

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**MOTION OF THE UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT**
(July 21, 2008)

The Postal Service hereby files its motion to dismiss the Complaint filed by Capital One Services, Inc. (“Capital One”), in which Capital One alleges that the Postal Service has violated certain provisions of title 39, United States Code, by not signing a Negotiated Service Agreement (NSA) with Capital One that is essentially identical to the Bank of America NSA.¹ In short, Capital One’s Complaint should be dismissed because it fails to establish that the Postal Service has unduly discriminated against Capital One or otherwise violated title 39. Moreover, the filing of the Complaint is premature because Capital One and the Postal Service have yet to undertake or exhaust reasonable efforts to negotiate a functionally equivalent NSA, and Capital One has failed even to allege any facts to support its claim of harm should negotiations continue in lieu of litigating the instant Complaint.

¹ Essentially, no changes were suggested by Capital One to any language in the contract, other than substituting “Capital One” for “Bank of America.” All thresholds and discounts, as negotiated between the Postal Service and Bank of America, were not changed.

I. CAPITAL ONE HAS FAILED TO ESTABLISH IN ITS COMPLAINT THAT THE POSTAL SERVICE HAS UNDULY DISCRIMINATED AGAINST CAPITAL ONE IN VIOLATION OF TITLE 39, UNITED STATES CODE

Capital One argues that the Postal Service's unwillingness to sign an essentially identical NSA constitutes an unlawful refusal to offer a functionally equivalent NSA, thus discriminating against Capital One (or, alternatively, extending an undue preference in favor of Bank of America). However, it has long been established that "functional equivalence" does not mean "identical." And nowhere in title 39 or the Commission's Rules of Practice, is the term "functionally equivalent" defined as "identical."²

The Commission's own interpretation of the term "functionally equivalent" has been quite clear. For instance, when the Commission considered NSAs proffered as functionally equivalent to the original Capital One NSA (Docket No. MC2002-2), it stated the following:

- While the DFS Negotiated Service Agreement is functionally equivalent to the Capital One Negotiated Service Agreement, it is not, nor is it required to be, identical. The DFS Negotiated Service Agreement is tailored to DFS's unique situation. *Discover NSA, Docket No. MC2004-4*³
- While the HSBC Negotiated Service Agreement is functionally equivalent to the Capital One Negotiated Service Agreement, it is not, nor is it required to be, identical. Just as the functional elements of the Capital One and HSBC Negotiated Service Agreements are similar, but not identical, the benefits or effects of each agreement on the Postal Service are comparable, but not identical. *HSBC NSA, Docket No. MC2005-2*⁴

Thus all parties, Capital One in particular, have been on notice that under longstanding Commission interpretation, "functionally equivalent" does not mean "identical." All

² Section 403(c) of Title 39 makes no mention of functional equivalence. Section 3622(c)(10) states that the Postal Service must make NSAs available "on public and reasonable terms to similarly situated mailers."

³ Opinion and Recommended Decision, Docket No. MC2004-4, at 2 (Sept. 30, 2004).

NSAs, including functionally equivalent agreements, are tailored to each NSA partner's unique situation and how, at some subsequent point in time, the NSA then benefits the Postal Service from financial and operational perspectives.

More recently, the Commission refined its view of functional equivalence by stating that, "the proposed agreement must primarily rest on the same substantive *functional elements* as the identified baseline agreement, and must provide a *comparable* benefit to the Postal Service" (emphasis added).⁵ Functional equivalence based upon common functional elements diverges substantially from the identical contract terms, identical baselines, identical thresholds, and identical discounts demanded by Capital One in its Complaint. Moreover, no Commission precedent supports Capital One's position that the Postal Service's unwillingness to offer Capital One an NSA with *identical* terms, thresholds, and discounts as those in the Bank of America NSA constitutes an unwillingness to negotiate a functionally equivalent NSA. Clearly, an analysis of functional elements would allow for a far wider range of functional equivalence than Capital One's exceptionally narrow argument allows.

