

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
MOTION OF BANK OF AMERICA CORPORATION TO
LIMIT THE SCOPE OF THE PROCEEDING**
(September 24, 2008)

The United States Postal Service hereby responds to the Motion of Bank of America Corporation to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel for Complainant Capital One Services, Inc., filed September 10, 2008. The Postal Service hereby responds in support of limiting the scope of the instant proceeding.

The Postal Service supports Bank of America's position that this docket should not be used for collateral attacks on the Bank of America NSA, or for re-litigating Docket No. MC2007-1. In the Postal Service's view, the key issues in this case are: 1) whether or not Capital One is similarly situated to Bank of America, 2) whether or not functionally equivalent agreements must be identical to the baseline agreements upon which they are based, and 3) whether or not the Postal Service's has unduly discriminated against Capital One (or granted an undue preference to Bank of America). The Postal Service's internal deliberations prior to the signing of the Bank of

America NSA, its negotiations with Bank of America, its litigation strategy, and its internal deliberations leading up to the issuance of the Governors' Decision in Docket No. MC2007-1, are outside the scope of this proceeding.

The parties have previously had repeated opportunities to litigate matters concerning the fundamental validity of the Bank of America NSA, particularly in the original classification proceeding for that NSA, Docket No. MC2007-1. Litigants in any forum are not afforded unlimited opportunities to argue and reargue their cases, and common law doctrines of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) apply to administrative agencies, as well as courts.¹ In recent U.S. Supreme Court case, Justice Ginsburg clarified the sometimes-murky distinction between the two doctrines:

Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.²

Those doctrines “enforce repose” of previously resolved facts and issues, in order to prevent the unjustifiable imposition of further litigation on those who have already “shouldered their burdens,” and in order to preserve the resources of the adjudicatory system.³

In this case, Capital One, APWU, and presumably ValPak have given indications, through motions and discovery, that they may wish to challenge the Bank of

¹ *Astoria Fed. Savings & Loan Ass'n v Solimino*, 501 U.S. 104, 107 (1991).

² *Taylor v. Sturgell*, ___ U.S. ___, 128 S. Ct. 2161, 2171 (2008) (internal quotation marks omitted) (citing *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)).

³ *Solimino*, 501 U.S. at 107-108.

America NSA's factual and legal basis, despite the fact that the Commission's action on the essential issues "attained finality" in Docket No. MC2007-1.⁴ These issues are "in substance the same as those resolved in" the Bank of America NSA proceeding,⁵ such as the NSA's financial and operational merit and the appropriate data on which to base such an assessment. In other words, the complainant and intervenor's challenge would be based on the same "transaction" or "nucleus of facts": on the one hand, the facts involved in evaluating the Bank of America baseline NSA at this juncture and, on the other hand, those that support the Commission's opinion and recommended decision in the classification proceeding of that NSA are *identical* with respect to "time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."⁶ Regardless of any fresh legal theories that Capital One, APWU, and ValPak might devise in this proceeding, challenges based on these facts clearly could have been asserted in the original classification proceeding.⁷ To allow APWU and ValPak, which were parties in Docket No. MC2007-1, and Capital One, which had ample

⁴ *Id.* at 107.

⁵ *Montana v. United States*, 440 U.S. 147, 155 (1979).

⁶ See, e.g., *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 217 (D.C. Cir. 2004). This unity might not arise if the present challenge were somehow based on actions or facts that occurred *after* the Commission's proceedings in Docket No. MC2007-1. However, the parties are concerned in this proceeding only with the Bank of America NSA *at its outset*, which is the relevant reference point from which to evaluate the functional equivalency of an as-yet-hypothetical Capital One NSA. Therefore, the present complaint necessarily would involve retreading the same ground that was charted in Docket No. MC2007-1.

⁷ *Id.* at 217-218 ("There are no new facts. Apotex is simply raising a new legal theory. This is precisely what is barred by *res judicata*."); *Drake v. Fed. Aviation Admin.*, 291 F.3d 59 (D.C. Cir. 2002) ("[U]nder *res judicata*, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could*

opportunity to intervene in that proceeding,⁸ a second bite at Bank of America's apple would contradict fundamental principles of sound jurisprudence.

Accordingly, the Postal Service supports Bank of America's request for the Commission to issue an Order narrowing the scope of the proceeding and the remedy available.

have been raised in that action.") (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)) (emphasis in original).

⁸ Although courts have tended to disfavor nonparty preclusion except in narrow circumstances where a prior party was representing the interests of an instant party, *see generally, Sturgell*, ___ U.S. ___, 128 S. Ct. 2161, this attitude rests intrinsically on due process concerns that are of diminished relevance here. In the judicial and administrative adjudication environment that was at issue in *Sturgell*, factual and legal issues are disputed between a limited number of specific parties or their representatives. Hence, it is understandable that a third party might not have had proper notice of the prior proceeding, had been unaware of the opportunity to assert its rights, and, as a matter of due process, would require a forum in which to present its particular complaints. This is a far cry, however, from the administrative *rulemaking* context to which the Bank of America NSA was subject in Docket No. MC2007-1. Such proceedings are expressly designed to ensure due process to interested parties through such procedural steps as public notice, opportunity for comment, and a full panoply of motion, objection, and discovery rights. Although Capital One chose not to intervene in the Bank of America NSA proceeding, it was offered a full and fair opportunity to raise any concerns with and challenges to the baseline NSA in that proceeding. Even after the Commission's opinion and recommended decision, Capital One had the opportunity to submit comments to the Governors under 39 C.F.R. § 9.2. Finally, Capital One could have appealed the Governors' determination before a federal court of appeals under former 39 U.S.C. § 3628, had it availed itself of its rights to intervene. Therefore, Capital One should be precluded from wasting Commission resources, and violating Bank of America's due process rights to the consequences of the Commission's and the Governors' long-since-final action, by using the complaint process to undermine a determination that it did not challenge when it had the opportunity.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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September 24, 2008