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

COMPLAINT OF CAPITAL ONE  
SERVICES, INC.

Docket No. C2008-\_\_\_\_\_

**COMPLAINT OF CAPITAL ONE SERVICES, INC.  
REGARDING DISCRIMINATION AND OTHER VIOLATIONS OF LAW  
BY THE UNITED STATES POSTAL SERVICE**

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## COMPLAINT

### *I. Introduction*

1. Just two and half months ago, on April 1, 2008, the United States Postal Service (Postal Service) began implementing its Negotiated Service Agreement (NSA) with Bank of America Corporation (Bank of America).<sup>1</sup> The co-proponents initially characterized the NSA as a pay-for-performance agreement in which Bank of America would receive payments only if it made “actual and measurable *improvements*.” During the regulatory approval process, however, discovery revealed that the baselines used as thresholds for most of the discounts to Bank of America were industry-average read/accept rates from 1998 and that more recent data showed considerable improvements in industry averages since then.

2. In response to concerns that the 1998 industry-average baselines were inappropriate proxies for Bank of America’s actual pre-NSA baselines, the Postal Service emphasized repeatedly that the baselines in the NSA—and the associated per-piece discounts—were key elements of the financial incentives offered to Bank of America for its willingness to undertake a “vast array” of modern mail processing operations for the full term of the NSA. These financial incentives were *not* tied to any specific mail processing practice or even to a demonstrable improvement in Bank of America’s actual read/accept rates.<sup>2</sup> The Commission accordingly concluded that, “as

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<sup>1</sup> See Docket No. MC2007-1, Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bank of America Corporation (Bank of America NSA). Unless otherwise stated, all citations herein refer to Docket No. MC2007-1.

<sup>2</sup> See, e.g., Reply Brief of the United States Postal Service (USPS Reply Br.) at 12.

evaluated, this is not a pay-for-performance agreement.”<sup>3</sup> The NSA was ultimately approved by the Commission and the Board of Governors—without any change to the 1998 industry-average baselines.

3. Further, to allay concerns of discrimination, the Postal Service explicitly recognized an “affirmative obligation to make comparable terms available to companies that are deemed functionally equivalent, thus obviating the possibility that any competitor of BAC need be affected by the Agreement.”<sup>4</sup> “[T]he Postal Service’s request, in conjunction with the record evidence in this proceeding, make *abundantly clear* that functionally equivalent NSAs will be available to other mailers.”<sup>5</sup> In fact, the Postal Service “would be happy to have a hundred functionally equivalent NSAs . . . .”<sup>6</sup>

4. The Postal Service also recognized that, to qualify for a functionally equivalent NSA, a mailer would have to commit, not to any particular mail processing improvement or mailer-specific baseline, but rather “to use a vast array of the specified processes on the vast majority of its qualifying mail for the full NSA term, as done by BAC.”<sup>7</sup> Because there were no “direct incentives” in the agreement, a mailer willing to commit to the “vast array of specified processes,” would qualify regardless of whether or not it had previously adopted one or more of those processes: “[P]rior voluntary

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<sup>3</sup> Postal Regulatory Commission, MC2007-1, Opinion and Recommended Decision (PRC Op. MC2007-1) at 37.

<sup>4</sup> Direct Testimony of Ali Ayub on Behalf of United States Postal Service (USPS-T-1) at 26.

<sup>5</sup> USPS Reply Br. at 18 (emphasis added).

<sup>6</sup> MC2007-1, Tr. 2/379; see Tr. 2/371-380. The sworn testimony on cross-examination of Postal Service witness Ali Ayub will be referred to by transcript volume and page number.

<sup>7</sup> USPS Reply Br. at 18-19.

adoption of the processes to which BAC has committed are [*sic*] neither a bar to eligibility nor a cause for concern.”<sup>8</sup>

5. Bank of America’s competitors and the general public were entitled to take those commitments at face value, and they chose not to intervene or oppose the NSA. The Postal Service relied on this as proof that the NSA created no competitive harm.<sup>9</sup>

6. This Complaint puts those commitments to the test. Over the past year, Capital One Services, Inc. (Capital One), faced with the competitive advantage conferred on Bank of America by the NSA, has repeatedly asked the Postal Service for a similar NSA. Indeed, it has even proffered a substantively *identical* agreement “*to use the vast array of the specified processes on the vast majority of its qualifying mail for the full NSA term, as done by BAC.*”<sup>10</sup> The Postal Service, however, has refused, and has insisted on mailer-specific baselines and reduced per-piece discounts in an attempt to enforce true “pay-for-performance” conditions that were never imposed on Bank of America.

