

PUBLIC VERSION

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

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 RESPONSE OF GAMEFLY,
INC., TO APRIL 4, 2014, USPS REPLY COMMENTS**
(April 24, 2014)

On April 11, 2014, GameFly filed a response to the Postal Service Reply Comments, in which it challenges the relevance of Commission precedent cited by the Postal Service, and contends that the decision in *Coal Exporters Association v. United States*¹ should control the outcome of these dockets.² As explained below, GameFly's response relies upon an inaccurate analysis of Commission precedent, and misrepresents the significance of the *Coal Exporters* case. The Postal Service requests leave to file this response for the sake of fairness and completeness of the record.³

The Postal Service renews its position that Commission precedent regarding product transfer cases is relevant to this case.⁴ GameFly attempts to dismiss as irrelevant the Commission precedent cited by the Postal Service based on the fact that "[i]n both of the earlier product transfer dockets ... FedEx, UPS and other private

¹ *Coal Exporters Association of the United States, Inc. v. United States*, 745 F.2d 76 (D.C. Cir. 1984).

² Response of GameFly, Inc., to April 4, 2014, USPS Reply Comments, Docket Nos. MC2013-57 and CP2013-75 (April 11, 2014) ("GameFly Response").

³ The Postal Service believes that this response is an essential supplement to the record advising on an important legal authority relied upon by GameFly. To the extent that it is deemed unauthorized procedurally, it should be considered a motion to include this information in the record.

⁴ United States Postal Service Reply Comments Submitted Pursuant to Order No. 2011, Docket Nos. MC2013-57 and CP2013-75 (April 4, 2014) ("Postal Service Reply Comments") at 2-9.

carriers competed with the [Postal Service] for the products at issue.”⁵ GameFly has not explained how this difference is relevant to these dockets. The Commission precedent regarding captive customers and elasticities cited by the Postal Service was not limited to situations involving competition from FedEx or UPS, as opposed to competition from other physical or digital delivery sources, and thus this precedent is relevant to the issues raised in these dockets.

With respect to GameFly’s attempt to link the *Coal Exporters* case with the situation under consideration in these dockets, as described below, the situation considered in the *Coal Exporters* case is very different from the issues presented in these dockets.

In *Coal Exporters*, the Court vacated a decision of the ICC because it found that the ICC had applied an unsupportable standard for determining whether railroads faced effective competition that justified deregulation under the Act.⁶ In the Court’s view, the standard of effective competition applied by the ICC was met if, absent regulation, shippers were likely to capture some profits, measured by the difference between the rate charged by the railroads and the costs of the shippers.⁷ The ICC explained that the distribution of profits would be determined by the negotiating leverage of the parties, and recognized that shippers with greater access to alternatives to the railroads had more negotiating leverage, and thus were more likely to capture profits, than shippers with no access to alternatives.⁸ Importantly, the ICC cited the railroads’ use of price

⁵ GameFly Response at 2.

⁶ *Coal Exporters*, 745 F.2d at 259-260.

⁷ *Id.* at 274-275.

⁸ *Id.* at 270-273.

discrimination to exercise market power and maximize their profits when dealing with captive customers that had no access to alternatives.⁹

It is not clear how the decision described above relates to the issues under consideration in these dockets. In the *Coal Exporters* case, the Court did not hold that the presence of captive customers or the capture of profits foreclose a finding of effective competition. The Court focused on the price discrimination available to the railroads, applied through independent contracts with each shipper, in supporting its rejection of the ICC's analysis of effective competition.¹⁰ The availability of price discrimination enabled railroads to isolate captive customers and exercise market power to maximize profits, and where price discrimination and individual price negotiation is available, the existence of alternatives available to other shippers has no impact on rates charged to captive customers.

Unlike the railroads in the *Coal Exporters* case, the Postal Service cannot utilize price discrimination. It cannot offer a profit-maximizing Round-Trip Mailer rate to captive customers, if any exist,¹¹ and a more competitive rate to customers with access to alternatives to the Round-Trip Mailer; 39 U.S.C. § 403(c) prohibits "undue and unreasonable" discrimination among mail users. Accordingly, the rates charged to any captive customers would be affected, and protected, by the competition identified by the Postal Service throughout these dockets.¹² Price discrimination is an essential element

⁹ *Id.* at 270-273, 277.

¹⁰ *See id.*

¹¹ Given the multiple distribution channels that exist for digitized entertainment content, the Postal Service reiterates its position that although there are business models built around the mail, there are no captive mailers for the Round-Trip Mailer.

¹² United States Postal Service Comments Addressing Responses to Chairman's Information Request Nos. 1, 2, and 3, Docket Nos. MC2013-57 & CP2013-75 (Mar. 21, 2014); United States Postal Service Update to Response to Comments, Docket Nos. C2009-1(R), MC2013-57, &

of the Court's decision in the *Coal Exporters* case cited by GameFly, and because price discrimination is not available for the Round-Trip Mailer product, the *Coal Exporters* case is not relevant for these dockets.

In addition to its inaccurate and misleading citation of the *Coal Exporters* case, GameFly mischaracterizes the Postal Service's position in these dockets. GameFly suggests that the pressure imposed on the Round-Trip Mailer will be limited to indirect pressure from product competition.¹³ This ignores evidence of direct competition and substitution of alternative distribution methods for mail delivery. Both GameFly and Netflix have utilized alternative, non-mail methods for providing consumer access to digitized entertainment content.¹⁴

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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CP2013-75 (January 22, 2014); Response of the United States Postal Service to Chairman's Information Request No. 1, Docket Nos. MC2013-57 & CP2013-75 (Jan. 17, 2014); United States Postal Service Response to Comments, Docket Nos. MC2013-57 and CP2013-75 (Sept. 23, 2013); United States Postal Service Reply to Comments, Docket Nos. MC2013-57 and CP2013-75 (Aug. 22, 2013).

¹³ GameFly Response at 2.

¹⁴ See Netflix, Inc., Form 10-K for the Fiscal Year Ended December 31, 2013 (hereinafter "Netflix 10-K") (2013), at 1 (noting Netflix's substantial use of streaming to provide consumer access to digitized entertainment content); Answers of GameFly, Inc., to Chairman's Information Request No. 2, Docket Nos. MC2013-57 and CP2013-75 (January 17, 2014) ("GameFly CHIR2 Answers") at GameFly Exhibit CHIR2, Q4 (documenting GameFly's use of kiosks and downloading to provide consumer access to digitized entertainment content). **[REDACTED]**