

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**OBJECTION OF THE UNITED STATES POSTAL SERVICE  
TO DOCUMENT REQUESTS OF CAPITAL ONE SERVICES, INC.  
(COS/USPS-DR-19-21)  
(September 8, 2008)**

In accordance with Rules 25 and 27 of the Commission's Rules of Practice and Procedure, the United States Postal Service hereby objects to Document Requests COS/USPS-DR-19-21, filed on August 29, 2008, and revised on September 2, 2008. The Postal Service objects to these document requests, which are stated verbatim below, on the grounds of relevance, undue burden, and privilege.

In addition, the Postal Service notes that not only are these requests duplicative of material covered by prior discovery requests, COS/USPS-DR-1-17, that are still subject to a pending objection, but these new document requests are also duplicative because documents arising from the deposition of Jessica Dauer Lowrance will be addressed elsewhere, in due course. As the Presiding Officer has ruled,<sup>1</sup> the Postal Service has seven days from the issuance of transcripts of the Lowrance deposition to address any material that the Postal Service considers to be outside the scope of the Lowrance deposition or otherwise objectionable on any grounds, including the protections offered by section 410(c)(4) of title 39, United States Code. Nevertheless,

the Postal Service is today providing its objections to these specific document requests, even though they will be addressed more fully in pleadings later this week.

**DOCUMENT REQUEST COS/USPS-DR-19**

Please provide all documents identified or described in the Deposition of Jessica Dauer Lowrance, taken on August 27-28, 2008.

**DOCUMENT REQUEST COS/USPS-DR-20**

In particular, please provide the memorandum from Postmaster General Potter to the Postal Service Board of Governors regarding the Bank of America NSA, as described by Ms. Lowrance during the public portion of her deposition.

**DOCUMENT REQUEST COS/USPS-DR-21**

In particular, please provide the powerpoint presentation given by Ms. Anita Bizzotto to the Postal Service Board of Governors regarding the Bank of America NSA, as described by Ms. Lowrance during the public portion of her deposition.

The Postal Service objects to the above-referenced document requests on the grounds of relevance. Particularly, COS/USPS-DR-19 encompasses a broad range of documents mentioned by Ms. Lowrance in her deposition (including passing references to her entire e-mail archive and electronic folders, whether on her hard drive or on a shared drive on the postal network), regardless of their subject matter. This document request seeks a level of detail well beyond that required to address the issues in this docket, and because of its breadth, cannot be considered reasonably calculated to the discovery of admissible evidence. This level of detail would simply muddy the record and obfuscate the broader issues which need to be resolved in the instant Complaint. Moreover, the Postal Service objects to COS/USPS-DR-19 on the grounds of undue burden, as it would be required to produce any documents or electronic files referred to by Ms. Lowrance during her deposition. Not only would this involve producing irrelevant

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<sup>1</sup> P.O. Ruling No. C2008-3/7 at 3-4.

documents, but it would require an inordinate amount of time from multiple postal employees to produce these voluminous records.

Additionally, document requests COS/USPS-DR-20-21 refer to documents described by Ms. Lowrance at her deposition, which the Postal Service submits were well beyond the scope of the subject matter of her testimony, as required by Rule 33 of the Commission's Rules of Practice and Procedure. Capital One should not be permitted to use the deposition of Ms. Lowrance to explore a wide-range of subject matter, and then bootstrap that information into future discovery requests.

Finally, the Postal Service objects to COS/USPS-DR-19-21 on the grounds of privilege. The incredibly broad scope of COS/USPS-DR-19 surely encompasses many privileged documents, including documents protected in full by the attorney-client privilege. Also, the specific documents in COS/USPS-DR-20-21 are objectionable on the grounds of privilege. These documents do not contain non-privileged or non-exempt material that could be reasonably segregated from the protected information, and thus susceptible to redaction.

The memorandum from the Postmaster General to the Board of Governors and the presentation from Ms. Bizzotto to the Board of Governors are privileged and statutorily protected from disclosure. Both documents were prepared following the Commission's Opinion and Recommended Decision on the Bank of America NSA, and prior to the Decision of the Governors. These documents were intended to assist the Board in deciding how to act on the Commission's Recommended Decision, in accordance with the Governors' extant authority under former 39 U.S.C. § 3625. Thus, these documents constitute "information prepared for use in connection with

proceedings under chapter 36 of [Title 39, U.S. Code]" and thus are protected from public disclosure requirements.<sup>2</sup>

These documents are also protected by the deliberative process privilege. The deliberative process privilege is intended to protect the free flow of ideas in the decision-making process of government agencies, as well as the integrity of that process itself, and it covers internal documents that are both "predecisional" and "deliberative."<sup>3</sup> First, agency documents are "predecisional" if they were communicated "antecedent to the adoption of an agency policy."<sup>4</sup> In this case, these documents were predecisional with respect to the Governors' decision that they were designed to inform.<sup>5</sup> Second, internal documents that contain the opinions, suggestions, or recommendations of government employees comprise "deliberative" information within the meaning of the privilege.<sup>6</sup> Both documents contain "deliberative" recommendations of postal employees that must be protected under the deliberative process privilege. Therefore, the Postmaster General's memorandum and Ms. Bizzotto's presentation that are requested in COS/USPS-DR-20-21 are both privileged and statutorily protected from disclosure.

Thus, the Postal Service objects to document requests COS/USPS-DR-19-21 for the foregoing reasons. The Postal Service also wishes to emphasize again that these

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<sup>2</sup> 39 U.S.C. § 410(c)(4). This provision is the same currently as it was before the Postal Accountability and Enhancement Act of 2006 ("PAEA").

<sup>3</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 (1975).

<sup>4</sup> Jordan v. U.S. Dept' of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

<sup>5</sup> These documents are not stripped of their predecisional character by the fact that the Governors subsequently reached a final decision on the matter. See, e.g., Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); May v. Dep't of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Elec. Privacy Info. Ctr. v. Dep't of Homeland Security, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005).

<sup>6</sup> See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

document requests are duplicative, as documents referred to by Ms. Lowrance in her deposition, particularly the Postmaster General's memorandum and Ms. Bizzotto's presentation, will be dealt with in due course, pursuant to P.O. Ruling No. C2008-3/7.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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