

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 COMPEL SUBMISSION OF POSTAL SERVICE  
PRIVILEGE LOGS AND TO CONTINUE  
(COS/USPS-DR-1-17, 19-21, 22)**

(April 9, 2009)

Capital One Services, Inc. ("Capital One") moves to compel the production of completed privilege logs relating to three sets of documents which are responsive to Document Requests COS/USPS-DR-1-17, 19-21, 22<sup>1</sup>: Eleven days before the close of discovery, the only documents Capital One has received are a handful of pages produced at the Lowrance deposition on August 27, 2008, two documents filed under a Joint Stipulation, and a "position description" and a PowerPoint presentation on "Accenture support activities," both attached to USPS Responses to Interrogatories COS/USPS-37 and 41 (March 20, 2009).<sup>2</sup> In light of the Postal Service's delay in filing privilege logs, Capital One further moves to continue the current scheduling order to provide Capital One with time to conduct reasonable discovery and a meaningful opportunity to present its case on the substantive merits.

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<sup>1</sup> COS/USPS-DR-1-17, filed August 8, 2008; COS/USPS-DR-19-21, filed August 29, 2008, and COS/USPS-DR-22, filed September 8, 2008.

<sup>2</sup> While this motion to compel focuses on the three privilege logs, it is possible that, among the tens of thousands of pages of responsive documents identified by the Postal Service, there are documents -- in addition to the few listed here -- that do not fall under any privilege and that could be produced immediately. In fact, it is difficult to believe that of over 30,000 documents, only a hundred or so documents are not privileged. To the extent necessary, Capital One seeks an order compelling production of those non-privileged documents. See discussion of Set A "non-privileged" documents at 5, *infra*.

The document discovery in this complaint case is unprecedented. This is the first major complaint case under the PAEA; unlike a rate case, this complaint involves allegations of a discriminatory decision that is better proven by facts (*i.e.*, documents) than by economic analysis or policy arguments. Since October, Capital One has worked informally with the Postal Service to develop a new procedure for searching through electronic files, which can be used in subsequent cases. The parties' cooperation has, in certain instances, significantly reduced motions practice. For example, the parties negotiated a Joint Stipulation, dated December 4, 2008, regarding entry into the record of two key documents. The Presiding Officer approved that Stipulation in P.O.R. C2008-3/32 (December 12, 2008).

Unfortunately, because of the impending discovery deadline in the procedural schedule issued on March 30, P.O.R. C2008-3/37, Capital One cannot continue to rely upon the Postal Service's voluntary response to informal requests for the privilege logs. To do so would endanger Capital One's ability to obtain sufficient evidence to present its case before the discovery deadline. Even if the logs were produced today, motions practice concerning privileges and additional discovery would almost certainly extend well past the April 20 discovery cut-off. Until resolution of those motions and an opportunity for Capital One to review the documents, it cannot complete its discovery and -- more importantly -- will be seriously hampered in preparing its direct case.

Mindful that the Commission has expressed strong interest in handling this case expeditiously -- after a lull in litigation to allow the parties to resolve matters informally -- Capital One nonetheless feels compelled to request more time not only for the completion of discovery but also for submission of initial testimony and presentation of its direct case.

Otherwise, the bottleneck created by the Postal Service's delay in submitting privilege logs will have a decisive effect on Capital One's ability to pursue its substantive claims. Failure to extend the current scheduling order deadlines will enable the Postal Service's discovery delays to improperly prejudice Capital One and will undermine the well-established rule that a party's case should be decided on its full merits. As such, Capital One respectfully requests that this Commission not only compel production of the privilege logs but also continue extend each of the deadlines in the current procedural schedule for at least 60 days.

Capital One's request for at least 60 days stems from the timeframe for motions relating to document discovery set forth in Commission Rules 21(b) and 27(e), 39 C.F.R. §§ 3001.21(b) and 3001.27(e). Those rules allot 7 days from the filing of this motion to compel logs for the Postal Service and other parties to respond; 7 days from a ruling on this motion for the Postal Service to submit logs; 14 days from submission of logs for Capital One to file motions to compel documents; 7 days from the filing of motions to compel documents for the Postal Service to answer; and 7 days from a ruling on the motions to compel documents for the Postal Service to produce documents. Thus, even if the Commission were to issue its rulings on the same day that responsive pleadings were filed, Capital One would not receive a document for at least 6 weeks. Capital One, and possibly other parties, would need at least 2 weeks to review those documents and file follow-up requests. Capital One thus suggests that the discovery deadline be extended for 60 days plus the amount of time the Commission may take to issue rulings.

**I. HISTORY OF DOCUMENT PRODUCTION AND DESCRIPTION OF PRIVILEGE LOGS**

The Postal Service should provide a privilege log for each of three sets of documents. Without the privilege logs, Capital One cannot determine the appropriateness

of the Postal Service's assertion of privileges in order to file meaningful motions to compel.

