

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

TRANSFERRING FIRST-CLASS MAIL PARCELS  
TO THE COMPETITIVE PRODUCT LIST

Docket No. MC2015-7

**REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE**  
(January 7, 2015)

In Order No. 2255,<sup>1</sup> the Commission solicited comments on the Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List. In that order the Commission required that comments be filed no later than December 17, 2014. Two parties filed timely comments, GameFly, Inc. (“GameFly”) and the Public Representative (“PR” or “Public Representative”).<sup>2</sup> The Postal Service hereby provides its reply comments.

**I. COMMENTS SUBMITTED BY GAMEFLY AND THE PUBLIC REPRESENTATIVE MISCHARACTERIZE THE EVIDENCE PRESENTED CONCERNING PRIVATE CARRIER COMPETITION.**

In response to 39 C.F.R. § 3020.32(g), which requires the provision of any information available on the views of those who use the product on the appropriateness of the proposed modification, the Postal Service briefly touched upon the relationship between First-Class Mail Parcels (“FCMP”) and the Priority Mail Small Flat-Rate Box:

Given that service standards will remain the same after the proposed transfer, customers’ major concern would likely be the effect of the transfer on prices. Though a modest price increase will be necessary to

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<sup>1</sup> Order No. 2255, Notice and Order Concerning Transfer of First-Class Mail Parcels to the Competitive Product list, PRC Docket No. MC2015-7 (Nov. 20, 2014).

<sup>2</sup> See Comments of GameFly, Inc. (hereinafter “GameFly Comments”), PRC Docket No. MC2015-7 (Dec. 17, 2014); Public Representative Comments (hereinafter “PR Comments”), PRC Docket No. MC2015-7 (Dec. 17, 2014).

ensure that First-Class Mail Parcels falls within the price exception to the Private Express Statutes, from a business standpoint, the Postal Service cannot raise First-Class Mail Parcels prices above those for a small Priority Mail Flat-Rate Box; otherwise, First-Class Mail Parcels volume would shift to Priority Mail.<sup>3</sup>

However, GameFly and the PR have wrongly concluded that this statement is the Postal Service's primary legal argument for why FCMP faces private competition in the marketplace, and should therefore be transferred to the Competitive product list.<sup>4</sup>

Instead, as the full quote from the Postal Service's Request makes clear, the description of the relationship between First Class Mail Parcels and the Priority Mail Small Flat-Rate Box was included solely to address customer concerns about future price increases.

Indeed, contrary to the assertions of GameFly and the PR, the Postal Service clearly stated in its request that First-Class Mail Parcels face competition primarily from private parcel carriers such as UPS and FedEx.<sup>5</sup> In support of this statement, the Postal Service described how FedEx and UPS typically price their product offerings, identified those products that it believes compete with First-Class Mail Parcels, and provided URLs for each company's rate and service guides to offer interested parties the opportunity to review the retail prices and service standards for each competing product.<sup>6</sup> Simply put, the Postal Service has never attempted to describe Priority Mail Flat Rate Boxes as being equivalent to the private sector competition required by

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<sup>3</sup> Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List (hereinafter "Postal Service Request"), PRC Docket No. MC2015-7 (Nov. 14, 2014), at 6-7.

<sup>4</sup> See GameFly Comments at 9 ("[The Postal Service's] November 14 Request asserted that First-Class Mail Parcels face 'competition,' mainly from another USPS product, the Priority Mail Flat-Rate Box." (emphasis added)); PR Comments at 5 ("[Competition with the Priority Mail Small Flat-Rate Box] does not meet the criteria of section 3642, which requires the loss of a significant level of business to 'other firms offering similar products.'" (emphasis added)).

<sup>5</sup> Postal Service Request at 6.

<sup>6</sup> Id.

Section 3642(b)(1), and the arguments of GameFly and the PR to that effect seem to be willfully obtuse, at best.

