Title 39 requires the Postal Service to provide “all supporting justification” to show that competitive pressures function across the market to effectively limit its market power. In addition to describing the market, the Postal Service must:

(d) Verify that the change does not classify as competitive a product over which [it] exercises sufficient market power that it can, without risk of losing a significant level of business to other firms offering similar products:

- (1) Set the price of such product substantially above costs;
- (2) Raise prices significantly;
- (3) Decrease quality; or
- (4) Decrease output.

This rule presents a demanding hurdle that requires specific facts and directed analyses to overcome – not blanket assertions, general industry observations, or web articles. After setting up “market power” as the focus, the rule specifies evidence on (a) elasticity (increase price “without risk of losing” significant volume), (b) volume lost to “other firms offering similar products,” (c) power to set the price “substantially above costs” and freedom to raise prices significantly, and (d) freedom to take actions that might “[d]ecrease quality” or “[d]ecrease output.”

¹² However the market is defined, it is important to keep in mind that the focus needs to be on the product in question, the RT Mailer for DVDs. The issue is whether the Postal Service has pricing freedom for this product, which goes to how senders and receivers are affected by, and respond to, price increases. That in turn depends on whether they perceive that there are close substitutes for this specific product. See, e.g., Supplemental Comments of GameFly, Inc., Docket No. MC2013-57, September 12, 2013, at 18 (“The core group of consumers who still rent DVDs by mail do not regard the ‘digitized entertainment content’ available from other channels as an acceptable substitute”). Netflix has noted that other products, even Netflix’s own streaming service, are notably dissimilar in terms of the “breadth of video titles” offered and are not considered substitutable. Comments of Netflix, Inc., Docket No. MC2013-57, August 15, 2013 (Netflix Comments), at 2.

Netflix has already addressed subsection (d)(1).¹³ The current cost coverage of the proposed product, particularly the letter part, is high enough to indicate substantial market power. The Postal Service has not rebutted this. The Commission can conclude, without going further, that the Postal Service “exercises sufficient market power, that it can [and has]... set the price of such product substantially above costs.” Rule 3020.32(d). That would end the inquiry.

Nevertheless, to clarify these matters, the Commission issued CHIR No. 1 to the Postal Service: Question 2 asked, essentially, about elasticity. The Postal Service refers to its response to Question 4. Question 3 asked for “all surveys, studies, and analyses ...from FY2003 to FY2013 ... of alternative delivery media for round-trip DVD mailers.” Again, the Postal Service refers to its response to Question 4.¹⁴ Question 4 asked for “all surveys, studies, and analyses ...from FY2003 to FY2013 assessing the changes in DVD customers’ usage of alternative delivery media for round-trip DVD mailers.” Here the Postal Service states that it “has not conducted any additional surveys, studies, or analyses related to the pricing and usage of round-trip DVD mailers, or to customers’ use of alternative delivery media,” other than the previously submitted Declaration of Mark Schoeman and IBISWorld Industry Report.¹⁵ Then, under the description of “is always monitoring,” the Postal Service makes several observations relating to recent market activity, suggesting a state of flux.

The Declaration of Mark Schoeman and the IBISWorld Industry Report, referred to by the Postal Service, constitute the only “studies” in the record in support of the Postal Service’s sweeping position that the market should be defined as “all providers of access to digitized

¹³ Comments of Netflix, Inc., Docket No. MC2013-57, August 15, 2013 (Netflix Comments), at 5-6.

¹⁴ A similar question was directed to Netflix (Question 4 of CHIR No. 3) and GameFly (Question 4 of CHIR No. 2). Netflix has no studies to provide. As would be expected, GameFly’s response shows no effective competition.

