

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

COMPLAINT OF CAPITAL ONE  
SERVICES, INC.

Docket No. C2008-3

**MOTION OF CAPITAL ONE SERVICES, INC. TO STRIKE  
A PORTION OF THE POSTAL SERVICE'S ANSWER AND  
FOR CLARIFICATION OF PROCEDURES**

(August 19, 2008)

Capital One Services, Inc. ("Capital One") moves to strike a portion of the Postal Service's Answer filed July 19, 2008 on grounds that it directly contravenes Commission Rule 84, creates confusion about which issues are disputed, and requires the parties to engage in unnecessarily broad discovery. Capital One also requests clarification of the requirements of certain rules as applied to discovery in this case in order to ensure targeted requests and full and fair responses.

**I. INTRODUCTION**

This Motion is necessitated by two unique aspects of this case. First, this is the first significant complaint filed since the passage of the Postal Accountability and Enhancement Act, codified at 39 U.S.C. §§ 101 *et seq.* ("PAEA"). The PAEA restructured the postal regulatory scheme by replacing rate case litigation with after-the-fact compliance review under strict time limits. It transformed the complaint process into

the primary opportunity for mailers to obtain discovery of the Postal Service and a key tool for the Commission to ensure transparency. Recognizing the new role of the complaint process, the Commission has announced plans to revise its complaint rules. In the meantime, however, the Commission has determined that this case should proceed under the existing procedural rules. Capital One agrees with this decision and points out that, while the old procedural rules may apply, the new substantive provisions for complaints under the PAEA are also in effect. It has filed this Motion to request strict enforcement of the rules as written and to suggest certain clarifications to accommodate the increased importance of discovery in the PAEA complaint process.

Second, the nature of this Complaint differs from that of recent complaints and rate cases. Instead of policy questions involving expert testimony, this case centers on facts and circumstances surrounding a **decision**. The Complaint alleges discrimination based on the decision of certain Postal Service officials to deny Capital One the same Negotiated Service Agreement that was granted to Bank of America. The Postal Service itself has put at issue **why** the decision was made and **how** it was made.<sup>1</sup> In traditional litigation, parties seeking discovery of facts, circumstances, and intentions normally rely on document requests and depositions to make the factual case rather than interrogatories that can often be circumvented by careful parsing of questions. Because document-based discovery often gives rise to claims of privilege, Capital One suggests certain guidelines in Section IV to streamline objections and privilege claims so that the Presiding Officer and participants will be able to evaluate whether a valid privilege is correctly applied to specific documents.

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<sup>1</sup> See, e.g., Answer of the United States Postal Service in Opposition to Motion for an Order Bifurcating Proceeding (June 26, 2008) at 6-7 ("internal reviews"); Motion of the United States Postal Service to Dismiss Complaint (July 21, 2008) at 5-6 ("Motion to Dismiss") ("changed circumstances").

Finally, unlike the typical rate case or NSA application, the Postal Service is in no hurry to implement rate or classification changes. In fact, delay and confusion, whether intentional or not, work to the benefit of the Postal Service and to the harm of the Complainant. Because time is on the side of the Postal Service, Capital One urges the Commission to take steps to narrow disputed issues, to discourage frivolous or vague objections, and to require strict compliance with discovery rules. Already, the Postal Service has ignored Rule 84 by asserting a catch-all denial in its Answer,<sup>2</sup> and the Commission should take immediate action to resolve the confusion created by this blanket denial.

**II. THE COMMISSION SHOULD STRIKE THE PORTION OF THE POSTAL SERVICE'S ANSWER THAT DIRECTLY CONTRAVENES THE REQUIREMENT OF SPECIFIC DENIALS IN RULE 84.**

Rule 84, 39 CFR § 3001.84, sets forth the Commission's minimum requirements for the Respondent's Answer to a complaint:

Such answer shall include the following:

(a) Specific admission, denial or explanation of each fact alleged in the complaint . . . . **Each fact alleged in the complaint not thus specifically answered shall be deemed to have been admitted . . . .**

The requirement of Rule 84(a) that Respondent specifically admit or deny each factual allegation is essential to define and narrow the issues in contention and thus set the parameters of subsequent discovery. The Postal Service's Answer blatantly ignores Rule 84(a):

To the extent this Answer fails to address with sufficient specificity **any allegation in the Complaint, the Postal Service denies such allegations.** Answer at 14.

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<sup>2</sup> Answer of the United States Postal Service (July 21, 2008) (Answer).

