

ORDER NO. 87

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway; Tony L. Hammond;
and Nanci E. Langley

Complaint of Capital One Services, Inc.

Docket No. C2008-3

ORDER CONCERNING MOTION FOR
BIFURCATION OF PROCEEDING
AND EXPEDITED SCHEDULE

(Issued July 8, 2008)

On June 19, 2008, Capital One Services, Inc. (Capital One) filed the Complaint of Capital One Services, Inc. Regarding Discrimination and Other Violations of Law by the United States Postal Service (Complaint). Concurrently, Capital One filed a motion requesting (1) the proceeding be bifurcated into legal and factual phases, and (2) an expedited schedule.¹ On June 26, 2008, the Postal Service filed an answer in opposition to the Motion.²

¹ Motion to Bifurcate Proceeding and to Expedite Scheduling, June 19, 2008 (Motion). The Motion is read to assume that the Commission will begin proceedings on, and not dismiss, the Complaint.

² 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 (Answer).

The Commission finds that the issues presented by Capital One in the Motion for resolution in this Complaint involve issues of both law and fact that can not be easily separated. Thus, the request to bifurcate the proceeding into legal and factual phases is denied, as explained below. The request for an expedited schedule also is denied subject to renewal if the Commission determines to begin proceedings on the Complaint. In the interim, the Commission encourages both parties to open discussions and explore informal avenues for resolving the Complaint.

I. BIFURCATION OF THE PROCEEDING INTO LEGAL AND FACTUAL PHASES

Capital One requests bifurcation of the proceeding into legal and factual phases. In Phase I, Capital One proposes consideration of the legal issues of the Complaint. It asserts that the “crucial legal question” is:

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?

Motion at 2 (emphasis in original). Capital One contends that this question may be resolved by referring to the alleged undisputed facts that Capital One has offered to sign the same contract as the Bank of America NSA (modified to reflect Capital One’s name and volume data) and that the Postal Service has refused; and by referring to Postal Service testimony, legal documents, and Commission findings developed in Docket No. MC2007-1 (Bank of America NSA). *Id.* at 1-2. Capital One proposes that parties be allowed to file requests for admissions, and then move directly to briefs.

Capital One proposes that a Phase II of the proceeding can be initiated if the Commission determines that certain issues require additional factual inquiry. However, Capital One asserts that resolution of the legal issues in Phase I may dispose of the

case and obviate the need for a Phase II. Phase II could include discovery, sworn testimony, and a request for a hearing.

In opposition to the motion to bifurcate the proceeding, the Postal Service argues the request is inconsistent with the Commission's Rules of Practice and Procedure, which allow 30 days for the Postal Service to respond to the Complaint, the opportunity to state the Postal Service's position with supporting facts and conclusions, and the opportunity to provide a recommendation on the need for a hearing. The Postal Service notes that the rules also favor exploring informal procedures to resolve issues prior to ruling on the necessity of a hearing. Answer at 1-3.

The Postal Service contends that there are both issues of law and of fact that require resolution. The issues include: consideration of what constitutes a functionally equivalent agreement; the form of agreement that may be acceptable to both parties; the legal importance of finding that the Bank of America agreement is not pay-for-performance; the nature and extent of harm suffered by Capital One; and whether Capital One is similarly situated to Bank of America. The Postal Service contends that these issues can not be resolved by relying only on the Docket No. MC2007-1 material. The Postal Service also asserts that it has had no substantive negotiations with Capital One that might shed light on these issues. *Id.* at 4-7.

Commission analysis. The Commission rejects the predicate for bifurcation that the "crucial legal question" posed by Capital One for Phase I may be resolved only based on alleged undisputed facts and materials developed in Docket No. MC2007-1.³ The Postal Service identifies several matters that involve mixed questions of fact and law relevant to the question posed by Capital One. These include, for example, what

³ For the purpose of argument, the Commission accepts that the question posed by Capital One is the pertinent question to be answered in this Complaint. The Postal Service has not answered the Complaint, and the Commission has not made a 39 U.S.C. 3663(b)(1) determination on whether or not to hear the Complaint.

constitutes a functionally equivalent agreement,⁴ and whether or not Capital One is similarly situated to Bank of America.⁵ Thus, the predicate for bifurcation is lacking. Accordingly, the motion to bifurcate is denied.

The Postal Service observes the Commission's preference for utilizing informal procedures to resolve issues before resorting to formal procedures. Whenever possible, the Commission favors resolution of issues in a manner acceptable to all parties. This usually is best accomplished through informal discussion among the parties without Commission intervention. The parties may anticipate that the Commission will inquire into the status and progress of any informal discussions directed towards resolving this Complaint.

II. REQUEST FOR AN EXPEDITED SCHEDULE

Capital One requests that the Commission adopt an expedited schedule to hear this Complaint. It asserts that it has suffered, and continues to suffer, ongoing harm. Capital One also contends that for the Postal Service to derive maximum benefit from a functionally equivalent negotiated service agreement, the agreement needs to be finalized as soon as possible. Capital One further requests that if the Commission decides not to bifurcate the proceeding, discovery be limited to no more than 45 days. Motion at 3-4.

⁴ In PRC Order No. 1391 at 50-51, the Commission sets out a two-part test for determining if one negotiated service agreement is functionally equivalent to another. The Commission used this test to evaluate proposed functionally equivalent negotiated service agreements with Discover Financial Services, Inc., Op. and Rec. Decision, Docket No. MC2004-4 at 20-26; Bank One Corporation, Op. and Rec. Decision, Docket No. MC2004-3, ¶¶ 6001-77; and HSBC North America Holdings Inc., Op. and Rec. Decision, Docket No. MC2005-2 at 21-28.

⁵ The factual basis for this comparison has not been established in any proceeding.

In opposition to the motion for expedition, the Postal Service argues that Capital One provides no indication of the amount and kind of harm allegedly suffered. The Postal Service contends that an approximately 1-1/2 year delay since Capital One indicated its desire for a negotiated service agreement to the filing of the Complaint is not consistent with the professed urgency. Finally, the Postal Service argues that the benefit to the Postal Service of mitigating a delay in entering into a negotiated service agreement also must consider the terms of any agreement. Answer at 7-8.

Commission analysis. The motion to expedite is premature and is, therefore, denied, subject to renewal if proceedings are commenced in this docket. Shortly after the Postal Service files its pleadings in response to the Complaint, the Commission will issue an order either to begin proceedings or to dismiss the Complaint. See 39 U.S.C. 3663(b)(1). The Commission is required to make this determination within 90 days of receiving the Complaint. If the Commission decides to begin proceedings, it will consider suggestions from the parties and promptly develop a procedural schedule to expeditiously consider the issues of this Complaint consistent with the due process rights of the parties.

It is Ordered:

1. The Motion to Bifurcate Proceeding and to Expedite Scheduling, filed June 19, 2008, is denied in regard to the bifurcation of the proceeding.

2. The Motion to Bifurcate Proceeding and to Expedite Scheduling, filed June 19, 2008, is denied in regard to adopting an expedited schedule, subject to renewal if proceedings are commenced.

By the Commission.

Garry J. Sikora
Acting Secretary