¹⁵ United States Postal Service Reply Comments, Attachment A: Declaration of Mark Schoeman, Docket No. MC2013-57 (August 22, 2013); USPS-LR-MC2013-57/NP6: IBISWorld Industry Report, Docket No. MC2013-57 (August 26, 2013).

entertainment content” and that there is effective competition in that market to satisfy Rule 3020.32(d). Gamefly has called into question the substance and credibility of those analyses¹⁶ and has presented its own evidence to rebut their conclusions (including its own declaration and analysis based on actual experience).¹⁷

Other federal agencies tasked with ruling on competition issues have required much more extensive records. GameFly has compared “the level of analysis performed by the FTC in the Office Depot/Office Max merger case, and that presented in the Postal Service’s request.” The FTC analysis “was based on a seven-month investigation of the substitutability..., including an ‘extensive’ series of econometric analyses, comparisons of prices in [multiple] markets, and ‘event studies.’”¹⁸ In another case, the FCC determined that the evidence of marketplace development was insufficient to decide whether online video was an effective substitute for cable television, pointing to the “nascent market” for online video and the industry’s state of flux.¹⁹

In contrast, the Postal Service claims that it “is always monitoring industry trends,” and provides observations and anecdotes from web articles about new products such as Steam Engine.²⁰ But these anecdotes cannot serve as the basis for a Commission decision with far-

¹⁶ See Supplemental Comments of GameFly, Inc. on USPS Proposal to Reclassify DVD Mailers as Competitive Products, Docket No. MC2013-57, September 12, 2013, at 19-26.

¹⁷ See, e.g., Supplemental Declaration of David Hodess, Docket No. MC2013-57, September 12, 2013.

¹⁸ GameFly’s Response to USPS Update, Docket No. MC2013-57, January 29, 2014, at 4.

¹⁹ Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc., Memorandum Opinion and Order, 26 FCC Rcd. 4238 (January 20, 2011), at 19, 276. See Netflix Comments at 7-8, and cases cited therein.

²⁰ In one of these observations, the Postal Service claims that a comment on investment activity in Netflix’s 10-Q Report is evidence that Netflix perceives its streaming service as a substitute for its DVD-by-Mail service. Specifically, the Postal Service notes that Netflix is “growing” its streaming business and “[shifting] spending away from the Domestic DVD segment to invest more in streaming.” USPS Response to CHIR No. 1 at Q.4, brackets in original, footnote omitted, quoting the Netflix 10-Q report. But the Postal Service misinterprets the nature of investment activity. All investors seek to identify and

reaching consequences. The Postal Service has asked the Commission to find that it competes with Internet and cable companies, kiosks and retail outlets, in the broadly defined market of “the provision of access to digitized entertainment content.”²¹ Such a finding would set the precedent that other market-dominant postal products compete in the market of the provision of access to digital content (including email, retail websites, etc.). The Commission should be wary of setting such a ground-breaking precedent on the basis of the sparse factual record in this docket (i.e., a disputed declaration and non-specific industry report, rebutted by a declaration and actual experience).

Moreover, the digital entertainment industry is constantly changing. In fact, on March 10, GameFly announced that it is entering the market for rental DVDs, placing it in direct competition with Netflix.²² This development not only underscores the fluid nature of the industry, it also gives rise to several questions about the impact of GameFly’s new line of business: (1) What increases in volume from movie DVDs do GameFly and the Postal Service project? (2) Does GameFly’s announcement render its response to CHIR No. 2 in need of updating? (3) Will GameFly use letter-size mailpieces to send movie DVDs (which the Docket No. C2009-1 record indicates are much less costly to replace if damaged or stolen²³)? (4) Will Gamefly use the 2-ounce flats mailer to include a movie DVD with a game DVD, in effect sending the movie DVD for no additional postage? Would such a scenario confer an unfair

evaluate investment opportunities, giving due consideration to risk, market trends, and other factors. For example, a newer line of business may require more investment to build up than a second, more established line. Investments that meet responsible criteria are then made. After funds are allocated, it may be possible to look back and see which areas have increased and which have declined, such as that streaming is growing and spending “ha[s] shifted ... away from the Domestic DVD segment.” But this says nothing about the substitutability of Netflix’s streaming service for its DVD-by-mail service or any purported strategy to slight the DVD-by-Mail service.