This “catch all” statement is an effort to correct for the Postal Service’s oversights in addressing each factual allegation and has the effect of a general denial. The point of the Rule 84(a), however, is to force the Respondent to focus on each factual allegation and specifically deny it in order to place it at issue. The Rule ensures this by stating that failure to specifically address an allegation results in the **admission** of the allegation, not the **denial**.<sup>3</sup> The Postal Service’s statement in its answer has attempted to circumvent this key motivation for compliance by “re-writing” the Commission’s Rule.

This distinction is more than theoretical. It has the practical effect of making it necessary for the parties to engage in discovery of issues that the Postal Service has not specifically disputed. For example, Paragraph 30 of the Complaint<sup>4</sup> alleges:

30. On January 31, 2008 – about one month after the Board of Governors’ approval of the Bank of America NSA—Niki Howard, Supplier Manager of Capital One, had an informal meeting with Jessica Lowrance, Acting Manager of Postal Service Pricing Strategy. Ms. Howard raised the possibility of a Bank of America-type NSA but Ms. Lowrance stated that Capital One would not be able to use the industry-average rates offered to Bank of America.

The Postal Service’s Answer at Paragraph 30 states:

30. In the first sentence, Respondent denies the existence of the decision by the “Board” of Governors, but Respondent admits that such a meeting took place; however, Ms. Lowrance was no longer Acting Manager of Pricing Strategy or any other Postal Service section at the time.

Under Rule 84, the allegation in the underlined sentence, which was not specifically denied, would be considered admitted. Under the Postal Service’s catch-all provision, that allegation would be deemed denied and the parties would have to engage in

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<sup>3</sup> Rule 84(a) is consistent with generally accepted practice in court and administrative litigation, where counsel for the respondent is often required to certify or verify the Answer, thereby vouching for the veracity of specific denials of allegations.

<sup>4</sup> Complaint of Capital One Services, Inc. regarding Discrimination and Other Violations of Law by the United States Postal Service (June 19, 2008) (“Complaint”).

discovery (most likely in the form of a deposition) to determine what Ms Lowrance in fact said.

Paragraphs 3-4, 9, 11, 12, 18 and 49 of the Answer provide similar examples. In those paragraphs, the Postal Service uses the phrase: “*Respondent denies the allegation insofar as . . .*.” On its face, this phrase would imply that the remaining allegations in the referenced paragraph are admitted. Again, however, the catch-all phrase would render the unaddressed allegations denied. As a practical matter, Capital One and other participants cannot afford to forego discovery on these unaddressed allegations. But unnecessarily broad discovery is burdensome not only to the parties which must propound and respond to requests<sup>5</sup> but also to the Commission which must oversee the discovery process. Capital One urges the Commission to strike the offending “catch-all” sentence from the Postal Service’s Answer.

### **III. THE COMMISSION SHOULD ENCOURAGE THE PARTIES TO DEFINE DISPUTED ISSUES AND TO FOCUS DISCOVERY BY REQUIRING INITIAL DISCLOSURES AND REQUESTS FOR ADMISSIONS.**

The Postal Service’s Answer is seriously deficient in other ways. Subsections (b) and (c) of Rule 84 require an answer to include:

(b) A statement as to the position of the Postal Service on the allegations in the complaint that the rates of service involved are not in accord with the policies of the Act, and **the facts and reasons in support of such positions;**

(c) The position of the Postal Service on the specific relief or redress requested by the complainant, the disposition of the complaint recommended by the Postal Service, including whether or not a hearing should be held, and a statement of **any facts and reason in support of such position.**

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<sup>5</sup> The Postal Service cannot have it both ways: filing ambiguous pleadings that require clarifying discovery and then objecting that discovery requests are burdensome.

The Answer itself does not attempt to comply with these requirements and contains no “statement of the facts and reasons in support of such positions.” Instead, it incorporates by reference the Postal Service’s Motion to Dismiss. While the Motion to Dismiss does include several quotes of questionable relevance on “functional equivalence,”<sup>6</sup> nowhere in that Motion is there a statement of the “facts” in support of the Postal Service’s position. The only factual discussion is found in Section II, which argues that Capital One failed to exhaust negotiations. Capital One’s Opposition pointed out the inaccuracies in the Postal Service’s those factual allegations,<sup>7</sup> and, in any event, they have since been rendered irrelevant by the denial of the Motion to Dismiss.

