

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

COMPLAINT OF CAPITAL ONE  
SERVICES, INC.

Docket No. C2008-\_\_\_

**MOTION TO BIFURCATE PROCEEDING  
AND TO EXPEDITE SCHEDULING**

**June 19, 2008**

Capital One Services, Inc. (Capital One) hereby requests bifurcation of the proceedings for its Complaint,<sup>1</sup> which is being filed concurrently. Capital One also requests expedited scheduling.

**REQUEST TO BIFURCATE PROCEEDINGS**

The Complaint raises legal issues relating to whether the Postal Service violated §§ 403(c) and 3622(c)(10) of Title 39 and the Commission's Rules. These legal issues can be decided based on undisputed facts and precedent—principally the record in Docket No. MC2007-1—and do not require expensive and time-consuming discovery on any material factual questions.

The essential, undisputed facts are these: (1) Capital One has offered to sign the same contract as the Bank of America NSA (modified only to reflect the change in

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<sup>1</sup> Complaint of Capital One Service, Inc. Regarding Discrimination and Other Violations of Law by the United States Postal Service (Complaint), Docket No. C2008-\_\_\_.

company name and the volume data in paragraph I.A.); and (2) the Postal Service has refused, insisting that it will only consider a “functionally equivalent” NSA with Capital One that contains mailer-specific read/accept rates for baselines and reduced per-piece rate schedules, conditions that would create a pay-for-performance arrangement.

In light of these undisputed facts, the statutory and regulatory claims in the Complaint can be resolved by reference to (1) Postal Service testimony under oath in Docket No. MC2007-1; (2) Postal Service representations in legal documents submitted in that case; and (3) the Commission’s finding in that case, after thorough discovery, cross-examination, and briefing, that “as evaluated, [the Bank of America NSA] is not a pay-for-performance agreement.” PRC Op. MC2007-1 at 37.

The crucial legal question raised by the Complaint is this: Does the Postal Service’s refusal to sign the exact same NSA with Capital One that it signed with Bank of America violate Sections 403(c) and 3622(c)(10) of Title 39 and the Commission’s rules, or, stated in the positive, can the Postal Service lawfully insist on pay-for-performance conditions in a functionally equivalent NSA when the original baseline NSA was conclusively determined to *not* be a “pay-for-performance” agreement?

Accordingly, unless the Postal Service disputes the two facts identified above, Capital One proposes that, after acceptance of the Complaint, the Commission initiate Phase I of the proceeding by requesting parties (including intervenors) to file Requests for Admissions. The Commission could then move directly to briefing of the legal issues raised by the statutory and regulatory claims in the Complaint.

Doing so would promote efficiency and better use of Commission resources. Prompt resolution of these issues would prevent ongoing harm to Capital One. In

addition, because one aspect of the proposed NSA is early adoption of mail processing technologies, benefits to the Postal Service would be maximized if the Complaint were resolved as a matter of law and an NSA implemented quickly.

If the Commission later determines that certain issues require additional factual inquiry, it could then initiate a Phase II to allow discovery and sworn testimony. All participants, including Capital One, would then have an opportunity to conduct discovery, submit testimony, and request a hearing on any of the remaining issues. There are strong reasons, however, to expect that resolution of the critical legal questions would dispose of the case without the need for protracted discovery and fact-based litigation.

#### REQUEST TO EXPEDITE SCHEDULING

Regardless of how the Commission rules on the request to bifurcate the proceedings, Capital One respectfully requests that the Commission adopt an expedited schedule.

An expedited schedule is essential for at least two reasons: (1) Capital One has suffered, and continues to suffer, ongoing harm; (2) for the Postal Service to derive maximum benefit from implementation of the various mailing processing technologies in a Bank of America-type NSA, the NSA needs to be finalized and implemented as soon as possible. The longer the delay, the less the benefit, so prompt resolution of these issues will benefit all concerned.

Under 39 U.S.C. § 3662(b), the Commission has up to 90 days from receipt of a complaint to either (a) begin proceedings after a finding that the complaint raises an issue of fact or law, or (b) dismiss the complaint. Capital One respectfully requests that

the Commission take into consideration that time is of the essence and make an initial determination as soon as possible so that the parties can move quickly towards resolution through formal or informal means.

In the event that the Commission decides not to bifurcate the proceeding and to allow discovery, Capital One respectfully requests that the Commission limit discovery to no more than 45 days.

### CONCLUSION

For the foregoing reasons, Capital One respectfully requests that the Commission bifurcate this proceeding and adopt an expedited schedule.

Respectfully submitted,

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