

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 INTERROGATORIES OF CAPITAL ONE SERVICES, INC.
(COS/USPS-46, 49, 50, 51, 59(F)-(G), 60(C), 61(B) AND (E)-(H),
63(B)-(C), 65, 66, 67, AND 76)
(April 30, 2009)**

In accordance with Rules 25 and 26 of the Commission's Rules of Practice and Procedure, the United States Postal Service hereby objects to the following interrogatories filed on March 6, 2008, by Capital One Services, Inc. (hereinafter "Capital One"): COS/USPS-46, 49, 50, 51, 59(f)-(g), 60(c), 61(b) and (e)-(h), 63(b)-(c), 65, 66, 67, and 76. The objectionable interrogatories are attached verbatim, and the reasons for objection are stated below. Interrogatories 59, 60, 61, and 63 were originally filed under seal on April 20, 2009, and the Postal Service incorporates those sealed interrogatories by reference.

Interrogatories COS/USPS-46, 49, 50, 51, and 63(b)-(c)

The Postal Service objects to interrogatories COS/USPS-46, 49, 50, 51, and 63(b)-(c) on the grounds of relevance, privilege, and commercial sensitivity. These interrogatories seek to elicit information contained in a report by the Office of the Inspector General to the Postal Service's Board of Governors regarding the Bank of

America NSA. The Postal Service has already discussed lack of relevance, statutory exemption under 39 U.S.C. § 410(c)(4), deliberative process privilege, and commercial sensitivity in connection with the Office of the Inspector General's report, and it incorporates herein by reference the arguments presented in its Response to P.O. Ruling C2008-3/7, Ruling on Procedural Requests Relating to the Deposition of Jessica Dauer Lowrance, filed on September 4, 2008. The same arguments concerning the document as a whole pertain to the constituent subject matter at issue in these interrogatories.

Interrogatories COS/USPS-59(f)-(g), 60(c), and 76

The Postal Service objects to interrogatories COS/USPS-59(f)-(g), 60(c), and 76 on the basis of privilege and commercial sensitivity. Interrogatories 59(f)-(g) and 60(c) seek a narrative account of discussions held at a Postal Service Board of Governors meeting about future contracts and other matters presented in a slide presentation delivered by Ms. Anita Bizzotto, former Chief Marketing Officer. Interrogatory 76 asks whether Postal Service management considered whether to discontinue offering market dominant NSAs to individual mailers in September 2008. Such information is 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 discussions concerning an impending agency decision. In this case, any discussions by members of the Board and Postal Service management, of the nature suggested by the interrogatories, would be "predecisional" because they occurred before the adoption of

pertinent courses of action: the Governors' decision that was at hand, the Postal Service's conclusion of future contracts, and a determination of whether to continue offering market dominant NSAs. In addition, the opinions, suggestions, or recommendations of Board members and other government employees comprise "deliberative" information within the meaning of the privilege. The interrogatory clearly implicates the privilege's underlying policy concern: any discussions would have been intended to give the Governors and Postal Service management the detail and analysis they needed to make an informed decision, which would not have been possible if the participants had had to contend with exposing controversial policy positions and rationales. Therefore, the discussions are protected by the deliberative process privilege, which applies both in the civil discovery context and, with respect to documents, as a basis for exemption from disclosure under Exemption 5 of the FOIA.

In addition, any discussions of the type referred to in the interrogatories consist of sensitive commercial information about the Postal Service's then-current contract negotiation plans, as well as the substance of certain exchanges with private sector entities. This information would not be publicly disclosed by the Postal Service's competitors or other large businesses. Thus, the information is exempt from disclosure requirements under 39 U.S.C. § 410(c)(2). To the extent that the discussions concerned confidential information that third parties provided in contract negotiations, that information may be protected by non-disclosure agreements (NDAs). The Postal Service would suffer commercial harm in its ability to deal with Bank of America and other prospective NSA partners, including Capital One as a negotiating partner. Thus,

the Postal Service objects to interrogatories COS/USPS-59(f)-(g) and 60(c) on the grounds of privilege and commercial sensitivity.

Interrogatories COS/USPS-61(b) and (e)-(h), 66, and 67

The Postal Service objects to interrogatories COS/USPS-61(b) and (e)-(h), 66, and 67 on the basis of relevance and undue burden. Interrogatory COS/USPS-61(b) and (e)-(h) asks the Postal Service to define certain terms used in a memorandum, and interrogatories COS/USPS-66 and 67 ask the Postal Service to confirm its litigation position regarding the “key issues” in this case and the requirements for a functionally equivalent NSA, respectively. These interrogatories are not reasonably calculated to lead to the discovery of admissible evidence. Instead of seeking factual information, they ask the Postal Service to detail its legal position on the construction of terms with central significance to this complaint, as well as on other central issues. The Postal Service’s litigation strategy, legal interpretations, and any factual support it plans to rely upon in this case are not, on their own, admissible evidence in this proceeding. Clearly, these interrogatories reflect Capital One’s intent to anticipate arguments the Postal Service might make in this case and to shift the burden of proof onto the Postal Service. The burden in any complaint case lies with the complainant, not with the Postal Service. Capital One should not be permitted to bypass the testimony, hearing, and briefing stage via these interrogatories.