Moreover, the principle that a postal product can serve as effective price cap for products transferred to the competitive product list is not novel. Indeed, the Postal Service made this same argument in its request that Parcel Post be transferred to the competitive product list (Docket No. R2012-13). There, the Postal Service stated that:

Though a modest price increase will be necessary to move Parcel Post to 100 percent cost coverage, from a business standpoint, the Postal Service cannot raise Parcel Post prices above the prices for Priority Mail; otherwise, Parcel Post volume would shift to Priority Mail. Thus, as a practical matter, Priority Mail prices will effectively act as a cap on Parcel Post prices.<sup>7</sup>

In response, the Public Representative in that proceeding (the same Public Representative as in the present docket) not only correctly characterized the Postal Service's position as being part of its response to 39 C.F.R. § 3020.31(g),<sup>8</sup> but actually accepted the premise that Priority Mail Rates would act as an effective cap on Parcel Post prices.<sup>9</sup> More significantly, the Commission itself acknowledged the relationship between Parcel Post and Priority Mail prices by stating that "[t]he check on the Postal Service's price increases is the existence of competitors and, to a lesser extent, prices the Postal Service establishes for Priority Mail."<sup>10</sup> Given that the Postal Service has previously argued that Priority

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<sup>7</sup> Request of the United States Postal Service to Transfer Parcel Post to the Competitive Product List, PRC Docket No. R2012-13 (Apr. 26, 2012), att. B at 8.

<sup>8</sup> Public Representative Comments, PRC Docket No. R2012-13 (May 26, 2012), at 4.

<sup>9</sup> *Id.* at 5-6 ("Although Priority Mail rates mostly exceed current Parcel Post rates, in certain low-weight, low-zone areas Priority Mail rates approximate current Parcel Post rates and rate increases would be capped at the Priority Mail rates." (citations omitted)).

<sup>10</sup> Order No. 1411, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, PRC Docket No. MC2012-3 (July 20, 2012), at 10. In the same order, the Commission went

Mail can serve as an effective price-cap with regard to another product that it was seeking to transfer, and more importantly, that the Commission accepted that argument in its order approving the transfer, the Postal Service is mystified by the commenters' mischaracterizations in this docket.

GameFly further misrepresents the content of the Postal Service's Request in this docket by stating that "[i]n its Response to Chairman's Information Request No. 1, Question 3, the Postal Service contended for the first time in this case that First-Class Mail Parcels also face 'robust' competition from private parcel carriers such as UPS and FedEx."<sup>11</sup> This statement is simply incorrect; pursuant to 39 C.F.R. § 3020.32(f), and as noted above, the Postal Service clearly stated in its request that "First-Class Mail Parcels compete primarily against the parcel shipping services offered by UPS and FedEx."<sup>12</sup> While the Postal Service's response to Chairman's Information Request No. 1, Question 3, provided additional detail concerning private competition in the marketplace, it is simply inaccurate to claim that this was the first occasion on which the Postal Service presented evidence of private carrier competition.

## **II. PARTICIPANTS' ALLEGATIONS REGARDING COMPETITION AND PRICING ISSUES AFFECTING FIRST-CLASS MAIL PARCELS DO NOT JUSTIFY CONTINUED MARKET-DOMINANT CLASSIFICATION.**

In addition to their inaccurate description of the sources of competition faced by First-Class Mail Parcels, the commenters misrepresent the significance of a number of

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on to note that "[h]istorically, Priority Mail rates served as a ceiling on Parcel Post rates, particularly the rates for lightweight parcels. Given the relationship between the two products, this is likely to continue to be true going forward." Id. at 11.

<sup>11</sup> GameFly Comments at 10 (emphasis added).

<sup>12</sup> Postal Service Request at 6.

factors – including market power, price profitability, product differentiation, and potential submarkets – in the classification analysis applicable to parcel products. Specifically, commenters flawed contentions include the apparent misunderstanding of market power as equivalent to monopoly power and market dominance;<sup>13</sup> the mistaken conclusion that demonstration of profitable price increases alone is sufficient to demonstrate market dominance;<sup>14</sup> a failure to acknowledge that product differentiation and market power exist in competitive markets;<sup>15</sup> and an inaccurate understanding of the market definition analysis applicable to parcel product transfer cases.<sup>16</sup>

**A. The Presence of Market Power Alone Does Not Justify Market-Dominant Classification.**

Market power does not equal monopoly power, and its existence in the market relevant for this docket, if present at all, does not require the market-dominant classification of First-Class Mail Parcels. In fact, it is common for participants in a competitive market to exercise market power, which can reflect product differentiation rather than dominance.<sup>17</sup> To reach the level of monopoly power or market dominance for purposes of section 3642(b)(1), market power must be durable, or capable of

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<sup>13</sup> See GameFly Comments at 3-4.

