

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint of Capital One Services, Inc.)

Docket No. C2008-3

PUBLIC REPRESENTATIVE OPPOSITION TO
BANK OF AMERICA CORPORATION REQUEST FOR
PRE-HEARING CONFERENCE
October 6, 2008

On September 26, 2008, Bank of America Corporation ("BAC") filed a request for oral argument ["Request"] on the question of whether the Commission will revoke the BAC NSA. Although styled a "Request for Pre-Hearing Conference,"¹ the pleading is actually a combination of (1) unauthorized reply to a pleading of Capital One Services, Inc., ("COS")² and (2) legal memorandum on whether revocation of the BAC NSA will be a possible remedy in this complaint proceeding. Most of the Request discusses statements in the COS Answer, rendering it, in effect, a reply to the Answer. Additionally, it would be premature for the Commission to take a remedy off the table, particularly when that remedy may be the *only* one that will bring the Postal Service into compliance with the PAEA.³ Accordingly, the Public Representative opposes the BAC Request as unnecessary.

¹ [Bank of America Corporation] Request for Prehearing Conference, September 26, 2008.

² Answer of Capital One Services, Inc., in Opposition to the Motion of Bank of America to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel (Redacted Version), September 24, 2008 ["Answer"]. The Rules of Practice do not provide for replies to answers to motions.

³ The PAEA prohibits granting an "undue or unreasonable preference" to a mail user and requires that "agreements between the Postal Service and postal users [be] available on public and reasonable terms to similarly situated mailers" 39 U.S.C. §§403(c), 3622(c)(10). However, NSAs must "(i) improve the net financial position of the Postal Service . . . or (ii) enhance the performance of mail preparation, processing, transportation, or other functions" *Id.* §3622(c)(10)(A). The Postal Service seems to be arguing that a COS NSA would violate 3622(c)(10)(A), see n.7, *infra*, and should not be recommended. But, in that case, either (1) the BAC NSA would not be available to similarly situated mailers, or (2) there are *no* similarly situated mailers. This raises the "unreasonable preference" issue, since the Postal Service never gave other mailers a chance to compete for a contract to supply "live" mail for testing the various systems that will be tested using BAC's mail. See nn.4, 6, *infra*.

One cannot fault BAC for attempting to protect its NSA. However, discovery to date raises the possibility that the Commission will make some or all of the following findings.

1. The activities that BAC is to perform under the terms of the NSA are pilot tests of various Postal Service information processing systems.⁴
2. The Postal Service needs only one large mailer to participate in the pilot tests.⁵
3. The Postal Service granted an unreasonable preference to BAC by failing to seek RFPs or competitive bids from other mailers who could have provided live mail for pilot tests.⁶

⁴ "A beta test is the final test of a presumptively fully-developed system before release into a production environment. The term is used interchangeably with pilot test and field test in these interrogatory responses." Response of USPS to Interrogatory VP/USPS-4, September 30, 2008. "The following operational commitments are still under development, and in different stages of development:

"• Seamless Acceptance is currently undergoing pilot testing.

"• Electronic mail documentation for commingled volume is currently in the process of Customer Acceptance testing.

"• FAST for First-Class Mail is currently in the process to start pilot testing."

Response of USPS to Interrogatory COS/USPS-11D, August 22, 2008. "[T]he operational commitments that BAC will adopt under this NSA will allow the Postal Service to *test* a host of processes, such as the Intelligent Mail Barcode ("IMB"), and will enable the collection of data that will facilitate the development of innovative approaches to pricing that could have 'a potential for broad applicability.'" Docket No. MC2007-1, Initial Brief of the USPS, August 7, 2007, at 1 (emphasis added). "[L]arge-scale adoption of [IMB] technology by BAC will provide a unique opportunity for the Postal Service to see 'live' performance of the barcode on automated equipment at mailing sites throughout the country, and to fine tune the technology in advance of its mandatory use." *Id.* at 21. "[T]his NSA will provide the Postal Service with the chance to gain considerable and valuable experience with the IMB well before it becomes a requirement for other mailers." *Id.* at 22. "BAC has agreed to serve as a large scale test bed for the programs listed . . . above, providing the Postal Service with the opportunity to determine how well these programs work together to ensure efficient mail processing and delivery." *Id.*

⁵ "While there may be cases where smaller mailers could make a valuable contribution to the development and implementation of new processes or technologies, it seems likely that large mailers would most likely fill that role, given the current industry structure and environment." Response of USPS to Interrogatory VP/USPS-2c, September 30, 2008. "[H]aving an additional large mailer in the test could have added value, but the testing is now far along, and the additional value to be gained is small." Response of USPS to Interrogatory VP/USPS-3d, September 30, 2008.

⁶ "Other mailers were not solicited through a notification process" Response of USPS to Interrogatory COS/USPS-9C, August 22, 2008. "No other alternatives to a mailer agreement under the NSA were considered for attaining the goals of the Bank of America NSA." Response of the USPS to Interrogatory APWU/USPS-5a, revised September 17, 2008.

4. Granting COS an equivalent NSA would simply throw good money after bad.⁷
5. The BAC NSA has produced a minimal amount of useful information to date.⁸

If the Commission makes any of the above findings, the remedies available are few. At a minimum, all remedies would involve revision of the BAC NSA. One such remedy would be a change in the threshold read/accept rates for BAC such that other mailers could qualify for equivalent NSAs. This would eliminate the preference granted to BAC and reduce the financial loss to the Postal Service. A remedy that would *minimize* the cost of obtaining "live" mail for pilot tests would be competitive bidding, but such a remedy would include total revocation of the BAC NSA. There is simply no way to know at this stage of the proceeding whether revision of the BAC NSA will be necessary. It is thus premature to consider elimination of any possible remedies at this time.

Respectfully submitted,

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⁷ "[M]anagement's expectation would be that, in the absence of evidence to the contrary, Capital One's read and accept rates for automation letter mail would be significantly above the thresholds used in the Bank of America NSA, and that using those thresholds and discount schedules would result in a net reduction in contribution to the Postal Service." Response of the USPS to Interrogatory PR/USPS-10b, September 8, 2008.

⁸ See n.4, *supra*. The first two quotations in note 4 seem to conflict. It may be that pilot testing is farther along than as described on August 22. However, no revision to the answer to Interrogatory COS/USPS-11D has been filed.