By the same token, Capital One's claim that the Postal Service's refusal to approve just the one narrow example of functional equivalence Capital One insists upon constitutes an undue or unreasonable preference in violation of 39 U.S.C. § 403(c) is equally unavailing. Nor has the Postal Service created a special classification not available on public and reasonable terms to similarly situated mailers in violation of 39

⁴ Opinion and Recommended Decision, Docket No. MC2005-2, at 2 (May 20, 2005).

⁵ Order No. 32, Docket No. MC2007-4, at 2 (September 7, 2007).

U.S.C. § 3622(c)(10).⁶ Capital One's claim that statutory violations rest on a definition of functional equivalence narrowed to identical terms, thresholds, and discounts as the baseline NSA upon which it is based simply lack any factual or legal foundation and cannot be supported anywhere in title 39 or in the Commission's rules. Indeed, it is directly contradicted in prior Commission rulings.⁷ Hence, Capital One has failed to establish in its Complaint, as a matter of law, that the Postal Service has violated any provisions of title 39. As such, the Complaint should be dismissed.

II. THE COMPLAINT IS PREMATURE BECAUSE THE PARTIES HAVE NOT EXHAUSTED GOOD FAITH, REASONABLE EFFORTS TO NEGOTIATE, AND CAPITAL ONE HAS FAILED TO ALLEGE ANY SPECIFIC HARM FROM THE STATUS QUO OR CONTINUING NEGOTIATIONS

The Postal Service contends that Capital One's Complaint was prematurely filed because the parties had never engaged in, much less exhausted, reasonable efforts to negotiate a functionally equivalent NSA. The Commission's stated policy and practice regarding Complaint dockets is "to encourage the resolution and settlement of

⁶ Capital One's claim that the Postal Service has violated Commission Rules 3010.40 *et seq.* similarly fails. The Commission's rules do not create additional requirements or new standards justifying a distinct statutory analysis; they merely restate the statutory requirements contained in title 39.

⁷ Capital One's claims for equitable relief in Claim 6 (page 19-20 of the Complaint) are also baseless, as they are dependent on Capital One's erroneous definition of "functional equivalence." The Postal Service is willing to negotiate a functionally equivalent NSA with Capital One, but is unprepared to agree to one that is wholly identical to the Bank of America NSA. Moreover, Capital One has failed to demonstrate the competitive harm or "basic unfairness" that allegedly arises from the Postal Service's desire to negotiate terms and conditions in a good faith and reasonable manner. Capital One should not be granted relief for its unreasonable reliance upon a definition of "functional equivalence" that has no statutory foundation, and is directly contradicted by Commission precedent.

complaints by informal procedures.”⁸ Similarly, for NSAs, negotiations and informal resolution of disputes between parties are necessary components of the process that must precede Commission involvement. In this case, the Postal Service was and remains prepared to continue NSA negotiations with Capital One.

Capital One’s Complaint effectively asserts that functionally equivalent NSAs are not negotiated, and would skip several key steps which the Postal Service, under good business practice, typically undertakes when developing NSAs. First, any prospective functionally equivalent NSA partner must be examined to determine if the partner is, in fact, similarly situated with the baseline NSA partner. The Postal Service cannot simply accept, on faith, that any prospective partner is similarly situated. This step generally involves informal discussions and data exchange, which aids the Postal Service in determining whether the customer would be an appropriate candidate for a functionally equivalent NSA. Not even this step was completed when Capital One filed its Complaint.