<sup>14</sup> See id. at 7, 13-14.

<sup>15</sup> See id. at 12.

<sup>16</sup> See id. at 18-19.

<sup>17</sup> U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, 2008 WL 4606679, at \*22 (2008).

preservation over a substantial period of time.<sup>18</sup> Short-term supracompetitive prices do not demonstrate monopoly power or market dominance.<sup>19</sup>

It is very difficult, if not impossible, to establish monopoly power or market dominance through allegations focused solely on profits, margins, or demand elasticities.<sup>20</sup> An analysis limited to these measurements produces an inaccurate measurement of monopoly power because these measurements do not reflect long-term trends or consider true costs or effects on output.<sup>21</sup> Supracompetitive prices are as likely to reflect “good management, superior efficiency, or differences in accounting” as monopoly power.<sup>22</sup> Accordingly, the Department of Justice has concluded that “direct evidence of a firm’s profits, margins, or demand elasticities is not likely to provide an accurate or reliable alternative to the traditional approach of first defining the relevant market and then examining market shares and entry conditions when trying to determine whether the firm possesses monopoly power.”<sup>23</sup>

The commenters’ representations regarding the profitability of First-Class Mail Parcels do not establish monopoly power, or market dominance for purposes of section 3642(b)(1), with respect to First-Class Mail Parcels. In its attempt to establish market dominance, GameFly relies primarily on its interpretation of First-Class Mail Parcels’

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<sup>18</sup> Id. at 22, 26 fn.49; 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801, at 318 (2d ed. 2002) (“It is generally reasonable to presume that a firm has monopoly power when the firm’s dominant market share has lasted, or will last, for at least five years.”).

<sup>19</sup> Bailey v. Allgas, Inc., 284 F.3d 1237, 1253-1254 (11th Cir. 2002).

<sup>20</sup> See U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY at 28-30.

<sup>21</sup> See id.

<sup>22</sup> Bailey, 284 F.3d at 1252 (citing In re IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 981 (N.D. Cal. 1979)).

<sup>23</sup> U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY at 30.

profitability and its representation that the Postal Service has the “ability to raise prices profitability [sic].”<sup>24</sup> Similarly, in his market dominance analysis, the Public Representative focuses on the Postal Service’s price increases and the potential loss of business.<sup>25</sup> The commenters’ flawed and incomplete analysis is inconsistent with the case authority cited above and fails to establish market dominance for purposes of Section 3642(b)(1).

With their attempts to demonstrate monopoly power and market dominance through assertions regarding profitability, commenters have adopted an approach that has been rejected repeatedly.<sup>26</sup> Courts and other respected authorities have identified the limitations of a monopoly power analysis focused on profitability, and cited additional factors for consideration, including true costs and the durability of market power, that have been ignored by the commenters here.<sup>27</sup> For example, in their evaluation of the prices proposed in this docket, the commenters fail to recognize that previous prices for First-Class Mail Parcels were below competitive levels.<sup>28</sup>

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<sup>24</sup> GameFly Comments at 7.

<sup>25</sup> PR Comments at 2-5.

<sup>26</sup> See, e.g., Bailey, 284 F.3d at 1250-1255 (affirming district court finding that evidence of profits and return on assets alone do not establish market power); Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9<sup>th</sup> Cir. 1997), judgment aff’d, 525 U.S. 299 (1999), and overruled on other grounds by, Lacey v. Maricopa County, 693 F.3d 896 (9<sup>th</sup> Cir. 2012) (concluding that evidence of high prices and profits does not establish market power); Church & Dwight Co. v. Mayer Labs., Inc., 868 F. Supp. 2d 876, 896-898 (N.D. Cal. 2012), order vacated in part on reconsideration, 2012 WL 1745592 (N.D. Cal. 2012) (recognizing that evidence of supracompetitive prices alone does not establish market power); In re eBay Seller Antitrust Litigation, 2010 WL 760433, at \*4-5 (N.D. Cal. 2010) (concluding that plaintiff’s evidence of elasticities and price increases was insufficient to withstand summary judgment on issue of monopoly power).

