

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO  
P.O. RULING NO. C2008-3/5, SECOND CLARIFICATION OF  
RULING ESTABLISHING PROCEDURES FOR THE  
DEPOSITION OF JESSICA DAUER LOWRANCE**  
(August 28, 2008)

The United States Postal Service hereby responds to P.O. Ruling No. C2008-3/5, the Second Clarification of Ruling Establishing Procedures for the Deposition of Jessica Dauer Lowrance, issued by the Presiding Officer on August 27, 2008. In that pleading, the Presiding Officer invited interested participants to address the issue of objections made at the deposition of Ms. Lowrance based on material subject to non-disclosure agreements (NDAs). The Ruling requires that such pleadings must be filed with the Commission by 8:00 a.m., August 28, 2008.<sup>1</sup>

The Postal Service has contractual obligations under various NDAs regarding confidential and commercially sensitive information (including data and discussions),

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<sup>1</sup> It is the Postal Service's understanding that, given the time-sensitive nature of these pleadings, that anything submitted electronically to the Commission's website on the evening of August 27, 2008, or the morning of August 28, 2008 (prior to 8:00 a.m.), will be accepted as filed consistent with this Ruling, regardless of the exact time when those documents are uploaded to the Commission's Daily Listing page on the morning of August 28, 2008.

which must be recognized. The Postal Service's NDA with Bank of America allows for disclosure in Commission proceedings pursuant to a *Commission Order*. Therefore, if a *Commission Order* were issued, the Postal Service would not oppose questioning in the closed session that pertains to material covered by the NDA with Bank of America.

Additionally, the Postal Service must limit any questioning under the NDA to material that pertains to *Bank of America-related* information. The NDA in question is, in fact, a multiparty NDA between the Postal Service, Bank of America, and an unnamed third party vendor. The terms of the NDA require the Postal Service to give reasonable notice to the third party vendor prior to any disclosures of information that relates to the third party vendor. That vendor is not an intervenor in this Docket, and is not normally focused on all matters of litigation before the Postal Regulatory Commission. Thus, the Postal Service cannot at this time consent to any request for information that relates to the third party vendor, as the Postal Service clearly lacks sufficient time to provide reasonable notice to this third party vendor in view of the short time frames requested by the Presiding Officer's Ruling.

In sum, if questions in the closed session are limited to Bank of America-related information, and must be disclosed in closed session pursuant to a Commission Order, the Postal Service does not oppose those questions under the terms of the NDA. Moreover, the Postal Service respectfully requests that any Order or Ruling pertaining to disclosure of sensitive information under NDAs should be limited to the issue at hand, namely the deposition of Ms. Lowrance. Any broader concerns would be more appropriately addressed in the ongoing rulemaking that pertains to confidentiality procedures, Docket No. RM2008-1.

As a final matter, the Postal Service submits its response to P.O. Ruling No. C2008-3/5, as it pertains to objections based on relevance. The Presiding Officer notes in that ruling:

...objections based on relevance do not raise issues of privilege. The witness shall answer the questions. Counsel for the witness shall instruct the reporter to note the objection. The Presiding Officer will resolve these issues at a later date.

P.O. Ruling No. C2008-3/5 at 2. The Postal Service will certainly heed the Presiding Officer's Ruling as it pertains to objections based on relevance. However, the Postal Service submits, as Postal Service counsel has repeatedly stated thus far during the deposition of Ms. Lowrance, that there is a difference between objections based on relevance, and the Postal Service's position that counsel for Capital One has gone far beyond the subject matter of Ms. Lowrance's deposition, as described in Capital One's Application, in violation of Rule 33 of the Commission's Rules of Practice and Procedure.<sup>2</sup>

Rule 33 clearly requires a participant, when filing an Application for Deposition, to state the subject matter of the witness's testimony. That Application may then be approved, and a deposition scheduled, pursuant to a Commission Order or Presiding Officer Ruling on the material contained in the Application. But, Rule 33 should not allow a participant to pose questions at a deposition that fall far outside the scope of

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<sup>2</sup> Application of Capital One Services, Inc. ("Capital One") for Authorization to Depose Jessica Dauer Lowrance, Docket No. C2008-3 (August 21, 2008).

the subject matter described in its Application.<sup>3</sup> The Postal Service recognizes that depositions have been rarely (if ever) used in Commission proceedings; however, that does not obviate the need for *some* limitation on the scope of matters that may be explored in a deposition. In the Postal Service's view, proper interpretation of Rule 33 provides that limitation.

Any argument that the emergency nature of the instant deposition should allow for additional flexibility in this regard is not supported by the Commission's Rules or Commission precedent. Moreover, Capital One filed no "emergency" motion or "emergency" amendment to its Application that would allow such broad inquiries into the Bank of America NSA. Indeed, Capital One's representations regarding the emergency nature of this deposition have primarily focused on Ms. Lowrance's personal knowledge of conversations she had with Ms. Niki Howard of Capital One. Questions that pertained to *that* subject matter were not posed until 4:12pm on Wednesday, August 27, 2008, over six hours after the parties convened for the deposition of Ms. Lowrance. Consequently, the Postal Service respectfully requests a further clarification of procedures, regarding the scope of the instant deposition, as soon as practicable.

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<sup>3</sup> The Postal Service notes that, if objections based on relevance are merely noted for the record, and irrelevant questions may still be asked and must be answered in the open session, then there is no limit on the subject matter of the questioning at any deposition outside the strictures of Rule 33. Participants in the open session are not bound by any protective conditions, and may then use that information for other purposes.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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