7. As explained more fully below, this course of action unduly discriminates against Capital One (or gives an undue preference to Bank of America) in violation of 39 U.S.C. § 403(c). It creates a special classification unavailable “on public and reasonable terms” and in a way that “creates unreasonable harm to the marketplace” in violation of 39 U.S.C. § 3622(c)(10). Finally, it violates the Commission’s own rules implementing those laws (Rules 3010.40, *et. seq.*), and raises equitable claims including estoppel and issue preclusion.

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<sup>8</sup> *Id.*

<sup>9</sup> See Initial Brief of the United States Postal Service (USPS Initial Br.) at 42-43.

<sup>10</sup> USPS Reply Br. at 19 (emphasis added).

**II. The Bank of America NSA**

A. The Bank of America NSA is NOT a pay-for-performance agreement.

8. Under the Bank of America NSA, discounts are calculated based on quarterly measurements of Bank of America's read/accept rates for First-Class Mail and Standard Mail. Discounts are also paid based on return rates for First Class Mail, forward rates for First-Class Mail, and UAA rates for Standard Mail.<sup>11</sup> Nevertheless, discounts based on read/accept rates control the bulk of the quantified Postal Service cost savings and mailer discounts and were thus the focus of the Commission's review<sup>12</sup> and, similarly, are the focus of this Complaint.

9. When first proposed, both the Postal Service and Bank of America pitched the agreement as a "pay-for-performance" NSA, *i.e.*, the Postal Service would not pay refunds except for "actual and measurable *improvements*."<sup>13</sup> The Bank of America witness explained, "If we manage to improve our address quality, we will earn rate discounts. If we fail to improve our address quality, the Postal Service will pay us nothing."<sup>14</sup> And the Postal Services witness agreed: "This Agreement does not require the Postal Service to pay any incentives to BAC unless and until it achieves a measurable improvement in actual mail processing performance."<sup>15</sup>

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<sup>11</sup> Negotiated Service Agreement between U.S. Postal Service and Bank of America Corporation at ¶¶ IV.C and F, IV.D, IV.E, and IV.G, included as Attachment F to the Request of the United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement a Baseline Negotiated Service Agreement with Bank of America Corporation, February 7, 2007 (USPS Request).

<sup>12</sup> See PRC Op. MC2007-1 at 21.

<sup>13</sup> USPS-T-1 at 5.

<sup>14</sup> Direct Testimony of Richard D. Jones on Behalf of Bank of America Corporation (BAC-T-1) at 12-13.

<sup>15</sup> USPS-T-1 at 13; see PRC Op. MC2007-1 at 35 (citing additional "pay-for-performance" representations); see also USPS Request at 2 (describing the NSA as a "pay for performance" NSA).

10. Tellingly, there is no operative language in the NSA contract or the DMCS that clearly ties Bank of America's discounts to a verifiable "improvement" over its actual pre-NSA read/accept rates. Rather, the read/accept rate baselines—without any reference to Bank of America's actual pre-NSA rates—are simply set at the numbers 96.8 percent (for First-Class Mail) and 96.9 percent (for Standard Mail).<sup>16</sup> Moreover, in qualifying for eligible discounts using those baselines, "[t]he specific means [if any] by which Bank of America achieves improved address and mail processing are left to the sole judgment of Bank of America."<sup>17</sup> In other words, the agreement allows Bank of America to qualify for discounts regardless of whether its mail processing commitments actually improve the company's read/accept rates—there is no legal obligation that ties specific discounts to particular performance "improvements" at all.<sup>18</sup>

11. In the course of MC2007-1, discovery by intervenors revealed that the 96.8 and 96.9 percent rates dated from 1998 and that more recent data from 2006 and 2007 suggested industry-average read/accept rates had improved considerably since then. This evidence cast doubt on the wisdom of using 1998 industry averages as a proxy for Bank of America's baselines if, in fact, the agreement was to be a pay-for-performance agreement.