<sup>27</sup> U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY at 28-30.

<sup>28</sup> First-Class Mail Parcels had a cost coverage of 98.5 percent in FY2012 and 99.5 percent in FY2013, rising above the breakeven point only in FY2014 (according to data filed after the evidence submitted in this docket). Annual Compliance Determination Report for Fiscal Year 2012, PRC Docket No. ACR2012 (rev. May 7, 2013), at 81; Analysis of United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2013, PRC Docket No. ACR2013 (rev. Apr. 10, 2014), at appx. A; United States Postal Service, FY2014 Annual Compliance Report, PRC Docket No. ACR2014 (Dec. 29, 2014), at 7, Table 1.

Accordingly, because portions of the previous price increases eliminated deficits, rather than captured profit, and do not reflect supracompetitive pricing, the commenters overstate the significance of First-Class Mail Parcels price increases for purposes of the market dominance analysis. Previously, the Commission has approved the competitive classification of a parcel product where the Postal Service proposed a fourteen percent price increase to achieve cost coverage.<sup>29</sup>

Even if the proposed prices for First-Class Mail Parcels are above competitive levels, the commenters cannot demonstrate market power through representations of profitability alone. When the Postal Service filed its request in this docket, First-Class Mail Parcels were unprofitable.<sup>30</sup> Accordingly, because the alleged supracompetitive pricing could have occurred only when First-Class Mail Parcels were profitable, a period that could have started no earlier than Fiscal Year 2014, it is impossible to establish through past conduct that any supracompetitive pricing for First-Class Mail Parcels is durable. Similarly, there is insufficient data to determine whether alleged supracompetitive pricing reflects long-term monopoly power or market dominance rather than a short-term adjustment to address changing demand or costs or product differentiation. As described above, market power is common where products face increasing demand or are differentiated from competing products, and these two characteristics describe First-Class Mail Parcels' current market. Demand for all parcel

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<sup>29</sup> See generally Order No. 1411, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, PRC Docket No. MC2012-13 (July 20, 2012).

<sup>30</sup> See supra note 29.

products has experienced significant increases due to the growth of ecommerce.<sup>31</sup> Contrary to commenters' representations, the differences in insurance and other features cited by commenters reflect product differentiation common in all markets, and explain the presence of market power in a competitive market.<sup>32</sup> Parcel products approved previously by the Commission for competitive classification reflected similar product differentiation, and included fewer features than those included in competing products provided by FedEx, UPS, and other competitors.<sup>33</sup>

Because of the inherent difficulties associated with the establishment of monopoly power and market dominance through direct evidence of profitability, margins, or demand elasticities, the most common approach to monopoly power analysis considers circumstantial evidence and focuses on market share and the ease of market entry.<sup>34</sup> In general, market share must exceed at least fifty percent to support monopoly power or market dominance.<sup>35</sup> As demonstrated in other materials submitted in this docket, the Postal Service's market share in all potentially affected markets ranges from 7.2 percent to 38.7 percent, far below the fifty-percent threshold recognized by the authorities cited above.<sup>36</sup> In previous dockets, the Commission concluded that

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<sup>31</sup> Natalie DiBlasio, USPS Delivers Record Number of Packages, USA TODAY, Dec. 23, 2014, available at <http://www.usatoday.com/story/money/business/2014/12/23/package-postal-service-delivery-holiday/20813279> (last visited January 7, 2015).

<sup>32</sup> U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY at 22.

<sup>33</sup> See Request of the United States Postal Service to Transfer Parcel Post to the Competitive Product List, PRC Docket No. MC2012-13 (Apr. 26, 2012), at att. B.

<sup>34</sup> U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY at 23; eBay, 2010 WL 760433, at \*6 (citing Rebel Oil Co., v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9<sup>th</sup> Cir. 1995)).

<sup>35</sup> U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY at 23-24.

<sup>36</sup> Postal Service Request, att. B at 4.

similar market share data supported the competitive classification of parcel products.<sup>37</sup> In fact, in Docket No. MC2012-13, the Public Representative assigned to the current docket relied on market share data to conclude that “competition in the ground package retail market has been demonstrated.”<sup>38</sup> With respect to barriers to entry, the emergence of smaller, lower-cost competitors offering parcel delivery services demonstrates the presence of low barriers to entry in the relevant market.<sup>39</sup>

As described above, Participants’ comments include an inaccurate and incomplete understanding of the legal concepts applicable to this docket, and do not establish monopoly power or market dominance with respect to First-Class Mail Parcels.

