

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**ANSWER OF UNITED STATES POSTAL
SERVICE IN OPPOSITION TO MOTION OF
CAPITAL ONE SERVICES, INC. FOR AN ORDER
BIFURCATING PROCEEDING AND FOR AN EXPEDITED SCHEDULE**
(June 26, 2008)

Capital One Services, Inc. (Capital One) filed a complaint on June 19, 2008, seeking a proceeding to obtain rulings from the Postal Regulatory Commission (Commission) that would permit it to obtain a Negotiated Service Agreement (NSA) with the Postal Service “that is substantively identical to the Bank of America NSA, without any further negotiation between the Postal Service and Capital One”. Concomitant with its complaint, Capital One filed the subject motion requesting an order to bifurcate the proceeding, adopt an expedited schedule, and limit any discovery to 45 days. The Postal Service opposes these requests.

REQUEST TO BIFURCATE THE PROCEEDING

Capital One filed its complaint relying on 39 USC § 3662, Rate and service complaints. Section 3662(b) reads:

(b) Prompt Response Required. —

- (1) IN GENERAL.—The Postal Regulatory Commission shall, within 90 days after receiving a complaint under subsection (a)—
- (A) either—
 - (i) upon a finding that such complaint raises material issues of fact or law, begin proceedings on such complaint; or
 - (ii) issue an order dismissing the complaint; and
 - (B) with respect to any action taken under subparagraph (A) (i) or (ii), issue a written statement setting forth the bases of its determination.

Section 3662 requires a “prompt response” by the Commission, one within 90 days of receiving the complaint, to issue a finding that begins proceedings or an order dismissing the complaint. Capital One’s requests contemplate more ambitious timeframes than the 90 days permitted in section 3662(b) for the Commission’s “prompt” response to the complaint.

Moreover, Capital One’s requests are inconsistent with the Commission’s Rules of Practice and Procedure. Commission rules applicable to rate and service complaints are long established, having served the Commission and those appearing before it for over three decades.¹ Rule 3001.84 contemplates an orderly procedure giving the Postal Service 30 days to respond to the specifics of the complaint, state its position with supporting facts and conclusions, and provide a recommendation on whether or not a hearing should be held. Rule 3001.85 states:

(b) It shall be the general policy and practice of the Commission to encourage the resolution and settlement of complaints by informal procedures, including correspondence, conferences between the parties, and the conduct of proceedings off the record with the consent of the parties.

Rule 3001.86 specifies:

¹ In PRC Order No. 43 (October 29, 2007), the Commission advised that its rules of practice on complaints and other matters “will continue to apply” in force, although the Commission advised that it “intends to turn as quickly as practicable to issuing proposed regulations on related matters under the PAEA, including those involving complaints”

If a complaint is not resolved or settled under informal procedures, the Commission shall consider whether or not, in its discretion, a proceeding on the record with an opportunity for hearing should be held on such complaint.

These rules emphasize the opportunity to provide specifics and facts, and favor exhaustion of informal procedures prior to any ruling on the necessity for an on the record hearing. Capital One would instead have the Commission 1) forgo any factual foundation for determining the necessity for a hearing, 2) obviate all informal discussion, and 3) have the Commission reach the ultimate question based only upon responses to (unidentified) requests for admission.

The Postal Service respectfully submits that Complainant conflates and confuses mixed issues of fact and law, including: 1) what constitutes the range of 'functional equivalence' to the baseline BAC NSA; 2) within the range defined by (1), what is or is not acceptable to the Postal Service; 3) also within the range of (1), what is or is not acceptable to Capital One; 4) whether in light of (or not) conclusions regarding (2) and (3), the Postal Service and Capital One have room to agree upon a functionally equivalent NSA; 5) the legal import of the Commission's finding in the baseline proceeding that it was not a 'pay for performance' NSA; and 6) the supposed nature and extent of the harm suffered by Capital One from its lack of an NSA functionally equivalent to the BAC NSA that is only now being implemented and whose financial impacts are as yet unknown. Capital One's requests are accordingly inconsistent with the Commission's Rules at a time when the Rules' specifics would seem to provide constructive guidance in consideration of the Complaint.

Capital One's conclusion that its claims can be resolved solely on testimony, representations and findings in Docket No. MC2007-1, without a hearing in this

proceeding seem, at best, grossly premature. Capital One presumes that it is similarly situated to BAC, and presumes that it is entitled to an NSA that not only is functionally equivalent to the BAC NSA, but also is virtually identical to it.

Functional equivalence is, however, a matter of fact to be determined by the circumstances of each case. In evaluating the Bookspan NSA, the Postal Rate Commission explained:

This is the first time that the Commission has received a proposal for a baseline agreement that includes proposed DMCS language setting guidelines for similarly situated mailers applying for functionally equivalent agreements. The Commission agrees with the Postal Service that it is worthwhile to identify such preliminary parameters in the DMCS in order for potential NSA partners to have a better understanding of whether they could qualify as functionally equivalent. It is important to note, however, that the DMCS guidelines set forth in proposed section 620.12 are not exhaustive. They contain highly important conditions, but the Commission must analyze each agreement on a case-by-case basis to determine if it is functionally equivalent and in accordance with chapter 36 and the Commission's functionally equivalency regulations. This ensures that mailers are in fact, similarly situated.