12. The co-proponents then seemed to changed tack: The "pay-for-performance" NSA became a "performance-based" agreement, replacing discounts

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<sup>16</sup> "The baseline value from which incremental improvements shall be computed is a read/accept rate of 96.8 percent." Attachment F of Request at ¶ IV.C.2. "The baseline value . . . is a read/accept rate of 96.9 percent." *Id.* at ¶ IV.F.2.

<sup>17</sup> *Id.* at ¶ IV.A.

<sup>18</sup> "[T]he incentives in this NSA cannot be associated exclusively with particular activities and results." Tr. 2/41.

contingent upon “improvements” with financial incentives tied loosely to “performance” (quarterly measurements of read/accept rates).<sup>19</sup>

13. During public hearings on the NSA, the Postal Service witness stated under oath that, although NSA discounts would be calculated based on Bank of America’s quarterly read/accept “performance,” the discounts were not intended to be justified by “improvements” to those particular rates, but by Bank of America’s commitment to adopt “all of the processes.” Under this approach, it did not matter whether Bank of America’s actual read/accept rates were higher or lower than the industry average. The touchstone of the agreement was a “commit[ment] to all of the other obligations within the NSA,”<sup>20</sup> not improvements in read/accept rates. For that reason, even a mailer who offered to use actual, mailer-specific baselines would not qualify if that mailer committed to anything less than “all of the processes identified in the original NSA.”<sup>21</sup>

14. Throughout the proceeding, the co-proponents steadfastly refused to change the 1998 industry-average baselines. To do so, they argued, would dilute the value of the NSA to the mailer, reducing the financial incentives to adopt the full suite of mail processing services: “Any adjustments to the baseline values . . . would, in essence, serve as a kind of ‘penalty’ against BAC for agreeing to adopt all of the practices which will ultimately benefit the Postal Service and other mailers.”<sup>22</sup> They explicitly recognized that using more up-to-date, mailer-specific baselines would

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<sup>19</sup> USPS Reply Br. at 12; see also *id.* at 19 (stating that there are no “direct incentives” for the various processes).

<sup>20</sup> Tr. 2/375.

<sup>21</sup> *Id.*

<sup>22</sup> USPS Initial Br. at 28.

fundamentally change the nature of the NSA by reducing or eliminating the primary incentive: “the adoption of alternative benchmarks . . . would reduce BAC’s expected return on investment, would weaken the incentives for BAC to make cost-savings investments, and would likely make the deal unpalatable to BAC.”<sup>23</sup>

15. The co-proponents even opposed the proposal in the Commission’s Notice of Inquiry No. 1 to adjust the baselines for the second and third years of the NSA to reflect actual, mailer-specific read/accept rates measured in the previous NSA year. In response, the Postal Service stated unequivocally that “any approach that would modify system-wide baselines [by using mailer-specific data] should not be adopted,”<sup>24</sup> because, among other things, it would “undermine the discount structure . . . which is intended to compensate BAC for the additional investments it would have to make to fulfill the operational commitments of this NSA.”<sup>25</sup>

16. The Postal Service consistently took the position that the 1998 industry-average rates were superior to any alternative baseline, mailer-specific or otherwise.<sup>26</sup> More specifically, it argued that the 1998 average rate baselines were “consistent with the system wide average data” thoroughly vetted in R2006-1 and “used as the basis for worksharing discounts involving billions of dollars.”<sup>27</sup> The baselines “take account of the

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<sup>23</sup> USPS Initial Br. at 24.

<sup>24</sup> Postal Service Response to Commission Notice of Inquiry No. 1 at 2.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> See USPS Initial Br. at 24; see also *id.* at 29-32. In its Initial Brief, the Postal Service evaluated—and flatly rejected—proposed alternative baselines including (1) aggregated End-of-Run (EOR) data from LR-4; (2) data from competitive tests of the wide field of view (WFOV) camera reflected in LR-3; and (3) data from Seamless Acceptance pilot tests. See generally *id.* at 29-33.

