

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-1-17)
(August 19, 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-1-17, filed on August 8, 2008. The Postal Service objects to these document requests, which are attached to this pleading, on the grounds of relevance, undue burden, commercial sensitivity, and privilege.

Relevance

The Postal Service objects to the above-referenced document requests on the grounds of relevance. These document requests encompass a broad range of information on a wide variety of subjects, and go far beyond the issues that are relevant to the instant Complaint. This breadth is reflected by the use of the phrase "all documents that relate to..." in virtually all of the document requests. Specifically, Document Requests COS/USPS-DR-1-16 use this type of broad language, and are all objectionable to the extent they request documents irrelevant to this proceeding.

The vast majority of the documents and communications that fall under the broad language of Document Requests COS/USPS-DR-1-16 would not assist the Commission in resolving this Complaint. Indeed, much of the material requested seems to be aimed at re-litigating the Bank of America NSA, rather than producing evidence that would elucidate whether or not Capital One is “similarly situated” to Bank of America, or what would constitute a functionally equivalent agreement to the Bank of America NSA under current circumstances, which are key issues in this Complaint. In addition, these document requests seek a level of detail well beyond that required to address the issues in this docket, and are not 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.

Document Request COS/USPS-DR-17 seeks organizational charts, names, and titles, from January 2005 to the present, for anyone involved in NSA preparation, analysis, negotiation, review, and approval. The Postal Service objects to this document request on relevance grounds because disclosure of the names and titles of postal employees, and the postal organizational structure over the last 3+ years, will not produce evidence that would assist the Commission in resolving the issues raised in the instant Complaint. A determination of whether or not the Postal Service has violated title 39 by discriminating against Capital One does not require the disclosure of the names and titles of dozens of postal employees over a three-year period simply because they were involved, in any way, with the Postal Service’s NSA program.

Undue Burden

Additionally, the Postal Service objects to Document Requests COS/USPS-DR-1-17 on the grounds of undue burden. The volume of documents implicated by these document requests is virtually impossible to accurately estimate. In this regard, we note Capital One's remarkably broad definition of "documents" and "communications" in its interrogatories, which Capital One has incorporated by reference with its document requests:

- "Documents" includes, but is not limited to the original or any manner of copy of any letter, email, note, spreadsheet, memorandum, report, study, meeting minutes, contract, diary entry or schedule, presentation, print out, newspaper clipping, speech, testimony, pamphlet, chart, tabulation, work paper, draft, diagram, audio or visual recording, and other writing, recording, or retrievable data of whatever kind or nature to which the Postal Service has or has had access, regardless of origin or location, hard copy or electronic, handwritten or typed. Any document that is not exactly identical to another document for any reason, including but not limited to marginal notations, deletions, redrafts, or rewrites, is a separate document within the meaning of this term.
- "Communications" includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person or by telephone, as well as all documents, including but not limited to letters, memoranda, telegrams, cables, electronic mail, or otherwise transmitted by any means or manner whatsoever.

See Interrogatories of Capital One Services, Inc. to the United States Postal Service (COS/USPS-1-11) at 5-6 (August 8, 2008). For example, under these definitions, if the Postal Service were to identify one potentially discoverable document in its files, it is also requested to seek out and produce all prior versions of the document (even if it was subject to multiple rounds of edits, by multiple individuals), in addition to all copies of that document that may have had the slightest and most trivial notations in their margins. Capital One requests that the Postal Service perform this duplicative task for every document that relates in any way to interrogatories COS/USPS-DR-1-11, as well

as a wide variety of topics related to the Bank of America NSA, as detailed in Document Requests COS/USPS-DR-1-17.

Complying with these document requests would require countless work hours, and would involve document searches performed by a number of postal employees, across multiple departments. The initial step, identifying all potential custodians and gathering all potentially responsive documents, would take the bulk of the time. Also, given the breadth of requests, there would be significant time expended to determine which documents are relevant to the instant complaint, which may contain commercially sensitive or privileged information, and which should be disclosed *in camera*, rather than via public disclosure. Finally, any necessary redactions would need to be performed.

Responding to these document requests would significantly sap postal resources, especially as the primary individuals involved in the search for, and production of, these documents also are likely to be involved in a concurrent effort to respond to interrogatories from Capital One and various intervenors during the initial discovery period. Producing responsive documents to comply fully with these document requests may require considerable time, extending the instant complaint proceeding a number of weeks, to the detriment of the parties. Thus, for the aforementioned reasons, the Postal Service objects to the above-reference document requests on the grounds of undue burden.

Commercial Sensitivity

The Postal Service also objects to the above-referenced document requests to the extent they request the production of documents that contain commercially sensitive and proprietary information.¹ The extraordinary breadth of the requests submitted by Capital One encompasses all documents, data, and communications which relate to the Bank of America NSA, the Postal Service's financial and operational analyses of the Bank of America NSA, and the Postal Service's NSA approval process in general. The disclosure of such material would not only reveal commercially sensitive and proprietary information related to the Bank of America NSA specifically, but it would also severely harm the Postal Service's ability to negotiate future NSAs.