The Postal Service must also, as part of good business practice, take into account changed circumstances when negotiating a functionally equivalent NSA. For instance, there may be contract terms which need to be updated, including term definitions for postal products and services, or clauses for mergers and acquisitions or risk mitigation provisions. Most importantly, specific thresholds and discounts must be negotiated so that the NSA makes financial and operational sense to the Postal Service and its NSA partner. The thresholds, baselines, and discounts in the Bank of America NSA were negotiated between the Postal Service and Bank of America. Capital One,

⁸ 39 C.F.R. § 3001.85(b).

however, has been thus far unwilling to negotiate specific thresholds, discounts, and other provisions that take into account today's changed circumstances, to make the most financial sense for Capital One and the Postal Service.⁹

Under the Postal Accountability and Enhancement Act (PAEA), the Postal Service must ensure that NSAs improve the net financial position of the Postal Service or improve operational efficiency.¹⁰ The statute does not distinguish between baseline NSAs or functionally equivalent NSAs here; this provision applies to all future NSAs filed under the PAEA. Good faith negotiations between the Postal Service and a prospective NSA partner are a key prerequisite to development of functionally equivalent NSAs that meet statutory requirements and reflect good business practice.

Yet Capital One argues that the Postal Service should skip the aforementioned steps, and simply sign a new NSA that is identical to the Bank of America NSA. This approach could place the Postal Service in a position of significant financial risk, and thus the Postal Service would fail to meet key statutory requirements for NSAs under the PAEA and the Commission's Rules.

To be clear, the Postal Service stands ready and willing to negotiate a NSA with Capital One that is functionally equivalent to the Bank of America NSA. The Postal Service has consistently expressed this position to Capital One.¹¹ The Postal Service

⁹ All functionally equivalent NSAs are still negotiated; it is presumptuous of Capital One to assume that it can bypass the negotiation process, especially when the baselines in the Bank of America NSA were specifically negotiated between the Postal Service and Bank of America.

¹⁰ See 39 U.S.C. § 3622(c)(10)

¹¹ See Attachments B and D to Complaint of Capital One Services, Inc., Docket No. C2008-3 (June 19, 2008).

believes negotiating a mutually beneficial agreement is still possible and is accordingly endeavoring to keep the lines of dialogue open.

Yet to date, the parties have had only one face-to-face meeting with principals from both sides to discuss crafting a functionally equivalent NSA. In that meeting, Capital One presented the Postal Service with a “take it or leave it” offer to sign a new NSA that was wholly identical to the Bank of America NSA. The parties had yet to exchange data, discuss specific contract terms, or even clarify whether a Non-Disclosure Agreement between the parties is applicable when Capital One filed its Complaint with the Commission. The parties had yet to exhaust reasonable efforts to negotiate, in good faith, and try to reach a mutually beneficial compromise. As such, Capital One’s Complaint is premature.

Moreover, Capital One has not demonstrated the irreparable harm it would allegedly sustain by negotiating in good faith with the Postal Service, and has shown no reason for why the Commission should grant immediate relief “without any further negotiation between the Postal Service and Capital One.”¹² The Commission’s docket already contains various other pressing matters, with still others likely to begin in the coming weeks and months. Capital One has not demonstrated why the use of Commission or Postal Service resources to hear this Complaint is appropriate prior to any meaningful negotiations.¹³ The Postal Service stands ready to negotiate a mutually

¹² Indeed, one wonders why, if Capital One was likely to suffer competitive injury from not having a functionally equivalent NSA that it did not demand to meet face-to-face and initiate NSA negotiations *well before* the Bank of America NSA was even implemented.

¹³ Additionally, consideration of complaints before good-faith negotiations between the Postal Service and the complaining party are complete would create incentives for negotiating parties to file complaints with the Commission in an attempt to obtain rulings that might serve as bargaining chips for use in those negotiations. Under these

beneficial NSA with Capital One that is functionally equivalent to the Bank of America NSA.

CONCLUSION

In conclusion, Capital One's Complaint has failed to establish that the Postal Service has unduly discriminated against Capital One or otherwise violated title 39 by not signing an NSA with Capital One that is identical to the Bank of America NSA. The instant Complaint is also premature, as the parties have not yet exhausted efforts to negotiate a functionally equivalent agreement, and Capital One has not alleged any specific harm that would arise either from the status quo ante or from continuing negotiations. Accordingly, the Postal Service moves to dismiss the Complaint.

circumstances, the Commission could become burdened in considering complaints intended to secure better bargaining positions with the Postal Service, rather than representing what the filing parties truly believed to be violations of law.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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