²¹ United States Postal Service Reply to Comments, Docket No. MC2013-57, August 22, 2013, at 3.

²² Notice of GameFly, Inc., Docket No. MC2013-57, March 10, 2014.

²³ See *e.g.* Joint Statement of Undisputed and Disputed Facts, Docket No. C2009-1, July 20, 2009, at 6 (“GameFly contends that a new video game DVD costs GameFly as much as \$50 to purchase,” which is much more than a movie DVD).

competitive advantage upon GameFly? (5) If GameFly finds that the 2-ounce limit on RT Mailers is inadequate, can it return to the Commission and ask for a 3-ounce limit? If not, what rate would GameFly pay for a 3-ounce flats? (6) If so, and the nature and use of the remedial provision changes, does this call for a re-evaluation of the linkage of the RT Mailer rate to the generic rate for 1-ounce First-Class letters?

This is one of the first Competitive Product proceedings under 39 U.S.C. §3642 to be strongly contested. It is likely to have far-reaching precedential effects. Before finding that the RT Mailer is a Competitive Product, the Commission should insist on a more complete showing by the Postal Service, including up-to-date studies and credible analyses, rather than anecdotes and web articles. Since Order No. 1828 put into effect the equalized rate remedy in September,²⁴ there are no longer time constraints that preclude the Commission from thoroughly examining these issues and allowing the participation of interested persons who might be affected by the precedent set in this case.

III. THE RESPONSES OF GAMEFLY AND NETFLIX CONTRADICT THE POSTAL SERVICE'S CLAIM THAT THE RT MAILER IS USED TO DELIVER MERCHANDISE; THE COMMISSION MUST ADDRESS FUNDAMENTAL QUESTIONS ABOUT THE PRIVATE EXPRESS STATUTES BEFORE IT CAN CONCLUDE THAT THE REQUIREMENTS OF SECTION 3642(b)(2) HAVE BEEN MET.

In addition to showing the lack of market power, the Postal Service must prove that the proposed Competitive Product is not covered by the postal monopoly,²⁵ which is codified in the Private Express Statutes.²⁶ The "primary basis of the [Postal Service's] analysis [is] that the DVDs contained in the mailing [are] merchandise and not letters subject to the PES."²⁷

²⁴ Order No. 1828, Order Prescribing Remedy, Docket No. C2009-1, September 4, 2013.

²⁵ 39 U.S.C. §3642(b)(2).

²⁶ See 18 U.S.C. §§1693-1696 and 39 U.S.C. §§601-606 (PES).

²⁷ United States Postal Service Response to Comments, Docket No. MC2013-57, September 23, 2013 (USPS Response), at 5.

However, GameFly's and Netflix's responses to Question No. 1 of CHIRs No. 2 and 3 show that the RT Mailer is not used to send merchandise, i.e., goods sold to customers: Netflix has no revenue at all from sales of DVDs, and GameFly generally does not use the RT Mailer to deliver sold DVDs. This makes business sense. It is unlikely a retailer selling a DVD would use a "round-trip" product, which may include the prepayment of return postage through Permit Reply,²⁸ when there are other Postal Service products available for the delivery of sold goods, such as Parcel Select.

The Postal Service's position under §3642(b)(2) directly contradicts its position under 3642(b)(1). For the PES issue, the Postal Service argues that the Commission should consider the RT Mailer as delivering the physical contents of the mailpiece, i.e., a physical DVD.²⁹ For the market definition issue, however, the Postal Service argues that the RT Mailer is delivering digital content. If the RT Mailer product is in fact a means of delivering "merchandise," then carriers such as Federal Express and UPS would be competitors of the Postal Service – not cable companies or the Internet, as the Postal Service alleges in its market definition argument. The Postal Service cannot have it both ways.