The Postal Service also objects to these interrogatories on the grounds of undue burden. Responding to these interrogatories would require the Postal Service to formulate its possible testimony and outline any legal briefs it may file immediately, in

the midst of the discovery process. Doing so would require countless additional workhours, involving a number of postal employees. The Postal Service would also have to make its arguments before Capital One would even file its own testimony in support of its Complaint. This interrogatory would not only place an undue burden on the Postal Service in terms of the resources required to respond, but also, as discussed above, because the interrogatory effectively subverts well-established procedures typically utilized in complaint proceedings and seeks to shift the burden of proof in this docket onto the Postal Service. Thus, the Postal Service objects to interrogatories COS/USPS-61(b) and (e)-(h), 66, and 67 on the grounds of relevance and undue burden.

Interrogatory COS/USPS-65

The Postal Service objects to interrogatory COS/USPS-65 because it is duplicative and unduly burdensome. Under the Commission's Rule of Practice 26(f), the Postal Service is affirmatively obligated to supplement or amend discovery responses as necessary, up to the date when the answer could have been accepted into evidence as written cross-examination. Because of this standing duty, it is unnecessary to ask the Postal Service to review and amend its prior responses by way of a specific interrogatory, as Capital One does here.

Thus, for the aforementioned reasons, the Postal Service objects to COS/USPS-46, 49, 50, 51, 59(f)-(g), 60(c), 61(b) and (e)-(h), 63(b)-(c), 65, 66, 67, and 76.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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INTERROGATORY COS/USPS-46

With respect to the Memorandum from the OIG to the Governors, from early November, 2007, identified in the Lowrance deposition, please indicate if the Memorandum addressed the following issues relating to management's Presentation on December 5, 2006 to the Board of Governors on the subject of the financial impact of the proposed BAC NSA ("2006 Presentation"):

- a. The financial impact in the 2006 Presentation was significantly different from that the financial impact presented to the PRC in the USPS subsequent filing in MC2007-1 of February 7, 2007.
- b. The 2006 Presentation inaccurately portrayed the BAC NSA as a "pay-for-performance" agreement.

INTERROGATORY COS/USPS-49

With respect to the Memorandum from the OIG to the Governors, from early November 2007, please indicate if the Memorandum addressed:

- a. Whether the Postal Service had followed the NSA process set forth in the Postal Service NSA Handbook, Exhibit 1 of the Lowrance Deposition, with respect to the preparation and negotiation of the Bank of America NSA
- b. Whether there was any requirement that Bank of America NSA be offered to similarly situated mailers
- c. If that answer to subpart b above is yes, whether the 2006 Postal Accountability and Enhancement Act retained the requirement that functionally equivalent NSAs be offered to similarly situated mailers.

INTERROGATORY COS/USPS-50

With respect to the Memorandum from the OIG to the Governors, from early November, 2007, please indicate whether the term "functionally equivalent" was referred to, defined or described in that Memorandum. If so, please provide all such references, definitions, or descriptions.

INTERROGATORY COS/USPS-51

With respect to the December, 2007 Memorandum from the OIG to the Governors, identified in the Lowrance deposition, please indicate:

- a. Whether the Memorandum informed the Governors of the possibility that "similarly situated" mailers might request a similar NSA.
- b. Whether the Memorandum contained any references to "functionally equivalent" NSAs.
- c. Whether the Memorandum provided an estimate to the Governors that the net financial impact of the BAC NSA was negative.

d. If the answer to subpart c above is yes, whether the Memorandum informed the Governors that the negative financial impact could be amplified if similarly situated mailers requested similar NSAs.

e. If the answer to subpart d above is yes, whether the Memorandum informed the Governors that functionally equivalent NSAs could differ from the baseline NSA. Please explain in detail.

INTERROGATORY COS/USPS-65

Please provide updates of all your responses to previous interrogatories and document requests.

INTERROGATORY COS/USPS-66

The Postal Service has stated that it regards the "key issues" in the case as: "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 [sic] has unduly discriminated against Capital One (or granted an undue preference to Bank of America)." Response of USPS to Public Representative Motion to Compel Response to Interrogatory (PR/USPS-12), C2008-3, September 16, 2008.

Please confirm that the Postal Service continues to regard these three issues as the only "key issues" in this case. If you do not so confirm, please indicate what the Postal Service regards as the "key issues" in this case at this time. If there are additional key issues, please describe them in detail.

INTERROGATORY COS/USPS-67

Is it the Postal Service's position that that for a mailer to obtain an NSA that is functionally equivalent to the BAC NSA, it must demonstrate that the second NSA will result in a "comparable benefit" to the Postal Service? Please explain why or why not.

In answering this interrogatory, please define your use of the term "comparable benefit."

INTERROGATORY COS/USPS-76

During September, 2008, did Postal Service management consider whether to discontinue offering Market Dominant NSAs to individual mailers (as distinct from niche tariffs)? If so, was any decision, formal or informal, reached by management on whether to discontinue offering Market Dominant NSAs to individual mailers. Please provide details.