**B. Commission Precedent Supports a Total-Market Approach to Parcel Product Classification Analysis.**

In determining whether to approve the transfer of a postal product to the competitive product list, the Commission must consider whether

the Postal Service exercises sufficient market power that it can effectively set the price of such 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.<sup>40</sup>

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<sup>37</sup> Order No. 1411 at 6; Order No. 710, Order Adding Lightweight Commercial Parcels to the Competitive Product List, PRC Docket No. MC2011-22 (Apr. 6, 2011), at 6.

<sup>38</sup> Public Representative Comments, PRC Docket No. MC2012-13 (May 31, 2012), at 8.

<sup>39</sup> See Erica Morphy, Meet the Uber of the Retail World, Forbes.com, July 19, 2014, available at <http://www.forbes.com/sites/erikamorphy/2014/07/19/meet-the-uber-of-the-retail-world> (last visited January 7, 2015) (describing low barriers to entry faced by Deliv delivery service).

<sup>40</sup> 39 U.S.C. § 3642(b)(1).

If the product meets this test, the product is categorized as market dominant. If it does not (and if it is not subject to the Private Express Statutes), the product is categorized as competitive.<sup>41</sup>

The commenters suggest that the effectiveness of the competition faced by First-Class Mail Parcels varies across geographic areas and among certain customers, and that this supposed variation supports a Commission finding that the First-Class Mail Parcels product satisfies the test for determining market dominance under Section 3642(b)(1).<sup>42</sup> Such an interpretation of Section 3642(b)(1) conflicts with the plain language of the statute and would have essentially precluded most of the major parcel product transfers approved by the Commission in recent years. In such cases, the Commission has applied a more comprehensive and common-sense approach to evaluating the market position of postal products than the approach urged by the present commenters.

For example, in Order No. 710, the Commission approved the transfer of First-Class Mail Commercial Parcels to the competitive product list.<sup>43</sup> In that case, the Postal Service proposed transferring the commercial segment of First-Class Mail parcels to the competitive product list, which consisted of lightweight fulfillment parcels less than one pound (“Lightweight Fulfillment Parcels”).<sup>44</sup> The Postal Service described the market for Lightweight Fulfillment Parcels as being segmented into three categories: (1) 2-to-3-day

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<sup>41</sup> The Commission must also consider other factors, such as the availability and nature of private competitors, the views of the product’s customers, and the likely impact of the proposed action on small business concerns. *Id.* at (b)(3).

<sup>42</sup> GameFly Comments at 18-19; Public Representative Comments at 9-10.

<sup>43</sup> *See* Order No. 710, Order Adding Lightweight Commercial Parcels to the Competitive Product List, PRC Docket No. MC2011-22 (Apr. 6, 2011), at 11.

<sup>44</sup> *Id.* at 2-4.

air, (2) consolidator ground, and (3) commercial carrier ground.<sup>45</sup> Although the Postal Service acknowledged that it had captured a majority of the market share in the 2-to-3-day air category,<sup>46</sup> it also presented evidence showing that competitors such as FedEx and UPS were gaining market share in the Lightweight Fulfillment Parcel market through their consolidator ground offerings.<sup>47</sup>

Faced with allegations similar to those raised by the commenters in this proceeding – that is, Postal Service dominance in a subcategory of a larger competitive delivery market – the Commission ultimately approved the transfer of Lightweight Commercial Parcels to the competitive product list. The Commission noted that it had “taken into account the Postal Service’s dominance in the 2-to-3-day air segment of this market” but that the market share data presented by the Postal Service indicated “the presence of significant competition in the marketplace.”<sup>48</sup> Had the Commission accepted Participants’ more rigid interpretation of Section 3642(b)(1), the Commission would have denied this transfer because of the Postal Service’s dominance in the 2-to-3-day air subcategory. Instead, the Commission appropriately chose to evaluate the Postal Service’s market position for Lightweight Fulfillment Parcels by taking into consideration the Postal Service’s lack of monopoly power in the larger fulfillment parcels market.