PRC Op. & Rec. Dec., Docket No. MC2005-3, at p. 90. In considering requests for functionally equivalent NSAs, the Commission has devoted significant portions of its Recommended Decisions regarding those requests to the issue of functional equivalency. See Recommended Decisions in Docket Nos. MC2005-2 at pp. 21-28; MC2004-4 at 20-26; MC2004-3 at 37-64; and MC2002-2 at 37-64. Consistent with these Decisions, Capital One is entitled to a NSA that is functionally equivalent to the BAC NSA based on facts and circumstances tailored to Capital One's specific situation with regard to the elements of the BAC NSA. These are issues of fact, to be decided on a case by case basis.

The basic elements of the BAC NSA to which an NSA with Capital One must conform are as follows. The NSA requires BAC to adopt a number of operational

commitments, many of which are under development, which would reduce the costs to the Postal Service of handling BAC mail. In recognition of the costs to BAC associated with adopting the operational commitments, the BAC NSA contemplates certain discounts to BAC. The magnitudes of several discounts are based on BAC's ability to prepare certain mail in accord with specified standards on read/accept rates, relative to base-line standards.

For Capital One to be entitled to an NSA functionally equivalent to the BAC NSA, it must show that it is similarly situated to BAC. A number of factual issues arise. Should the Commission find the complaint to be justified, then any proceeding would require the development of a factual record to support examination of the degree to which Capital One is similarly situated to BAC and, therefore, entitled to a functionally equivalent NSA, based on Capital One's specific circumstances.

These circumstances are not available from the testimony, representations and findings in Docket No. MC2007-1. Therefore, material from that Docket cannot obviate the need for a hearing in this one, should the Commission determine that the complaint is justified.

In this regard, Capital One avers only the following representations:

(1) Capital One has offered to sign the same contract as the Bank of America NSA (modified only to reflect the change in 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.

Capital One further notes that the Commission determined that the NSA with Bank of America (BAC) was not a "pay-for-performance" agreement, and concludes that the Postal Service cannot lawfully insist on pay-for-performance conditions in an NSA that

is functionally equivalent to the BAC NSA. On these bases, Capital One concludes that it is entitled to an NSA that is identical, except in company name and volume data, to the BAC NSA. Capital One's statements, however, fail to illuminate the potentially complex issue of functional equivalence, or the facts that would be essential to a Commission determination. They are conclusory and unhelpful in establishing any justification for the complaint. In this context, Capital One's proposal that the Commission deviate from its proven procedures for orderly consideration of complaints is itself not justified by Capital One's arguments.

The Commission's complaint proceeding rules emphasize the opportunity to provide specifics and facts, and favor exhaustion of informal procedures prior to instituting a complaint proceeding. Issues involving functional agreements, the subject of the complaint, are in essence issues of fact which require the Commission to analyze each functional agreement on a case-to-case basis to determine whether it in fact is functionally equivalent. An agreement that is functionally equivalent to the BAC NSA must take into account how Capital One is similarly situated relative to BAC. Information supplied in Docket No. MC2007-1 and provided by Capital One in its initial pleadings is not related to determining whether Capital One is similarly situated to BAC.

Furthermore, there have been no substantive negotiations between Capital One and the Postal Service, either on an NSA functionally equivalent to the BAC NSA, or addressing Capital One's complaint, that could provide such information. Among other things, Capital One's position assumes that the Postal Service has learned nothing on the road to implementation of the BAC NSA; yet the Postal Service asserts that knowledge it gained by undertaking regulatory and internal reviews of the BAC NSA can

and should inform its judgment regarding any functionally equivalent NSA negotiated on that foundation. These circumstances support the value of procedures that would elucidate the status of functional equivalency in this situation, should the complaint be deemed to be justified, rather than bifurcation of the proceeding. Bifurcation would merely vault over the consideration of issues that would be essential to the ultimate disposition of the complaint. For these reasons, Capital One's request for an order bifurcating this proceeding must be rejected.

REQUEST FOR AN EXPEDITED SCHEDULE

Capital One requests the Commission to adopt an expedited schedule in this proceeding, indicating that:

(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.

In support its request for an expedited schedule, Capital One provides no indication of the amount and kind of harm that it allegedly suffers. Moreover, Capital One's own behavior in pursuing a NSA functionally equivalent to the BAC NSA is not consistent with its allegation of ongoing harm. According to its complaint, Capital One first indicated its desire to the Postal Service's Pricing Strategy organization for a NSA similar to the BAC NSA during February, 2007.² Approximately one and one half years passed before Capital One filed its complaint. This delay alone is inconsistent with the

² The Postal Service disputes certain of the particulars indicated in the complaint, but accepts the dates of contact indicated therein and referenced here for purposes of discussion.

urgency it now professes and would be unexpected from an organization experiencing the ongoing harm it claims.

Capital One also bases its request for an expedited schedule on mitigation of delay that would lessen the benefit to the Postal Service from a functionally equivalent NSA. The benefit of such an NSA to the Postal Service also is determined by its terms, for which the Postal Service would appreciate the opportunity for consideration in accord with the schedule provided in the Commission's Rules, rather than an expedited schedule unjustified by the circumstances. For the above reasons, the Postal Service opposes Capital One's request for an expedited schedule. Furthermore, given the factual issues involved in a NSA functionally equivalent to the BAC NSA and the lack of negotiation with Capital One involving these issues, the Postal Service also opposes Capital One's requests for bifurcation and limited discovery. In the absence of information produced by the full give and take of negotiations between Capital One and the Postal Service, if the Commission determines the complaint to be justified, a full discovery period may be required to elicit required factual information.

CONCLUSION

For the foregoing reasons, the Postal Service respectfully requests that the Commission deny Capital One's requests to bifurcate this proceeding, adopt an expedited schedule, and limit discovery to 45 days.

UNITED STATES POSTAL SERVICE

By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business

Frank R. Heselton

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-2997; Fax -5418