<sup>27</sup> USPS Reply Brief at 23.

operational commitments BAC will undertake for which no specified incentives are provided.”<sup>28</sup>

17. The Postal Service went further and recognized that the 1998 industry-average baselines—and the financial incentives they represented—were essential not only for Bank of America, but for other mailers, like Capital One, who could be expected to seek NSAs on similar terms: “The Commission should reject such an approach [*i.e.*, using any baseline other than the 1998 industry averages] because it would likely make the agreement unpalatable to BAC *and functionally equivalent customers* who must consider ‘the present value of expected future payoff over the entire life of the agreement.’ [An adequate return on investment is important for] BAC, *and presumably, any other economically rational mailer.*”<sup>29</sup> “The alternative of requiring parties to a performance-based NSA, such as the one at issue here, to use customer-specific data to determine the baseline values from which discounts would be calculated would likely deter *customers* from pursuing NSAs with the Postal Service due to the substantial time or cost of collecting and analyzing such data.”<sup>30</sup>

18. On October 3, 2007, the Commission soundly rejected the notion that the Bank of America NSA reflected a true pay-for-performance agreement. The Commission recommended the Bank of America NSA, but “strongly caution[ed]” the Governors: “The Commission concludes that read/accept rates have improved to such an extent that Bank of America will not have to make any improvements in barcode readability to receive all available mail processing performance discounts. This is not

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<sup>28</sup> *Id.* at 23-24.

<sup>29</sup> USPS Initial Br. at 34 (emphasis added).

<sup>30</sup> Postal Service Response to NOI No. 1 at 2 (emphasis added).

indicative of a pay-for-performance agreement.”<sup>31</sup> After an extended discussion explaining why the “pay-for-performance” characterization was inapt, the Commission made a finding that “as evaluated, *this is not a pay-for-performance agreement.*”<sup>32</sup>

19. Approval of the NSA without any change to the controversial 1998 average baselines reflects a recognition that these baselines form an essential part of the agreement—the key financial incentive from the mailer’s point of view—and not, as originally pitched, a proxy to estimate the mailer’s starting point in a pay-for-performance contract.

20. The Commission’s Opinion further reflects the understanding that this essential part of the Bank of America NSA would apply to functionally equivalent NSAs: “[M]any mailers similarly situated to Bank of America may qualify for functionally equivalent agreements, and *demand equivalent discounts* . . . . The Postal Service has expressed its intent to make comparable agreements available to similarly situated mailers. This reduces the possibility that other mailers would find the Agreement discriminatory, but increases the financial risk to the Postal Service as it may have to provide substantial additional rate incentives . . . .”<sup>33</sup> In her concurrence, Commissioner Goldway stated, “First and foremost, through this NSA, the Postal Service will lose between \$25 and \$45 million [through use of the 1998 industry-average baselines] and opens itself—*if it is to be fair to other similarly situated mailers*—to lose much more.”<sup>34</sup>

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<sup>31</sup> PRC Op. MC2007-1 at 1-2.

<sup>32</sup> *Id.* at 37 (emphasis added).

<sup>33</sup> PRC Op. MC2007-1 at 2 (emphasis added).

<sup>34</sup> PRC Op. MC2007-1, Concurring Opinion of Commissioner Goldway at 1 (emphasis added).

21. On December 18, 2007, the Postal Service Board of Governors approved the Bank of America NSA.<sup>35</sup> Pursuant to the Board's Decision, implementation of the NSA began on April 1, 2008.<sup>36</sup>

22. Nowhere in the Governors' Decision is the Bank of America NSA characterized as a "pay-for-performance" agreement. Instead, the Governors "emphasize the great importance, in our view, of the benefits of the unquantifiable mandatory operational commitments BAC has agreed to adopt under the NSA . . . . Although the Commission indicated that the benefits of BAC's operational commitments were not quantified on the record, the Commission specifically endorsed the "concept" of the NSA, *i.e.*, 'having a very large volume mailer assist in the introduction of a *panoply of modern mail processing systems.*' PRC Op. MC2007-1 at 31. We conclude that the potential benefits of the variety of operational commitments made by BAC provide a convincing reason, despite any estimated reduction in contribution, for proceeding with the implementation of the NSA."<sup>37</sup>

