

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**RESPONSE OF CAPITAL ONE SERVICES, INC. TO
BANK OF AMERICA'S REQUEST FOR A PRE-HEARING CONFERENCE**

(October 3, 2008)

Capital One Services, Inc. (Capital One) strongly opposes Bank of America Corporation's Request for Prehearing Conference (Request), filed on September 26, 2008.¹ Bank of America continues to treat the Commission's Rules with contempt, requesting yet another special accommodation. Rule 24(c) states that "[a]ll participants in any proceeding before the Commission are *required and expected* to come to the prehearing conference *fully prepared to discuss in detail and resolve all matters* specified in paragraph (d), [including] appropriate clarification or amendment of . . . [the] complaint, [and] any [l]imitation on the scope of the evidence." 39 C.F.R. § 3001.24(d)(7). ***"The failure of any participant . . . to raise any matters that could reasonably be anticipated shall constitute a waiver of the rights of the participant with regard thereto."*** 39 C.F.R. § 3001.24(c).

¹ This response also addresses the arguments on *res judicata* and/or claim preclusion raised, for the first time, in the Response of the United States Postal Service to Motion of Bank of America Corporation to Limit the Scope of the Proceeding (September 24, 2008) (Postal Service Response).

On August 14, 2008, the date of the prehearing conference in this case, Bank of America was fully aware of the Complaint's "undue preference" claim, having already stated that "Capital One's complaint centers on the April 1, 2008 Negotiated Service Agreement between the United States Postal Service and Bank of America. Bank of America could be affected by the outcome of this matter and its full participation in this proceeding is necessary to ensure that its interests are adequately represented."² Counsel entered an appearance for Bank of America and sat silently through the entire prehearing conference. Counsel listened to the statements of Capital One regarding the scope of discovery that it now claims are "objectionable," but chose, for whatever reason, not to respond. Now, however, Bank of America insists that the Commission hold a second prehearing conference for the sole purpose of addressing its concerns.³

Ironically, Bank of America demands that the Commission and other parties expend time and effort to hold another prehearing conference just a few days after Capital One approached Bank of America to explore informal resolution of those concerns. One may question whether Bank of America's latest request is motivated by a true desire to resolve issues or by a strategy to impede⁴ or delay⁵ a Complainant's

² Notice of Intervention of Bank of America Corporation at 1 (August 12, 2008) (Notice of Intervention).

³ The alleged basis for those concerns (*i.e.*, the sole issue "that gives rise to Bank of America's interest in this proceeding and is impetus of [the] Motion [to Limit]" was fully evident on June 19, 2008, when the Complaint was filed containing a claim of "undue preference." See Motion of Bank of America Corporation to Limit Scope of the Proceeding or, Alternatively, Disqualify Counsel of Capital One Services, Inc. (September 10, 2008) at 2 (Motion to Limit).

⁴ See, *e.g.*, Motion to Limit (effectively a motion to dismiss coupled with a threat to disqualify counsel for Capital One if Bank of America's demands are not met).

⁵ See Motion of Bank of America Corporation to Stay Proceedings Pending Ruling on Motion to Narrow Scope of Proceedings Or, Alternatively, Disqualify Counsel of Capital One Services, Inc. (September 10, 2008). Of course, the Postal Service, as the respondent in this case, benefits from

effort to seek relief from the competitive disadvantage created by Bank of America's NSA and the Postal Service's refusal to provide others a similar NSA.

PROCEDURAL BACKGROUND

A brief summary of the procedural developments in this case demonstrates that the Commission's Rules have already provided Bank of America numerous opportunities to make its views known. Bank of America chose not to avail itself of those opportunities:

- On June 19, 2008, Capital One filed a six-count complaint alleging discrimination and other violations of law by the United States Postal Service, including the following:

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

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).

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).⁶

- On June 19, 2008, Capital One filed a Motion to Bifurcate Proceeding and to Expedite Scheduling. The motion asserted that certain of Capital One's claims could be resolved based on undisputed facts and prior precedent

either dismissal of a claim or from a stay. Not surprisingly then, the Postal Service generally supports Bank of America's attempts to derail this complaint proceeding.

⁶ The remaining two counts invoke Commission rules that incorporate the statutory prohibitions by reference and equitable claims including promissory and equitable estoppel. See Complaint at ¶¶ 66-78.

without the need to resort to costly and time-consuming discovery. See Motion at 1-2.