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<sup>45</sup> Request of the United States Postal Service Under Section 3642, PRC Docket No. MC2011-22 (Feb. 24, 2011), att. B at 4.

<sup>46</sup> Id. at 4-5.

<sup>47</sup> Id. at 4-6.

<sup>48</sup> Order No. 710 at 6.

The Commission also applied this total-market approach to evaluating a product's market dominance in Order No. 689.<sup>49</sup> In that order, the Commission approved the transfer to the competitive product list of Commercial Standard Mail Parcels (now known as Lightweight Commercial Parcels), which consisted of bulk commercial parcels weighing less than one pound.<sup>50</sup> During that case the Postal Service again acknowledged that it had captured a majority of the market share in the bulk segment of the under-one-pound commercial parcel market,<sup>51</sup> but advanced three arguments in support of the transfer: (1) that its market share was distorted by below-cost pricing;<sup>52</sup> (2) that, when viewed in the context of the larger ground parcel market, the Postal Service only had a 20.1 percent market share,<sup>53</sup> and (3) that a substantial price increase (required to cover attributable costs under 39 U.S.C. § 3633) would create a substantial risk of losing a significant level of business.<sup>54</sup> Thus, despite Lightweight Commercial Parcels' large share of a limited market segment, the Postal Service contended that the product did not meet the test for market dominance under Section 3642(b)(1).<sup>55</sup>

In opposing that transfer, the Parcel Shippers Association ("PSA") argued that, because the Postal Service had captured nearly 80 percent of the lightweight

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<sup>49</sup> Order No. 689, Order Conditionally Granting Request to Transfer Commercial Standard Mail Parcels to the Competitive Product List, PRC Docket No. MC2010-36 (Mar. 2, 2011).

<sup>50</sup> Id. at 20.

<sup>51</sup> Response of the United States Postal Service to Questions 1-2, 5-11 of Commission's Information Request No. 1, PRC Docket No. MC2010-36 (Dec. 15, 2010), att. A at 4-5.

<sup>52</sup> Id. at 5-6.

<sup>53</sup> Id. at 6-7.

<sup>54</sup> Id.

<sup>55</sup> Id.

commercial parcel market segment, it had *de facto* power to raise prices substantially without the loss of a significant volume of business to other firms.<sup>56</sup> In addition, PSA questioned whether the data presented by the Postal Service was sufficient to prove that the Postal Service would in fact lose a substantial volume of business if prices were raised or service were degraded.<sup>57</sup> As with GameFly's arguments in this case, PSA's arguments took a narrow view of how Section 3642(b)(1) should be applied, ignoring the role of the postal product in question in the larger marketplace.

In approving the transfer of Lightweight Commercial Parcels to the competitive product list, the Commission rejected the arguments advanced by PSA. Indeed, the Commission approved the transfer, notwithstanding the Postal Service's significant market share, and stated that

[a]ny pricing power the Postal Service may enjoy is illusory based on its pricing under one-pound parcels below cost. In any event, the Postal Service's ability to raise rates is limited by the competitors' decisions on pricing. The Postal Service has amply demonstrated there is at least a risk of losing a substantial amount of business if its rates are raised significantly or if it alters its service.<sup>58</sup>

The Commission also took into account the impact of the transfer on outlying delivery areas that might be more reliant on Lightweight Commercial parcels. In that regard, the Commission noted that "[t]he Universal Service Obligation (USO) covers all mail matter, not just market dominant products" and stated that it was "confident that while the Postal Service may establish higher prices for competitive lightweight parcels in the

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<sup>56</sup> Parcel Shippers Association Comments on the United States Postal Service Request to Transfer Commercial Standard Mail Fulfillment Parcels to the Competitive Product List, PRC Docket No. MC2010-36 (Sept. 24, 2010), at 6.

<sup>57</sup> *Id.* at 8-9.

<sup>58</sup> Order No. 689 at 16.

absence of the price cap constraint, competitive market forces will ensure that readily available small parcel delivery service to all areas will remain.”<sup>59</sup> Again, the Commission’s approval of the transfer was predicated upon a more rational approach to transfers than the narrow one that the commenters advance in this case. The Commission recognized that any market dominance analysis under Section 3642(b)(1) must take into account a broad array of factors, not just whether a small subset of customers in a market prefer a postal product.