*B. The touchstone of the Bank of America NSA is the commitment of a large volume mailer to implement the full "panoply" of specified mail processing systems in exchange for financial incentives tied to established baselines.*

23. The touchstone of the Bank of America NSA is thus, in the Commission's words (and as quoted approvingly by the Governors), "having a very large volume mailer assist in the introduction of a *panoply of modern mail processing systems.*"<sup>38</sup>

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<sup>35</sup> Decision of the Board of Governors of the United States Postal Service on the Opinion and Recommended Decision of the Postal Regulatory Commission Approving Negotiated Service Agreement with Bank of America Corporation, (Governors' Decision) at 1.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> Governors' Decision at 5 (emphasis added).

<sup>38</sup> PRC Op. MC2007-1 at 31.

“[A]ny company that wants to be deemed functionally equivalent in the NSA terminology would have to commit to all of the requirements as identified in the NSA contract.”<sup>39</sup>

24. The essential requirements of the NSA are:

A large volume mailer commits to: “(i) the implementation of Four-State Barcode, OneCode ACS, Confirm Service, Seamless Acceptance, FAST, and Dropship, (ii) the barcoding of Courtesy Reply Mail, Business Reply Mail, and Qualified Business Reply Mail, and (iii) the adoption of electronic Address Correction Service in lieu of physical returns for letter-rated First-Class Mail that would otherwise be eligible for Standard Mail rates.” DMCS 630.22.

In exchange, the Postal Service commits to: pay per-piece discounts calculated “in accordance with the text of the [Bank of America] NSA.” DMCS 630.41.

### **III. Discrimination against Capital One and Other Violations of Law**

#### **A. Factual Background**

25. Established in 1995, Capital One is a Fortune 500 company specializing in credit cards, home and auto loans, banking, and personal savings products, with over 50 million customer accounts.

26. As of 2006, Capital One was the Postal Service’s fourth largest customer and single biggest generator of First Class Mail. Capital One sent approximately 1.2 billion First Class Mail letters and 1.4 billion Standard Mail letters through the system during that Postal Service fiscal year.

27. Beyond the sheer volume of mail it sends, Capital One works extensively with the Postal Service. For example, the Postal Service and Capital One negotiated, won approval for, and implemented the first successful NSA in 2003. Capital One also

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<sup>39</sup> Tr. 2/379.

worked with the Postal Service to create and implement the National Mail Piece Design Approval Process in March, 2004.

28. Capital One continues to work with the Postal Service on a variety of matters, participating in various events, workshops, and symposia with the Postal Service and the broader mailing industry, particularly in the area of new mail processing technologies. In recent years, Capital One has also partnered with the Postal Service in discrete voluntary pilot programs.

29. In or around February, 2007, shortly after the initial filing for regulatory approval of the Bank of America NSA, Capital One indicated to the Postal Service's Pricing Strategy Group its desire for a similar NSA.

30. On January 31, 2008—about one month after the Board of Governors' approval of the Bank of America NSA—Niki Howard, Supplier Manager of Capital One, had an informal meeting with Jessica Lowrance, Acting Manager of Postal Service Pricing Strategy. Ms. Howard raised the possibility of a Bank of America-type NSA but Ms. Lowrance stated that Capital One would not be able to use the industry-average rates offered to Bank of America.

31. On April 2, 2008, Ms. Howard spoke to Ms. Lowrance by telephone and again raised the Bank of America NSA, asking Ms. Lowrance if she was sure that Capital One could not do something similar.

32. Ms. Lowrance replied that her department "was not supporting any NSAs like the Bank of America filing" and that they were only interested in doing volume-based deals.

33. On April 17, 2008, Ben Lamm, Director of Direct Marketing Operations for Capital One, had a telephone conversation with Stephen Kearney, Vice President of Pricing and Classification for the Postal Service. Mr. Lamm voiced his concern that Capital One had been seeking an NSA that was functionally equivalent to the Bank of America NSA for a long time but had been told that a Capital One NSA would not be able to use the same industry-average baselines offered to Bank of America.