- The Postal Service opposed that motion, noting that the Complaint raised “potentially complex issue[s].”⁷ Indeed, the Postal Service went so far as to observe that **“the knowledge it gained by undertaking regulatory and internal reviews of the [Bank of America] NSA can and should inform its judgment regarding any functionally equivalent NSA negotiated on that foundation.”** *Id.* at 6-7 (emphasis added).
- The Postal Service filed a motion to dismiss the entire complaint, including Claim 2, as either legally inadequate or premature on July 21, 2008.
- The Commission denied that motion by order dated August 1, 2008 (Order No. 92). The order concluded that “the Complaint raises material issues of fact and law,” *id.* at 2; see also *id.* at 4-5 (explaining the Commission’s decision). The order further specified that notices of intervention had to be filed by August 13, 2008, and that the Commission would hold a pre-hearing conference under Rule 24 on August 14, 2008. See *id.* at 6.
- Bank of America intervened on August 12, 2008, stating that **“Capital One’s complaint centers on the April 1, 2008 Negotiated Service Agreement between the United States Postal Service and Bank of America. Bank of America could be affected by the outcome of this matter and its full participation in this proceeding is necessary to ensure that its interests are adequately represented.”** Notice of Intervention at 1 (emphasis added).
- The pre-hearing conference was duly held, as specified in Order No. 92, on August 14, 2008. Counsel for Bank of America entered an appearance and was present at the entire hearing. During that conference, Capital One articulated its intent to conduct discovery into the objective and subjective reasons behind the decision to deny Capital One an NSA on the same terms given to Bank of America, making it “much more complicated in terms of discovery.” Tr. 1:8 at line 17.
- On August 8, 2008, Capital One filed interrogatories and document requests relating to the Bank of America NSA, questions that Bank of America only now finds objectionable on relevance grounds.

⁷ Answer in Opposition to Motion of Capital One Services, Inc. for an Order Bifurcating Proceedings or for an Expedited Schedule (June 26, 2008) (Answer in Opposition) at 6.

- On August 28-29, 2008, Capital One deposed Jessica Dauer Lowrance. All of the parties, except Bank of America, attended at least one day of the deposition.
- On September 10, 2008, Bank of America filed its Motion to Limit.
- On September 26, 2008, Bank of America filed its request for a **second** prehearing conference.

ARGUMENT

I. BANK OF AMERICA HAS SHOWN CONTEMPT FOR THE COMMISSION'S RULES AND SHOULD NOT BE PERMITTED TO FURTHER DELAY THESE COMPLAINT PROCEEDINGS OR TO LIMIT THE SCOPE OF INQUIRY.

The Commission did not promulgate its Rules of Practice and Procedure⁸ so that parties could flaunt those rules when it suits their purposes. The rules allow for the orderly process of adjudications, development of evidence, and resolution of motions. They do not contemplate special accommodations made to one party at the expense of another, such as reconsidering a decided motion or reconvening a hearing because one party failed to avail itself of the opportunity to respond during the first hearing. At some point, over-indulging a third-party intervener by allowing it to argue over and over its “due process” claims without regard to the deadlines observed by the other parties imposes an unreasonable burden on the Commission and the other parties, and infringes on the due process rights of the Complainant.

⁸ We recognize that the Commission is in the process of supplementing its rules to reflect the increased importance of complaints in fostering greater transparency under the PAEA. That effort underscores the need to ensure complainants have adequate opportunities to prove their claims and to pursue discovery. Bank of America, by contrast, endeavors to foreclose claims or bar lines of discovery, as a third party intervener and competitor—an effort fundamentally at odds with the expanded role of complaints under the PAEA.

The spate of recent motions filed by Bank of America exhibits an extraordinary disregard for the Commission's rules and orders. First, in its Motion to Limit, Bank of America effectively asks the Commission to foreclose Capital One's opportunity to prove one of its claims—it seeks dismissal of the “undue preference” claim of the Complaint (or its withdrawal by Capital One under threat of having its counsel disqualified)—even though the Commission already denied a motion to dismiss which included that claim, and explicitly held that the Complaint “raises issues of both law and fact relevant to whether or not the actions, or inactions, of the Postal Service rise to the level of undue or unreasonable discrimination among users of the mails, *or to the granting of undue or unreasonable preferences to any such users in violation of 39 U.S.C. 403(c).*” Order No. 92, at 5 (emphasis added). The Order further held that “The Commission shall hear all issues presented by the Complaint.” *Id.* at 5 (emphasis added). Bank of America could have weighed in or asked for reconsideration after intervening, but it chose not to, deciding instead to file much later a so-called “motion to limit”—a type of motion not provided for in the rules and an apparent stand-in for a motion to dismiss.