Essentially, these document requests seek to reveal in great detail the Postal Service's negotiating strategy and analytical process related to the Bank of America NSA, and thus shed light on the Postal Service's likely negotiating strategy and analytical process for any and all future NSAs, whether related to the type of agreement at issue in this Complaint or not. Disclosure of such information in this proceeding would significantly weaken the Postal Service's negotiating position for future NSAs, and would also serve as a deterrent to any prospective NSA partner, as it would become clear that all aspects of negotiation and implementation could be subject to public disclosure in complaint proceedings. Therefore, the Postal Service objects to these document requests on the grounds of commercial sensitivity.

¹ As discussed more fully in the sections above, the use of the phrase "all documents that relate to..." (or any similar language) encapsulates such a wide range of documents that each request may implicate documents that contain a variety of objectionable information. Here, the Postal Service objects to all the document requests (COS/USPS-DR-1-17) on the grounds of commercial sensitivity.

Privilege

Finally, the Postal Service objects to the above-referenced document requests to the extent they are protected by the attorney-client privilege and the deliberative process privilege. The instant document requests extend to many documents which are attorney-client privileged. As discussed above, the breadth of the requests encapsulates a wide variety of materials. Specifically, the request for “all documents that relate to” the Postal Service’s responses to Interrogatories COS/USPS-DR-1-11 surely implicates any attorney-client communications that have arisen in the last few weeks in responding to the instant Complaint. In addition, the requests that relate to the Bank of America NSA, including but not limited to internal reviews, analyses, and communications involved with that NSA (before, during, and after approval), implicate documents that are covered by the attorney-client privilege over the last three years. Thus, the Postal Service objects to the above-referenced document requests to the extent they request materials covered by the attorney-client privilege.

In addition, the Postal Service objects on the grounds that many of the documents requested contain information that is predecisional, and therefore protected from disclosure by the deliberative process privilege. As the Presiding Officer noted in Docket No. R97-1, the deliberative process privilege safeguards predecisional deliberations, thereby encouraging intra-agency candor and enabling agency decision-makers to fully consider all relevant legal and policy issues without fear of “premature disclosure.” P.O. Ruling R97-1/60 at 3. Presiding Officer's Ruling No. R97-1/60 recognized that “[m]anifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” Id. (quoting N.L.R.B. v. Sears,

Roebuck & Co., 421 U.S. 132, 151 (1975) (citing Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993))). The protection afforded by the deliberative process privilege is broad, encompassing, among other things, information exchanged during a federal agency's consultations with a state agency concerning a joint state-federal regulatory project and documents provided by an agency's contractor employees. See Citizens for Pa.'s Future v. United States Dep't of the Interior, 218 F.R.D. 441, 446-47 (M.D. Pa. 2003) (protecting documents exchanged between the Department of the Interior and the Pennsylvania Department of Environmental Protection pursuant to a joint regulatory mandate); see also Hertzberg v. Veneman, 273 F. Supp. 2d 67, 76 n. 2 (D.D.C. 2003) (holding that "witness statements from Forest Service contractor employees may be considered 'inter-agency or intra-agency' for the purpose of Exemption 5" (citing Department of the Interior v. Klamath Water Users Protective Ass'n., 532 U.S. 1, 10-11 (2001))).

Document Requests COS/USPS-DR-1-17 encompass predecisional documents and communications because they request documents that relate specifically to the Bank of America NSA negotiation and approval process, and the internal postal NSA approval process in general. The disclosure of such information would harm the decision-making process within the Postal Service by discouraging negotiators and decisionmakers from candidly discussing a variety of issues with potential NSA partners and with other postal employees. The rationale for protecting information discussed during negotiations, i.e., to ensure the confidentiality of the information discussed, is similar to the rationale underlying the civil discovery privilege for documents exchanged between parties engaged in settlement negotiations. See Goodyear Tire & Rubber Co.

v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (stating that “for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination” and “[t]hey must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts.”). Moreover, the information sought by these document requests is inextricably intertwined with the Postal Service’s decision-making process regarding the terms of the Bank of America NSA. The disclosure of such information would, in effect, reveal the Postal Service’s deliberative process. As such, the Postal Service objects to the above-referenced document requests to the extent they are protected by the deliberative process privilege.

Conclusion

In sum, the Postal Service respectfully objects to Document Requests COS/USPS-DR-1-17 on the grounds of relevance, undue burden, commercial sensitivity, and privilege.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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DOCUMENT REQUEST COS/USPS-1

Please provide all documents that relate to any part of Interrogatory COS/USPS-1 or to the Postal Service's Response to any part of Interrogatory COS/USPS-1.