In short, Commission precedent in past product transfers disfavors the proposition that Section 3642(b)(1) requires the Postal Service to show that all customers view competitive alternatives to a postal product as being perfect substitutes to the postal service provided. Such an exacting standard does not exist in the plain language of Section 3642(b)(1), and it would have the practical effect of barring nearly all product transfers, so long as some group continues to prefer a particular postal service. The Commission should continue to use a more comprehensive approach when determining the market position of parcel products, taking into consideration the product’s role in the relevant market.

**III. WHEN CLASSIFYING A POSTAL PRODUCT, IT IS ENTIRELY APPROPRIATE TO CONSIDER POSTAL SERVICE PRICING FOR PURPOSES OF THE PRIVATE EXPRESS STATUTES’ PRICE TEST.**

With the PAEA, Congress took the Private Express Statutes, which previously were used only to define what private actors could and could not do, and used them as a dividing line between the new market-dominant and competitive categories of Postal Service products. Yet Congress did little to acknowledge, much less resolve, the

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<sup>59</sup> Id. at 18.

inherent tension between the “outward-looking” monopoly and the “inward-looking” task of mail classification. As the Commission recognized when it approved numerous prior NSAs on the very same theory at issue here, the Commission’s administration of the mail classification regime calls for a dose of pragmatism rather than GameFly’s broad literalism.

GameFly starts out on firm enough ground. The relevant statutes clearly establish that any “product covered by the postal monopoly” cannot be a competitive product, and the relevant “postal monopoly” is qualified by, among other things, a price test (i.e., the amount paid for private carriage must be at least six times the basic rate for a single-piece, one-ounce First-Class Mail letter).<sup>60</sup> From there, however, GameFly sallies forth with a claim that is seductively literal, yet plainly illogical: that prices charged by the Postal Service are irrelevant to the price test pursuant to the Private Express Statutes.<sup>61</sup> GameFly poses the hypothesis that, no matter how high the Postal Service raises its price above the Private Express Statutes threshold, some private person somewhere might want to charge a below-threshold amount but for the risk of prosecution under the postal monopoly, and concludes that the Postal Service product must therefore be covered by the Private Express Statutes and *per se* market-dominant.<sup>62</sup> Under this theory, then, not even a \$5.25 Priority Mail item<sup>63</sup> can properly be a competitive product, since it could contain a letter and a private person could theoretically (however improbably) contemplate offering delivery of that item for less

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<sup>60</sup> 39 U.S.C. §§ 409(e)(1), 601(b)(1), 3642(b)(2); see GameFly Comments at 19-20.

<sup>61</sup> See GameFly Comments at 20-21.

<sup>62</sup> GameFly Comments at 2, 20-21.

<sup>63</sup> Assume that the item weighs less than 12.5 ounces, see 39 U.S.C. § 601(b)(2), and does not qualify for any other exception to the Private Express Statutes.

than \$2.94, if only the Private Express Statutes did not force him or her to charge more. That irrational outcome, and likewise GameFly's absolutist stance, clearly runs counter to a realistic sense of how market actors and the postal monopoly actually operate. Indeed, the evidence on record in this proceeding indicates that major private delivery companies actually charge more, not less, than the Postal Service's prices for the corresponding service.<sup>64</sup>

Under GameFly's interpretation, the price test effectively renders any postal product a market-dominant product, unless and until it can be conclusively proven that nobody in the United States charges (or would conceivably charge under any hypothetical circumstance) less than the price-test amount to deliver a comparable item. While the PAEA clearly requires a monopoly-based dividing line between the two product lists, GameFly's version of this standard would essentially require the Postal Service to prove a negative and thus sets an impossibly high bar to any product transfer. Such an outcome would be hard to reconcile with the Congress's objective in enacting the PAEA of balancing oversight against "the Postal Service's need for increased pricing and product flexibility."<sup>65</sup>

The balance that Congress intended finds better expression by applying simple common sense to reconcile the "outward-looking" monopoly and the "inward-looking" task of mail classification. As long as the Postal Service sets its price above the price floor (which it has affirmed it will do in this case), then it is hard to see how the price

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<sup>64</sup> Response of the United States Postal Service to Chairman's Information Request No. 1, Question 3, PRC Docket No. MC2014-7 (Dec. 16, 2014), at (b)(ii).