Now, Bank of America seeks a *second* pre-hearing conference, even though its counsel attended the first one, entered an appearance, and then chose to say nothing about the scope of discovery, nature of the inquiry, or clarification of issues—all of which were discussed at the hearing. *See generally* Tr. 1:2-11 (August 14, 2008).⁹

⁹ At that hearing, counsel for Capital One described with specificity the type of discovery necessary to test Capital One's claims. *See, e.g.,* Tr. 1:8 at lines 9-17 (noting that a reasonable inquiry into the

Under the clear application of Rule 24, Bank of America thereby waived the right to demand a second pre-hearing conference and to raise those issues at this late date.

Rule 24, which the Commission designed to ensure “expeditious disposition of the proceeding,” 39 CFR § 3001.24(d)(12), clearly lays out the Commission’s expectations for all participants:

All participants in any proceeding before the Commission are *required and expected* to come to the prehearing conference ***fully prepared to discuss in detail and resolve all matters*** specified in paragraph (d) of this section¹⁰ The failure of any participant to appear at the prehearing conference or to raise any matters that could reasonably be anticipated and resolved at the prehearing conference *shall not be permitted to unduly delay the progress of the proceeding and shall constitute a waiver of the rights of the participant with regard thereto, including all objections to the agreements reached, actions taken, or rulings issued by the presiding officer with regard thereto.*

39 CFR § 3001.24(c) (emphasis added).

Bank of America—by its own choice—is clearly a “participant in [this] proceeding,” *id.*; its counsel entered an appearance on Bank of America’s behalf at the August 14, 2008 hearing, see Tr. 1:2, and, accordingly, was “required and expected” to raise any limitation of scope issues there. See 39 CFR § 3001.24(c). Both its Notice of Intervention, filed August 12, 2008, and its later-filed Motion to Limit admit that the Complaint filed on June 19 informed Bank of America of the nature of the claims and the relief requested: “*The Complaint asserts, inter alia, that the Bank of America NSA*

objective and subjective reasons behind the decision to deny Capital One an NSA on the same terms given to Bank of America made the case “much more complicated in terms of discovery”).

¹⁰ The “matters specified” in paragraph (d) include the very issues addressed in Bank of America’s Motion to Limit, such as the “definition and simplification of the issues including any appropriate explanation, clarification, or amendment of any . . . complaint,” *id.*; [l]imitation as to the scope of the evidence,” *id.* at (d)(7); and “[a]ll other matters which would aid in an expeditious disposition of the proceeding.” *id.* at (d)(12).

gives the Bank ‘an undue preference . . . in violation of 39 U.S.C. §403(c)’ and is fairly ready to seek an outcome under which the Commission is urged to modify or amend that NSA to eliminate the alleged ‘undue preference.’ It is that issue and only that issue [that] is the impetus for this Motion.” Motion to Limit at 1-2 (emphasis added). At the prehearing conference, counsel for Capital One was explicit in describing the intended scope of discovery during the prehearing conference. Thus, all of the issues Bank of America now seeks to raise in its Motion to Limit and Request for a Pre-Hearing Conference “could reasonably have been anticipated” on August 14. See 39 CFR § 3001.24(c). Having chosen not to “raise any matters” during the prehearing conference, Bank of America has waived its rights to request a second pre-hearing conference and, further, has waived its right to object at this time. See *id.* It cannot be permitted to “delay the progress of the proceeding.” *Id.* In fact, any further delay would seriously prejudice the procedural rights of the Complainant and increase the competitive harm described in the Complaint.

II. THE COMMISSION SHOULD NOT ALLOW BANK OF AMERICA TO ABUSE COMMISSION PROCEDURES TO HINDER A COMPETITOR FROM SEEKING RELIEF FROM THE COMPETITIVE HARM CREATED BY BANK OF AMERICA’S NSA AND THE POSTAL SERVICE’S DISCRIMINATORY ACTIONS.

Far more is at stake here than the time and expense associated with personal attacks on counsel,¹¹ novel and unwarranted motions, and disregard of the

¹¹ The Request reiterates its ultimatum: “If there cannot be closure on the permissible scope of the proceeding and the remedy sought, *then* we will be constrained to ask the Presiding Officer to schedule a subsequent hearing on the disqualification issue.” *Id.* at 5. There is no need for the Commission to further delay this proceeding to conduct a hearing with “with documents and

Commission's rules. In this, the first major complaint proceeding since passage of the PAEA, a third party intervener's attempt to manipulate the Commission's rules to disrupt, delay, and preclude the claims and discovery of a competitor raises fundamental questions of fairness and due process. The Commission has already determined that it will hear "all issues" presented by the Complaint, and that ought to be enough: a competitor to Capital One should not be able to inject itself into the process at a later date, throw its weight around, and demand that either Capital One or the Commission limit the issues raised or the scope of permissible discovery.¹²