Moreover, the Answer and the Motion to Dismiss are devoid of any “facts and reasons” or any affirmative defenses with respect to five of the claims in the Complaint, including a claim under the new Section 39 U.S.C. § 3622(c)(10). As Order 92<sup>8</sup> found,

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<sup>6</sup> Capital One’s Opposition to the Motion to Dismiss (July 28, 2008) pointed out that the Postal Service’s reliance on previous NSAs was misplaced because the Bank of America NSA at issue is a “cost-savings” NSA, not a volume-incentive NSA. Discounts and key baselines in the Bank of America NSA were based not on mailer-specific attributes but on the Postal Service’s cost savings; discounts and baselines in volume-incentive NSAs are necessarily based on each individual mailer’s mail profile. Had the Bank of America NSA been a true “pay-for-performance” agreement, then mailer-specific baselines would have been appropriate. The Commission found, however, that the Bank of America NSA was “not indicative of a pay-for-performance agreement.” PRC Op. and Rec. Dec., MC2007-1 at 2.

<sup>7</sup> Capital One rebutted these factual allegations in its Opposition to Motion to Dismiss by listing the numerous face-to-face meetings and other negotiations with the Postal Service during 2007 and 2008. *Id.* at 10-11 and notes 15 and 16.

<sup>8</sup> Order Denying Motion of the United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings (issued August 1, 2008) (“Order 92”).

“[t]he Postal Service does not specifically address these claims other than offering a denial.” Order 92 at 5.<sup>9</sup>

To remedy the deficiencies in the Answer, Capital One proposes that the Postal Service be required to file initial disclosures and that the parties be allowed to file requests for admissions concerning mixed questions of law and fact.

#### 1. Initial Disclosures

The Federal Rules of Civil Procedure and the rules of various administrative agencies use mandatory initial disclosures to help narrow and expedite discovery.<sup>10</sup>

At a minimum, initial disclosures contain:

- (a) The name, title, and, if known, contact information for each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses; and
- (b) A copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has within its possession, custody, or control and that it may use to support its claims or defenses. See Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii).

Initial disclosures are particularly appropriate in this case where the Postal Service has not yet filed testimony identifying the employees with relevant knowledge that can speak for the institution.

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<sup>9</sup> In traditional litigation, many courts deem failure to plead affirmative defenses in the answer as a complete waiver of those defenses.

<sup>10</sup> In addition to the Federal Rules, other federal agencies including the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) require initial disclosures as part of their complaint procedures. See, e.g., 16 CFR § 3.31 (FTC), 47 CFR § 1.729(i) (FCC).

## 2. Requests for Admission

In its pleadings to date, the Postal Service has repeatedly raised or identified what it calls “mixed questions of law and fact.” See, e.g., 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), at 3 (characterizing several issues as “mixed questions of law and fact”). These and other issues raised by the Postal Service’s filings to date—issues that may be characterized as the application of law to fact, or opinions about the legal significance of various facts—can be focused and narrowed by requests for admission just as readily as pure questions of fact can be narrowed by the answer.

Accordingly, Capital One requests that, for purposes of this proceeding, the Commission allow requests for admission that address questions of “facts, the applications of law to fact, or opinions about either.” Fed. R. Civ. P. 36(a)(1)(A); see also Commentary to the 1970 Amendment (“[A]n admission on a matter of opinion may facilitate or narrow the issues or both. *An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues.*”) (emphasis added).<sup>11</sup>

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<sup>11</sup> Other federal regulatory agencies or commissions have adopted this standard. For example, FTC Rule 22 allows requests for admission on “any matters relevant to the pending proceeding . . . that relate to statements or opinions of fact or of the application of law to fact” (16 CFR § 3.32), and Surface Transportation Board (STB) Rule STB Rule 27 allows requests addressing “any matters” without distinguishing between issues of fact or law (49 CFR § 1114.27).

#### **IV. THE COMMISSION SHOULD ENCOURAGE FULL AND FAIR RESPONSES BY REQUIRING SPECIFICITY IN OBJECTIONS AND CERTIFICATION OF RESPONSES.**

Even the most robust discovery tools will do little to help resolve issues in dispute if the parties are allowed to avoid effective discovery through tactics such as delay, obfuscation, generalized objections, and broad claims of privilege.<sup>12</sup> To address these concerns, Capital One asks that the Commission offer explicit guidance on the procedures governing *responses* to discovery requests. In particular, Capital One requests the following:

##### **1. Specific Objections and Privilege Logs**

Commission rules already require that discovery requests must be answered “fully,” *see, e.g.*, Rule 26(b), 39 CFR 3001.26(b), and objections stated “clearly and fully.” *See, e.g.*, Rule 26(c), Rule 27(c).<sup>13</sup>

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<sup>12</sup> Capital One understands that certain responses may need to be filed under a protective order and will likely file a motion for protective order to ensure confidentiality of certain of its own responses. However, the need for confidentiality does not justify totally withholding responsive information or documents because the Commission has often established protective conditions to deal with this concern.