But the Commission must face a thornier question before it can conclude that the PES requirements of 39 U.S.C. §3642(b)(2) have been met. Whether DVDs are "letters" or "non-letters" rests on the validity of the underlying Postal Service regulations, cited by both the Postal Service and Netflix. Since the filing of the parties' last round of comments,³⁰ Federal Express Corporation (FedEx) filed comments on the scope of the postal monopoly³¹ to "assist the

²⁸ Netflix uses Permit Reply to prepay return postage for its Round Trip DVD Mailers.

²⁹ USPS Response at 6.

³⁰ See, e.g., Additional Comments of Netflix, Inc. Submitted Pursuant to Order No. 1827, Docket No. MC2013-57, September 11, 2013.

³¹ Federal Express Corporation Comment on the Scope of the Postal Monopoly, Docket No. MC2013-57, September 17, 2013 (FedEx Comments).

Commission in its analysis of this threshold question.”³² Raising “very fundamental claims regarding the scope of the U.S. postal monopoly law,” FedEx argues that the “threshold question” is whether “[r]eliance by both Netflix and the Postal Service on the Postal Service’s current postal monopoly regulations is misplaced because those regulations are *ultra vires* and legally void.”³³ FedEx also claims that the exemptions under 39 C.F.R. §301.1(a)(7), which are the subject of dispute by Netflix and the Postal Service, must be interpreted in light of new limitations placed on them by the recent amendment of 39 U.S.C § 601(b).³⁴

In response, the Postal Service agrees that the PES issues are “weighty” and that “other interested parties” might claim that the Commission “did not provide them adequate notice that this proceeding would serve as a forum on the post-PAEA Private Express Statutes.”³⁵ But instead of addressing the merits of FedEx’s arguments, the Postal Service argues that “discuss[ing] and consider[ing] [these issues] in this proceeding ... would only impede its timely resolution.”³⁶ That “tight timeframe for resolution” no longer exists.

But the “weighty” issues that the Postal Service seeks to sidestep cannot be avoided if the Commission is to grant the Competitive Product Request.³⁷ Even if the Commission

³² Request for Leave to File Comments of Federal Express Corporation, Docket No. MC2013-57, September 17, 2013, at 2.

³³ FedEx Comments at 1.

³⁴ 39 U.S.C. §601(b) was amended by the Postal Accountability and Enhancement Act of 2006, Pub. L. 109-435, December 20, 2006 (PAEA).

³⁵ United States Postal Service Response to Federal Express Corporation Comments, Docket No. 2013-57, September 23, 2013, at 2, 3.

³⁶ *Id.* at 2. While it is true that “a tight timeframe for resolution” existed when the Postal Service’s Response was filed on September 23, 2013, the Commission issued Order No.1828, on September 4, 2013, placing the RT Mailer into the effect on the market dominant side, removed the urgency underlying the Postal Service’s refusal to address the merits of the PES issues.

³⁷ Of course, if the Commission were to find that the Postal Service did not satisfy §3642(b)(1) (lack of market power), it could deny the USPS Request on those grounds without reaching the PES issues presented by §3642(b)(2).

determines that the RT Mailer meets the other provisions of Section 3642, it cannot transfer the RT Mailer to the Competitive Product classification without also addressing the fundamental questions of the validity of the postal monopoly regulations and interpretation of 39 U.S.C. §601(b). Many persons who are not parties in this docket may have “a vital interest in the scope of the postal monopoly law,” and should be given notice that the Commission intends to rule on these fundamental questions.