Fairness, due process, and transparency concerns are heightened where, as here, a complaint under the PAEA alleges competitive harm and harm to the marketplace, and *the challenging party is the very entity alleged to enjoy the competitive advantage by virtue of the Postal Service's discrimination*. Whether intentional or not, a competitor's demands that the Commission stay the complaint proceeding, foreclose crucial lines of discovery, limit the Complainant's opportunity to prove its claims, or commit not to adopt a remedy that might harm the intervener, *must be viewed through*

witnesses" (and the pre-hearing discovery that Capital One would be entitled to), and there is no need for the Commission to be drawn into a credibility contest between Ms. Leong's Declaration and Ms. Berenblatt's Declaration, because the disqualification issue can be fully resolved based *on the law, not on "disputed" facts*. The D.C. Bar's standard for disqualification is whether confidential information from the earlier representation is "material" in the current proceeding. As Table 2 in the Answer in Opposition painstakingly details, the issues in this complaint proceeding have nothing to do with any confidential information that Ms. Leong is alleged to have learned or *could have learned* during her brief 2005 representation of Bank of America (which would be outdated or irrelevant or both). *Id.* at 19-21. A time-consuming factual investigation of what Bank of America believes Ms. Leong learned is unnecessary because "*even assuming she did receive the confidential information Bank of America alleges, the information is not material to the [complaint] proceeding.*" Answer in Opposition at 14 (emphasis added).

¹² It is not, in any event, Bank of America's place to object—on relevancy grounds—to discovery *directed to the Postal Service*.

the lens of the effect on competition and the marketplace. Otherwise, a competitor can take advantage of the Commission's rules (or the indulgence of the Commission in stretching of those rules to make special accommodations) to encourage delay, increase litigation costs, or otherwise sustain a competitive advantage to the detriment of the mailer bringing the complaint.¹³

III. NONE OF THE "KEY TOPICS" RAISED IN BANK OF AMERICA'S REQUEST WARRANT A SECOND PREHEARING CONFERENCE

Bank of America devotes the bulk of its request to an explanation of three "key topics" that, it alleges, "need to be resolved" at a second prehearing conference to "enabl[e] the Presiding Officer to understand" the positions of the parties:

- (A) Capital One's position on the substantive law that governs this proceeding. See Request at 2.
- (B) Capital One's position as to the scope of relief it seeks. See *id.* at 2-3.
- (C) Capital One's position with regard to the permissible scope of discovery. See *id.* at 3-4.

For the reasons stated in this Response, Bank of America's request for a second prehearing on these issues is defective, and Bank of America has no right—grounded in statute, regulation, or case law—that entitles it to demand that Capital One commit to a fixed position before the facts are known. The request, however, should be denied for another reason: A second prehearing conference is totally unnecessary because

¹³ There is nothing wrong with any party forcefully presenting substantive arguments in its best interests at the appropriate time and in compliance with the Commission's rules and procedures. What makes Bank of America's actions suspect are factors such as its disregard of the Commission's rules and orders, its preference for an "out-of-the-ordinary" second prehearing conference over proffered informal resolution, and its not-so-subtle threat that it will actively seek to disqualify counsel for Capital One unless its demands are met.

Capital One's current positions on all these issues have already been clearly articulated.¹⁴ The Table below is provided to assist Bank of America's understanding of those positions:

Capital One's Position	Relevant Discussion
(A) Substantive law	<p>Complaint at ¶¶ 43-82 (relevant statutes and regulations, etc.)</p> <p>Answer in Opposition at 1-2, 7-8 (motion to limit is procedurally improper; complaint satisfies the correct standard: "colorable claim")</p> <p>Answer in Opposition at 8-9, n.14 (motion to limit states the wrong test under 403(c); draws false distinctions; authorities do not support Bank of America's crabbed reading of 403(c))</p>
(B) Scope of relief	<p>Complaint at ¶ 84 (asks for basically the same deal offered Bank of America; includes a generic request for "any other relief" that the Commission deems just and proper)</p> <p>Answer in Opposition at 3-4, 13-14 (Commission has a statutory obligation to fashion an appropriate remedy if it finds a violation)</p> <p>Answer in Opposition at 13 (clarifies that Capital One does not currently seek cancellation or modification of the Bank of America NSA)</p>
(C) Scope of discovery	<p>Answer in Opposition at 3, 9-11 (explains Capital One's position on various discovery issues; detailed chart explaining how various information that Bank of America finds objectionable relates to Capital One's claims)</p>

¹⁴ See, e.g., Answer in Opposition to the Motion of Bank of America to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel (Answer in Opposition) (September 24, 2008).