34. Mr. Kearney replied by citing the controversy surrounding the use of the 1998 industry-average read/accept rates for the Bank of America NSA, and explained that, if Capital One wanted an NSA, they could not use those baselines. Mr. Lamm responded by pointing out that this created an unfair advantage for Bank of America and put Capital One, a competitor, at a serious competitive disadvantage.

35. Mr. Kearney then reiterated the position that Capital One could not receive the same industry-average baselines, and indicated that, if Capital One believed it was being treated unfairly, it could file a complaint with the Postal Regulatory Commission.

36. On May 15, 2008, David Hummelberg, Managing Vice President of Capital One, sent a letter and email to Mr. Kearney, stating "you indicated that Capital One cannot get an NSA like the Bank of America NSA. As I'm sure you'll understand, that places us at a competitive disadvantage to Bank of America." Attachment A to the Declaration of Ben Lamm.

37. The letter further stated that, after a careful review of the Bank of America NSA, Capital One stood "ready, willing, and able" to enter into and comply with a new contract that "uses the identical language and terms as the Bank of America agreement with only, the name, address, and mail volumes (in paragraph 1.A.) changed."

38. Mr. Kearney responded by letter, dated May 27, 2008, stating that it was willing to negotiate a functionally equivalent NSA with Capital One, but that “a new Capital One NSA would not be identical to the Bank of America NSA. Certain terms and conditions would necessarily have to be changed, as the situation regarding the factors in the Bank of America agreement is different today.” Attachment B to the Declaration of Ben Lamm.

39. Upon receipt of the letter, Mr. Lamm of Capital One sent a second letter and email to Mr. Kearney, dated May 30, 2008. That letter attached a draft NSA identical to the NSA that the Postal Service signed with Bank of America except for the substitution of Capital One’s name throughout and its mail volume description in paragraph 1.A. The letter noted that “you indicated in your letter that ‘[c]ertain terms and conditions would necessarily have to be changed,’” and then asked Mr. Kearney to specify on the attached draft what terms and conditions would need to be changed and why. The letter also asked that the Postal Service “indicate specifically [the] exact changes you will require to Paragraphs IV(C)(1)-(3)(a); IV(D)(1)-(2); IV(F)(1)-(3)(a); and IV(G)(1)-(2)”—the paragraphs that prescribe the discount baselines and discount schedules offered to Bank of America. (Attachment C to the Declaration of Ben Lamm.)

40. Mr. Kearney responded by letter and email to Mr. Lamm on June 4, 2008. Mr. Kearney reiterated the Postal Service’s offer to negotiate a “functionally equivalent” NSA with Capital One, but refused to indicate any desired changes, requesting instead a face-to-face meeting.

41. Accordingly, Mr. Lamm and other representatives of Capital One met with Mr. Kearney and other representatives of the Postal Service at Postal Service

Headquarters on June 9, 2008. During that meeting, Mr. Kearney explicitly stated that, in any functionally equivalent NSA offered to Capital One, the Postal Service would insist on changes to the discount baselines and the discount schedules. The Postal Service would also request certain word changes to improve the language of the NSA.

42. Mr. Kearney explained that the Capital One NSA would have to use mailer-specific baselines and that the discounts would have to be reduced to reflect that Capital One was not the “first” adopter. Mr. Kearney argued that the changes in the baselines and discount schedules were justified by changes in circumstances. When asked whether those changes had occurred since the date of implementation (April 1, 2008), he said that they had not.

*B. Legal Claims*

**Claim 1 – The Postal Service Unreasonably or Unduly Discriminated Against Capital One in Violation of 39 U.S.C. § 403(c).**

43. This claim incorporates by reference paragraphs 1- 42, *supra*.

44. Capital One and Bank of America are both users of the mail. By denying Capital One an NSA under the same terms it offers to Bank of America, a competitor, the Postal Service has unduly or unreasonably “discriminate[d] among users of the mail.” 39 U.S.C. § 403(c).