<sup>13</sup> Federal Rules state that denials in pleadings must “fairly respond to the substance of the allegation,” Rule 8(b); interrogatories must be answered not only “separately and fully,” but “under oath,” Rule 33(b)(3), and grounds for objections “stated with specificity,” Rule 33(b)(4); responses to document requests must “either state that inspection and related activities will be permitted as requested or state and objection to the request, including the reasons,” Rule 34(b); and, in responding to Requests for Admission, “the answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and the information it knows or can readily obtain is insufficient to enable it to admit or deny.” Rule 36(a)(4). More generally, the Federal Rules authorize sanctions for “evasive or incomplete” disclosures, answers, or responses. *See* Rule 37.

Other agencies have taken a similar approach to the Federal Rules, requiring detailed responses, prohibiting general denials, and authorizing broad sanctions for failure to fully and fairly respond to discovery requests. *See, e.g.*, FCC Rule 729(f) (47 CFR § 1.729(f)) (authorizing a motion to compel for “inadequate” or “insufficient” discovery responses); FERC Rule 410(b)(1) (18 CFR § 385.410(b)(1)) (authorizing a motion to compel for anything less than a “full, complete, and accurate” response).

If objection is made to part of an item or category, *the part shall be specified*. A participant claiming privilege shall identify the *specific evidentiary privilege asserted and state with particularity the reasons* for its applicability. A participant claiming undue burden shall *state with particularity the effort* that would be required to answer the request, providing estimates of cost and work hours required, to the extent possible. Objections shall be filed . . . within 10 days of the request for production. Rule 27(c)

The intent of the Commission's rule is to do away with sweeping generalized objections to critical discovery requests (especially with respect to document production) which may be used to delay, confuse and even defeat valid discovery.

When a privilege is claimed, the parties and the Commission must have enough information to evaluate (1) whether the privilege is valid and (2) whether it is correctly applied. The propensity of litigants in document discovery to apply a valid privilege too broadly has resulted in courts and agencies<sup>14</sup> requiring "privilege logs." Capital One's instructions in its Interrogatories to the Postal Service, filed on August 8, 2008, specify the use of a privilege log:

1. If a privilege is claimed with respect to any data, information, or documents requested herein, the party to whom the discovery request is directed should provide a privilege log (see, e.g., Presiding Officer Ruling C99 1/9, p. 4, in Complaint on PostECS, Docket No. C99-1). Specifically, "the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5).
2. For any claim of privilege or other discovery immunity, list all documents withheld under the claim of privilege or other discovery immunity and, for each:
  - state the title and general subject matter of the document (to the extent possible without waiving the privilege or immunity);

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<sup>14</sup> See, e.g., FERC Rule 410(a)(2) (18 CFR 385.206).

- state the privileges or discovery immunities being interposed;
- state the number of pages of the document and the number and title and number of pages of any attachments;
- state the date of the document;
- identify all persons who wrote or prepared the document; and
- identify the addressees and all other recipient(s) of the document; and indicate the discovery request(s) to which the document is responsive. [cite]

The privilege log does not require the litigant to waive any of its privileges, but without it, the parties and the Commission cannot fairly evaluate whether any specific document is in fact covered by a privilege.

## 2. Certification Requirements

To underscore the importance of full, fair, and accurate discovery responses, Capital One also requests that the Commission require certification of discovery responses: specifically, that, in response to any document request, interrogatory, initial disclosure, request for admission, the person who provides the answers (as to the availability of documents or accuracy of facts) must sign the answer, and the attorney who objects must separately sign for any objections. See, e.g., Fed. R. Civ. P. 33(b)(5) (requiring such signatures for interrogatory responses); Surface Transportation Board Rule 26(a), 49 CFR 1114.26(a) (“[t]he answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in Sec. 1112.9. Objections are to be signed by the representative or counsel making them”).<sup>15</sup> This is particularly necessary in this case where the Postal Service has not

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<sup>15</sup> A certification requirement would also go far to minimizing unintentional misstatements in key pleadings. See, e.g., Motion to Dismiss at 4-7, particularly, n.11; Opposition to Motion to Dismiss at 10-11, particularly nn.15-16.

yet identified which individuals will submit testimony under oath, and there are no sponsoring witnesses to whom interrogatories can be directed.

## V. CONCLUSION

For the foregoing reasons, Capital One respectfully requests that the Commission:

- Strike the designated portion of the Postal Service's Answer which contravenes Rule 84(a);
- Require the Postal Service to file Initial Disclosures;
- Allow the parties to file Requests for Admissions for facts and mixed questions of law and fact;
- Require specific objections and privilege logs in order to ensure proper evaluation under Rules 27 and 28; and
- Require certification of responses and objections, answers to requests for admissions, and initial disclosures.

Respectfully submitted,

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