IV. THE POSITIONS ON *RES JUDICATA* OF BANK OF AMERICA AND THE POSTAL SERVICE MISAPPREHEND THE NATURE OF CAPITAL ONE'S CLAIMS AND CONFLICT WITH ACCEPTED LAW.

Both Bank of America's recent motions and a recent Postal Service filing¹⁵ reflect a fundamental misunderstanding of the nature of Capital One's claims. Capital One does not question the propriety of the Commission's MC2007-1 Order approving the Bank of America NSA. What Capital One raises is an entirely different issue: namely, whether the Postal Service's decision to grant that NSA to Bank of America and deny it (or an equivalent NSA) to Cap One is discriminatory or otherwise unlawful. While that question certainly touches on the Bank of America NSA, the specific issues raised by the Complaint were not considered or addressed by the Commission in MC2007-1, and indeed could not have been, as one of the express rationales given by the co-proponents to address potential discrimination was that that the Bank of America NSA was a baseline NSA and that the Postal Service would make available—and would even welcome—“hundreds” of functionally equivalent NSAs. In other words, discrimination could only arise when a separate decision was made that denied to other mailers the already-approved baseline NSA.

With that critical distinction in mind, none of the arguments raised by Bank of America or the Postal Service warrant any “limitation of issues,” let alone a second-bite-of-the-apple hearing to consider such limitations. In particular, the legal arguments involving claim preclusion and issue preclusion raised in the Postal Service Response

¹⁵ Response of the United States Postal Service to Motion of Bank of America Corporation to Limit the Scope of the Proceeding (September 24, 2008) (Postal Service Response).

simply do not apply here, as even a casual review of the authorities cited in the Postal Service's own brief will attest. The reasons are obvious: ***neither the parties nor the issues are the same***. See, e.g., *Drake v. FAA*, 291 F.3d 59 (D.C. Cir. 2002) (“[U]nder *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were *or could have been* raised in that action.”) (internal quotations marks and citation omitted) (emphasis in original). Recognizing this flaw in its argument,¹⁶ the Postal Service makes a half-hearted attempt in footnote 8 to spin a theory—utterly unsupported by case law of any kind—that Capital One should be precluded here from “using the complaint process to undermine a determination that it did not challenge when it had the opportunity.” *Id.*

Questions of “privity” aside (and the cases cited by the Postal Service demonstrate just how inapplicable these theories are to Capital One, an entity that neither participated in MC2007-1 nor was privy to any party that did), the notion that Capital One had “the opportunity” to litigate its discrimination and related claims in MC-2007-1 is ludicrous. Capital One had no reason to intervene or otherwise oppose the Bank of America NSA because the Postal Service publicly acknowledged in MC2007-1 its “affirmative obligation” to provide functionally equivalent NSAs. As a result, neither Capital One nor any other entity had reason to believe *at that time* that the Postal Service had discriminated, created an undue preference or “special classification” not available on public and reasonable terms to similarly situated mailers, or otherwise

¹⁶ See Postal Service Response at 4 and n. 8 (recognizing that the Postal Service seeks the “disfavored” remedy of non-party preclusion).

caused “unreasonable harm to the marketplace.” See *supra* at 3 (listing Capital One’s claims).

The touchstone of *res judicata* analysis is whether a party “has a full and fair opportunity to litigate” a matter, *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008), a principle grounded in the “deep-rooted historic tradition that everyone should have his own day in court.” *Id.* (internal citation and quotation marks omitted). Here there can be no doubt that Capital One has not had any kind of opportunity to litigate its claims, let alone a “full and fair” one.¹⁷ Bank of America’s argument to “limit” (or dismiss) Capital One’s “undue preference” claim fails for the same reasons.

CONCLUSION

For the foregoing reasons, Bank of America’s Request for a Pre-Hearing Conference should be denied.

Respectfully submitted,

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¹⁷ The Postal Service’s arguments are inappropriate for the separate and independently sufficient reason that claim preclusion and issue preclusion are affirmative defenses considered waived unless a party specifically pleads them in his or her answer, which the Postal Service failed to do here. See Fed. R. Civ. P. 8(c); *Hartman v. Wick*, 678 F. Supp. 312, 322 (D.C. 1988) (“*Res judicata* and collateral estoppel are affirmative defenses that are waived unless specifically and timely raised.”). Nor did the Postal Service raise these issues in its motion to dismiss. Here again is another example of how Bank of America’s irregular and untimely motions have encouraged disregard of the Commission’s rules and orders.

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