45. The Commission has repeatedly emphasized that NSAs cannot be lawful unless they are offered to other mailers willing to meet the same terms and conditions: “Negotiating Service Agreements . . . are legally permissible provided that . . . the

negotiated rate-and-service package is made available on the same terms to other potential users willing to meet the same conditions of service.”<sup>40</sup>

46. Capital One is a leader in the industry, a large volume mailer, and a competitor to Bank of America. It is ready, willing, and able to meet “the same conditions of service.”

47. On information and belief, the Postal Service either has derived, or will derive, the same kind of benefits from Capital One’s implementation of the terms and conditions of a functionally equivalent NSA as it has derived, or will derive, from Bank of America’s implementation of its baseline NSA.

48. No relevant changes have occurred since approval and implementation of the Bank of America NSA that would warrant offering Capital One an NSA with fundamentally different or lower incentives in exchange for undertaking the same obligations.

49. As the Postal Service itself has admitted, that the financial incentives in the Bank of America NSA—primarily derived from the use of 1998 industry-average baselines—constitute a key, operative provision of that agreement.

50. Using different baselines would, by definition, radically alter the Capital One’s incentives, and, by extension, discriminate against Capital One in violation of Section 403(c).

51. Additionally, where, as here, a mailer is willing and able to commit to all the same substantive requirements and obligations as the agreement offered to a competitor, refusing to offer the same discounts at the same per piece rate in exchange

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<sup>40</sup> See Postal Rate Commission, *Report to Congress: Authority of the United States Postal Service to Enter into Rate and Service Agreements with Individual Customers and Groups of Customers* (February 11, 2002) at 1.

for those commitments unreasonably or unduly discriminates against that mailer in violation of Section 403(c).

**Claim 2 – The Postal Service Has Granted an Undue or Unreasonable Preference to Bank of America in Violation of 39 U.S.C. § 403(c).**

52. This claim incorporates by reference paragraphs 1- 51, *supra*.

53. Section 403(c) also states that, “[i]n providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not . . . grant any undue or unreasonable preferences to any such user.”

54. For all the reasons described above, if a negotiated rate-and-service package” like the one offered to Bank of America is not “made available on the same terms to other potential users willing to meet the same conditions of service,” PRC Report to Congress at 1, the Postal Service has granted a “preference” to Bank of America, and that preference is “undue.”

55. That “undue preference” has created a significant competitive advantage to one user in a highly competitive industry.

**Claim 3 - The Postal Service Has Created a Special Classification that is Not Available on Public and Reasonable Terms to Similarly Situated Mailers in Violation of 39 U.S.C. § 3622(c)(10).**

56. This claim incorporates by reference paragraphs 1 to 55, *supra*.

57. By denying Capital One an NSA under the same terms it offers Bank of America, the Postal Service has violated the statutory requirements of 39 U.S.C. § 3622(c)(10). It has created a “special classification” that is not “available on public and reasonable terms to similarly situated mailers.”

58. The Bank of America NSA is a “special classification” within the meaning of § 3622(c)(10).

59. Capital One is a “similarly situated mailer” to Bank of America within the meaning of § 3622(c)(10).

60. Offering an NSA with mailer-specific baselines (and, in effect, radically different performance measures, financial incentives, and per piece rates) and calling that NSA functionally equivalent to the Bank of America NSA does not constitute making the special classification available “on public and reasonable terms” within the meaning of § 3622(c)(10).

**Claim 4 - The Postal Service Has Created a Special Classification that Creates an Unreasonable Harm to the Marketplace in Violation of 39 U.S.C. § 3622(c)(10).**

61. This claim incorporates by reference paragraphs 1 to 60, *supra*.

62. Bank of America and Capital One are direct competitors in the financial services industry.

63. The Postal Service’s refusal to offer an equivalent NSA to Capital One confers a significant competitive advantage to Bank of America and puts Capital One at a distinct competitive disadvantage.

64. Offering discounts to Bank of America that are not available to Capital One on equivalent terms thus creates “unreasonable harm to the marketplace” within the meaning of §3622(c)(10).

65. Representing to the public that equivalent NSAs will be offered to other mailers and then denying those mailers the opportunity to obtain an equivalent NSA creates “unreasonable harm to the marketplace” within the meaning of § 3622(c)(10).