<sup>65</sup> S. REP. NO. 108-318, at 6 (2004); see also H.R. REP. NO. 109-66, pt. 1, at 43 (2005) (describing the Administration's goals for postal reform).

floor can effectively preclude competition. Competitors will be able to price their products at or below the Postal Service's price, so long as they stay above the price floor. Even if there is little room between the Postal Service's price and the price floor, a competitor can compete on non-price terms such as customer service, convenience, and speed. By setting its price above the price-floor level, the Postal Service is casting off the protections of the Private Express Statutes and baring its product to competition on price and other terms.<sup>66</sup>

This concept is hardly novel. The Postal Service has used it to justify the competitive classification of at least seven earlier products, and the Commission accepted each such proposed classification.<sup>67</sup> It is irrelevant that these earlier products concerned international services: the point is that they were eligible for competitive status because "the rates payable to the Postal Service [were] higher than six times the current price of a one-ounce, single-piece First-Class letter, and so it may be assumed

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<sup>66</sup> GameFly has certainly submitted no evidence to the effect that rational, profit-maximizing private carriers would actually set their prices below the price floor if the Postal Service were to set its own prices above that level. In fact, as discussed earlier in this section, the record evidence before the Commission shows that the predominant private carriers' practice is to price above, not below, the Postal Service. See supra note 65 and accompanying text.

<sup>67</sup> Order No. 218, Order Concerning Royal Mail Inbound Air Parcel Post Negotiated Service Agreement, PRC Docket Nos. MC2009-24 & CP2009-29 (May 29, 2009), at 7-8; Order No. 362, Order Adding Inbound Air Parcel Post at UPU Rates to Competitive Product List, PRC Docket Nos. MC2010-11 & CP2010-11 (Dec. 15, 2009), at 7-8; Order No. 365, Order Adding Inbound International Expedited Services 3 to the Competitive Product List, PRC Docket Nos. MC2010-13 & CP2010-12 (Dec. 22, 2009), at 7-8; Order No. 376, Order Concerning Bilateral Agreement with Canada Post for Inbound Competitive Services, PRC Docket Nos. MC2010-14 & CP2010-13 (Dec. 30, 2009), at 6-7; Order No. 546, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, PRC Docket Nos. MC2010-34 & CP2010-95 (Sept. 29, 2010), at 7-8; Order No. 579, Order Adding Inbound International Expedited Services 4 to the Competitive Product List, PRC Docket Nos. MC2010-37 & CP2010-126 (Nov. 5, 2010), at 7-8; PRC Order No. 2160, Order Approving Product List Transfer, PRC Docket No. MC2014-28 (Aug. 19, 2014), at 5. To be sure, with respect to the products at issue in Order Nos. 218, 365, and 546, the Postal Service also argued that part of each product would fall outside of the weight threshold in 39 U.S.C. § 601(b)(2). That argument did not apply to the entirety of the respective product, however, and so the Commission's determination that each product was "appropriately classified as a competitive product" was necessarily based solely on the price test for at least a portion of those products.

that alternative delivery could also be obtained from a private carrier at a price exceeding this test.”<sup>68</sup> Thus, approval of the proposed classification at issue here would simply be a natural extension of Commission precedent.

This construction admittedly requires the Commission to apply pragmatism in filling a statutory gap. Given the impractical consequences of GameFly’s strict-textualist approach, GameFly cannot offer any workable alternative, much less a rational and equitable basis for the Commission to depart from its well-established practice. As in similar past cases, the Commission should find that this product is exempt from the Private Express Statutes and appropriately classified as competitive.

#### **IV. CONCLUSION**

The Postal Service’s Request and these Reply Comments demonstrate why the transfer of First-Class Mail Parcels from the market dominant product list to the competitive product list satisfies the applicable criteria set forth in section 39 U.S.C. § 3642. Accordingly, the Postal Service reiterates its request that the Commission approve the transfer of First-Class Mail Parcels to the Competitive Product list.

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<sup>68</sup> Request of the United States Postal Service to Add Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors’ Decision and Agreement, PRC Docket Nos. MC2010-14 & CP2010-13 (Nov. 15, 2009), att. 2 at 3.

Respectfully submitted,

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