DOCUMENT REQUEST COS/USPS-2A

Please provide all documents that relate to any knowledge the Postal Service has gained from regulatory reviews of the Bank of America NSA.

DOCUMENT REQUEST COS/USPS-2B

Please provide all documents that relate to all "internal reviews of the BAC NSA," including copies of reports, audits, investigations, notes, minutes, or presentations for each internal review, whether formal or informal.

DOCUMENT REQUEST COS/USPS-3

Please provide all documents that relate to discounts accrued, accounted for, or provided to Bank of America under the terms of the Bank of America NSA, including underlying measurements and supporting documentation.

DOCUMENT REQUEST COS/USPS-4

Please provide all documents that relate to any part of Interrogatory COS/USPS-4 or the Postal Service's Response to any part of Interrogatory COS/USPS-4.

DOCUMENT REQUEST COS/USPS-5

Please provide all documents that relate to any part of Interrogatory COS/USPS-5 or the Postal Service's Response to any part of Interrogatory COS/USPS-5.

DOCUMENT REQUEST COS/USPS-6A

Please provide all documents that relate to any part of Interrogatory COS/USPS-6 or the Postal Service's Response to any part of Interrogatory COS/USPS-6.

DOCUMENT REQUEST COS/USPS-6B

Please provide all documents that relate to the potential effects of the Bank of America NSA on the broader marketplace or on competitors to Bank of America.

DOCUMENT REQUEST COS/USPS-7

Please provide all documents and communications that relate to Capital One's request for an NSA similar in any respect to the Bank of America NSA.

DOCUMENT REQUEST COS/USPS-8A

Please provide all documents that relate to any part of Interrogatory COS/USPS-8 or the Postal Service's Response to any part of Interrogatory COS/USPS-8, including all documents that relate to any other mailer's request for an NSA similar in any respect to the Bank of America NSA. The mailer's name may be redacted.

DOCUMENT REQUEST COS/USPS-8B

Please provide all documents that relate to the Postal Service's evaluation of any other mailer's qualifications (or lack of qualifications) for an NSA similar in any respect to the Bank of America NSA. The mailer's name may be redacted.

DOCUMENT REQUEST COS/USPS-9

Please provide all documents that relate to any part of Interrogatory COS/USPS-9 or the Postal Service's Response to any part of Interrogatory COS/USPS-9, including, but not limited to, any manuals or guidelines for evaluating potential NSA partners.

DOCUMENT REQUEST COS/USPS-10

Please provide all documents that relate to Interrogatory COS/USPS-10 or the Postal Service's Response to Interrogatory COS/USPS-10.

DOCUMENT REQUEST COS/USPS-11

Please provide all documents that relate to any part of Interrogatory COS/USPS-11 or the Postal Service's Response to any part of Interrogatory COS/USPS-11.

DOCUMENT REQUEST COS/USPS-12

Please produce all documents consulted, reviewed, or relied upon in answering any of the Interrogatories COS/USPS-1-11.

DOCUMENT REQUEST COS/USPS-13

For each Operational Commitment in Sections III and IV of the Bank of America NSA, please provide all documents that relate to (1) the time that Bank of America began or will begin to actually use each Operational Commitment; and (2) any concerns, obstacles, or modifications of how Bank of America's performance is to be measured under Section IV, including, but not limited to, performance measurements under Sections IV.C.3.a and IV.F.3.a of the Bank of America NSA.

DOCUMENT REQUEST COS/USPS-14

For the time period from January 1, 2005, to present, please provide all documents that relate in any way to the following aspects found in the Bank of America NSA: (1) read/accept rates, (2) early adoption of the Intelligent Mail Barcode (IMB); (3) computer services; (4) data collection, processing, or analysis services; (5) mailing and addressing services; (6) computer software or data rights. Please include communications and documents on these topics with all vendors, as well as with Bank of America and with any of Bank of America's potential or existing vendors or subcontractors.

DOCUMENT REQUEST COS/USPS-15

Please provide all documents, communications, and records of conversations between the Postal Service and Bank of America that relate to (1) the Postal Service's offering to another mailer an NSA that is functionally equivalent to the Bank of America NSA; (2) the Postal Service's offering any kind of NSA to Capital One (including communications and documents that relate to Capital One's Complaint case); and (3) the use of a niche tariff, experimental tariff, or rate structure other than an NSA to encourage improvements in mail processing and/or IMB implementation.

DOCUMENT REQUEST COS/USPS-16

Please provide all documents that relate to any step of the Postal Service approval process for the Bank of America NSA, including, but not limited to, reviews by the Executive Committee, the Finance Department, the Marketing Department, and any other Department, Committee, or Work Group.

DOCUMENT REQUEST COS/USPS-17

Please provide organizational charts for the period January 2005 to the present indicating names and titles of all persons who had responsibility for the preparation, analysis, negotiation, review, and approval of NSAs at the Postal Service.