**Claim 5 – The Postal Service Has Also Violated Commission Rules 3010.40 *et seq.***

66. This claim incorporates by reference paragraphs 1 to 65, *supra*.

67. Because Commission Rules 3010.40 *et seq.* incorporate by reference the legal standards laid out in 39 U.S.C. § 3622(c)(10), if the Commission determines that the Postal Service has violated one or more provisions of that section, the Postal Service has also violated Commission Rules 3010.40 *et seq.*

**Claim 6 – Equitable Relief**

68. The claims for equitable relief incorporate by reference paragraphs 1 to 67, *supra*.

Promissory or Equitable Estoppel

69. The Postal Service made a definite representation to Capital One and others that it would make “functionally equivalent” NSAs available.

70. The NSA terms offered to Capital One are not remotely similar, let alone “functionally equivalent.”

71. Capital One relied on the Postal Service’s representations and changed its position for the worse by not intervening or otherwise contesting the original Bank of America NSA.

72. Capital One relied on the Postal Service’s representations and changed its position for the worse by expending time and resources in gearing up to put itself in a position to be ready to implement an NSA with the Postal Service on the same terms offered to Bank of America.

73. Capital One has suffered, and continues to suffer, competitive harm.

74. Capital One's reliance on the Postal Service's representations was reasonable.

75. Accordingly, Capital One is entitled to affirmative, equitable relief, or, alternatively, the Postal Service is estopped to deny an NSA to Capital One that has the same terms offered to Bank of America.

#### Collateral Estoppel

76. The issue of whether the Bank of America NSA was a "pay-for-performance" NSA was fully litigated by and conclusively resolved against the Postal Service in Docket No. MC2007-1, and not appealed.

77. The Commission had jurisdiction to resolve that issue.

78. Precluding the Postal Service from contesting that issue now will not work "a basic unfairness" to the Postal Service. On the other hand, allowing the Postal Service to contest the issue now might well work "a basic unfairness" to Capital One.

#### **IV. Jurisdiction**

79. Jurisdiction is proper under 39 U.S.C. § 3662, which provides that "any interested person . . . who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a), or 601, or this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission . . ." *Id.*

80. The Commission has jurisdiction and broad powers to fashion an appropriate remedy—including approving a new product on its own initiative—under 39 U.S.C. § 3642, which authorizes the Commission, "[u]pon request of the Postal Service or users of the mails, or upon its own initiative, the Postal Regulatory Commission may

change the list of market-dominant products under section 3621 and the list of competitive products under section 3631 by adding new products to the lists, removing products from the lists, or transferring new products and transfers of products between the lists.” *Id.*

81. Similarly, § 3662(c) of Title 39 requires the Commission to take action if it finds a complaint to be justified, but leaves the remedy within the Commission’s discretion: “If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance.”

82. Thus, the Commission has authority to order and approve, as a matter of law, a substantively identical NSA between the Postal Service and Capital One without any further negotiation between the Postal Service and Capital One, or to impose any other remedy that it deems just and proper.

**V. Statement on Persons Similarly Situated**

83. Persons similarly situated to Capital One may include other financial services institutions that send a high volume of credit card solicitations and customer statements. Whether those mailers are in fact similarly situated depends on their ability and willingness to adopt the same (or similar) suite of services that form the basis of the Bank of America NSA and for a similar term.

**VI. Relief Requested**

84. For the reasons stated, Capital One respectfully requests: (1) a ruling from the Commission that the Postal Service has violated 39 U.S.C. § 403(c), 39 U.S.C. § 3922(c)(10), and/or Commission Rules 3010.40 *et seq.*; (2) a ruling that Capital One is entitled to an NSA product with the same substantive terms as the NSA offered to Bank of America, or, at a minimum, that Capital One is entitled to an NSA that includes the same financial incentives (including the 1998 industry-average baselines and the same discount schedules) offered to Bank of America, and (c) any other relief that the Commission deems just and proper, including, but not limited to, ordering and approving, under 39 U.S.C. § 3642, a new product that is an NSA between the Postal Service and Capital One that is substantively identical to the Bank of America NSA, without any further negotiation between the Postal Service and Capital One.

Respectfully submitted,

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