While Netflix has not responded to the substantive issues in this pleading, we demonstrate in Appendix A that the Commission cannot rule that the RT Mailer is a Competitive Product without first addressing the threshold questions raised by FedEx. Appendix A shows that a Commission determination that the RT Mailer is not “covered by the postal monopoly” under Section 3642(b)(2) necessarily entails the following findings, which Netflix opposes:

1. The Commission would have to find that the RT Mailer is not a “letter” under 18 USC §1693. In doing so, it must consider whether the postal monopoly regulations relied upon by the Postal Service are still valid after the PAEA amendment. If these regulations are not valid, then, as FedEx argues, the Commission has only an 1872 Postal Act and an 1881 Attorney General Opinion to help interpret the term “letter.” Those materials suggest that all “commercial documents” and “printed matter” (which FedEx contends include DVDs) are exempt from the PES. Mailers that send “commercial documents” and “printed matter” would be affected by this precedent.
2. The Commission would also need to determine how to apply the PES exemptions in 39 CFR §301.1, which were grandfathered through the PAEA amendment to 39 U.S.C. §601(b)(3). Netflix has reasoned that the §301.1(a)(7) exclusion of a small subset of “films” and “photographic materials” from the definition of a “letter,” means that items

which do not fall into this excluded subset, such as DVDs, must logically fall into the remaining larger set of covered, non-excluded “letters.” FedEx would interpret Section 601(b)(3) to reach the opposite conclusion. The point is that FedEx’s proposed interpretation of §601(b)(3) would apply with equal force to the other eleven grandfathered exemptions, including the one for computer programs relied upon by the Postal Service.³⁸ The Commission’s decision would affect all persons operating under these exemptions.

That such fundamental PES issues are presented for the first time in this Competitive Product proceeding is not surprising. Prior to 2006, the Postal Service promulgated its own PES regulations without input from the Commission. The 2006 Postal Accountability and Enhancement Act changed over a century of practice and “vest[ed] future rulemaking authority over the postal monopoly in the Commission, not the Postal Service. See Section 601(c).”³⁹ Moreover, Section 3642, which sets forth criteria for transfers to the Competitive Product list, explicitly requires the Commission, not the Postal Service, to determine the applicability of the PES. The fundamental PES questions raised by FedEx must be addressed in this contested Competitive Product docket and may serve as precedent for future PES disputes. The Commission should provide notice and an opportunity to comment to all interested persons.

³⁸ Although not addressed in its Comments, FedEx’s argument for a narrow interpretation of 39 C.F.R. §301.1(a)(7) based on the PAEA amendment of 39 U.S.C. § 601(b) would logically apply to all twelve exemptions under §301.1(a)(7), not just to the exemptions for “films” and “photographic materials” of Section 310.1(a)(7)(xi) and (ix). This would include the exemption for “computer programs” of Section 310.1(a)(7)(xii), which the Postal Service relies upon. The Postal Service seeks to broaden the interpretation of the “computer programs” exemption to include DVDs, despite the language of its own Advisory Opinion. FedEx’s argument would undercut the Postal Service’s argument.

³⁹ FedEx Comments at 3.

CONCLUSION

With respect to the narrow issue of access to the generic FCM letter offering, Netflix respectfully requests that the Commission not bar mailers from using, at some time in the future, generic FCM letters to send mailpieces with DVDs which would be processed just like ordinary letters.

With respect to the Competitive Product Request, Netflix contends that the Postal Service has failed to create an adequate record to support its Request. The recent responses to the CHIRs show a paucity of credible studies to support the finding that the Postal Service lacks market power. Nor has the Postal Service addressed the merits of the threshold questions posed by FedEx as to validity of the PES regulations and the interpretation of 39 U.S.C. §601(b).

There is much at stake in this proceeding. In light of the deficiencies in the current record, the Commission should deny the Postal Service's Request. Alternatively, the Commission could require that the record be supplemented and that notice be given to all persons that might be affected by the fundamental issues in this docket.

Respectfully submitted,

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NETFLIX APPENDIX A: SUMMARY OF SELECTED PES ISSUES RAISED IN MC2013-57

The purpose of these charts is to demonstrate that, whatever the merits of the various positions, the Commission cannot grant the USPS' Request, without first addressing the threshold questions of (1) the validity of the Postal Service's PES regulations, relied upon by the parties, and (2) the interpretation of 39 U.S.C. §601(b)(3) as amended by the PAEA. Both of these issues have consequences that reach far beyond this Competitive Product proceeding. (The arguments and legal support presented in these charts are necessarily abridged; more detail may be found in the participants' filings.)

Chart 1: Is a DVD RT Mailer a "letter" and thus covered by the postal monopoly?

Participant	Position	Legal Support	Threshold Question for Commission
USPS	The RT Mailer contains merchandise that has been bought and thus is not a letter. (<i>But see</i> Responses to CHIRs, which refute the claim that the RT Mailer is used for sold DVDs.)	39 CFR Section 310.1 (a)(3)	Before interpreting those regulations, Commission must consider whether postal monopoly regulations are still valid after the PAEA.
Netflix	A DVD meets the regulatory definition of a "letter" as a "message"— "any information or intelligence that can be recorded," not just on paper but on tangible objects such as "recording disks."	39 C.F.R. Sections 310.1 (a)(2) and (4)	Before interpreting those regulations, Commission must consider whether postal monopoly regulations are still valid after the PAEA.
Fed Ex	The postal regulations at 39 CFR 310 and 320, relied upon by the USPS and Netflix, are <i>ultra vires</i> ; the only basis for interpreting the term "letters" is the Postal Act of 1872 and an 1881 Opinion of Attorney General MacVeagh, which exempts "commercial documents" and "printed matter" from the postal monopoly; DVDs are more akin to those items than they are to letters.	Fed Ex quotes an 1881 opinion of Attorney General MacVeagh	If the Commission accepts Fed Ex's <i>ultra vires</i> argument, it must still decide whether commercial documents and printed matter (which could include Standard Mail advertisements) are exempt from the PES (and thus can become Competitive Products). Other interested parties should be given due process notice before the Commission reaches the conclusion that all "commercial documents" and "printed matter" are exempt from PES.

NETFLIX APPENDIX A CONTINUED

Chart 2: Should amended 39 U.S.C. §601(b)(3) be interpreted so that DVD RT Mailers are covered by the PES?

Participant	Position	Legal Support	Threshold Question for Commission
USPS	Interprets the computer programs exemption of 39 CFR Section 310.1(a)(7)(xii) to apply and does not respond to Netflix's arguments under (ix) and (xi).	39 CFR Section 310.1(a)(7)(xii) and USPS PES Advisory Opinion 85-3.	The Commission must consider whether postal monopoly regulations and the Advisory Opinions which interpret them are still legally valid after the PAEA.
Netflix	39 CFR Sections 310(a)(7)(xi) and (ix) specifically exclude certain "films" and "photographic materials" from the definition of a covered "letter"; because DVDs do not fall under these narrow exclusions carved out of the "letter" definition, they logically remain in the broader group of non-exempt letters. Nor do DVDs fall under the narrow §310.1(a)(7)(xii) exemption for "computer programs or similar procedural materials."	39 C.F.R. Section 310.1(a)(7)(ix) and (xi) and USPS PES Advisory Opinion 85-3.	Commission must consider whether postal monopoly regulations and the Advisory Opinions which interpret them are still legally valid after the PAEA.
Fed Ex	While Fed Ex does not dispute Netflix's interpretation of the <i>pre-PAEA</i> Sections 310.1(a)(7)(ix) and (xi), it argues that the PAEA amended 39 U.S.C. § 601(b)(3), not simply to codify the suspensions under §310.1 but to change how they should be applied. Thus, the fact that DVDs do not fall under the narrow "non-letter" exemptions does not necessarily mean that they are "letters."	39 U.S.C. § 601(b)(3), as amended by the PAEA; U.S. Senate Report on PAEA, cited at n.13 at 6 of Fed Ex Comments	Commission must address whether the language in 39 U.S.C. §601(b)(3) "within the scope of services described by regulations" should be given Fed Ex's interpretation. Other interested parties (including providers that operate under the other exemptions) have "vital interests" and should be given notice.