As the Presiding Officer stated early in this case:

According to Commission rules when a party objects to a request for the production of documents by "claiming privilege [the party] shall identify the specific evidentiary privilege asserted and state the reasons for its applicability." 39 CFR 3001.26(c). *The burden is on the party objecting to the discovery based on a claim of privilege to establish that the privilege is properly claimed.* *Horton v. U.S.*, 204 F.R.D. 670, 673 (D.Colo. 2002) . . . .

The Postal Service must provide a detailed privilege log within 7 days. The privilege log must provide a specific and detailed description of the materials claimed to be privileged or exempt in a manner that, without revealing the materials at issue, will allow the Presiding Officer to thoroughly evaluate the basis for the claim that they are privileged or exempt from disclosure. See, e.g., Fed R. Civ. P. 26(b)(5) . . . . Such privilege log must also state "the precise reasons for each claim of privilege asserted."

P.O.R. C2008-3/3 at 3-4 (August 26, 2008).

As detailed below, responsive documents from Sets A and B resulted from one electronic search, and responsive documents from Set C resulted from a second electronic search:

1. First search: Agreed-upon search terms such as "Capital One" and "discrimination" were applied to the electronic files of key Postal Service employees, such as Michael Plunkett, Virginia Mayes, and Ali Ayub. In October, 2008, Capital One was told that the number of documents identified by this electronic search was in the tens of thousands. The Postal Service divided these documents into two sets: (1) Set A for "non-privileged" documents; and (2) Set B for "privileged" documents.

A. Set A: "Non-privileged" documents (approximately 20,000 pages):

After signing a detailed confidentiality agreement, counsel for Capital One was allowed to "preview" the "non-privileged" documents, in order to identify those

documents that Capital One wanted produced. The preview process took place approximately once a week from October 20, 2008, to April 3, 2009 (except for the holiday period). Two professionals from Capital One previewed the documents at USPS headquarters but were not allowed to take substantive notes or remove documents from the room. Postal Service personnel were present in the room at all times. But when counsel for Capital One asked for copies of the selected "non-privileged" documents, the Postal Service insisted on a second opportunity to review the selected documents to see if privileges could be asserted. To date, the Postal Service has not produced a single document from this set or provided a privilege log to justify withholding the documents.

B. Set B: "Privileged" documents (approximately 12,000) pages:

The first electronic search in October also uncovered a set of responsive documents that the Postal Service determined from the outset were "privileged" and therefore did not allow Capital One to "preview". The documents are contained in 19 binders, each containing 500-600 pages. The Postal Service still has not provided a privilege log for this set, although these documents were uncovered by the same electronic search (with the agreed-upon search terms) that was used for Set A, and are just as relevant and responsive.

2. Second search: The documents in Set C are responsive to the request contained in Capital One's Application for Authorization to Depose Jessica Lowrance "to bring all documents from Ms. Lowrance's offices relating to the issues in the Capital One Complaint, including, but not limited to, any documents she prepared, reviewed, or has on file (hard copy or electronic) that are responsive to Capital One's Document Requests COS/USPS-1-17, filed August 8, 2009." Application of Capital One for Authorization to Depose Jessica Dauer Lowrance, Docket No. C2008-3 at 4 (August 21, 2008). Over seven months ago, the Presiding Officer ordered that "Ms. Lowrance must bring all documents

from her offices relating to the issues in the Capital One Complaint to the deposition .... [T]he Postal Service must expressly allege the privilege or exemption claim asserted, and provide a detailed privilege log within 7 days." P.O.R. C2008-3/3 at 4 (August 26, 2008). To compile these documents, the Postal Service selected certain directories and emails from Ms. Lowrance's electronic files that it deemed would be responsive to this ruling.<sup>3</sup>

A. Set C: Lowrance Deposition documents:

Since the Lowrance deposition on August 27, 2008, the Postal Service has been under an obligation to produce documents and a privilege log from Ms. Lowrance's files. At the deposition, the Postal Service produced a handful of pages from Ms. Lowrance's cubicle and printouts of documents from the PRC's website, but ignored the files in her old office or on her computer hard drive. In P.O.R. C2008-3/12, issued on September 4, 2008, the Presiding Officer ordered the submission of a privilege log for documents pertaining to the first day of the Jessica Lowrance deposition by September 5, 2008, and for documents pertaining to the second day of the Jessica Lowrance deposition by September 9, 2008. In that Ruling, the Presiding Officer noted that "Capital One requests that the ruling indicate that the Postal Service must file a 'complete' privilege log, including electronic documents, by the due date." *Id.* at 2. Later, the Presiding Officer allowed the Postal Service to supplement its privilege log by September 18, 2008, based on the assertion that "the hundreds of e-mails on Ms. Lowrance's computer will take a significant amount of time to review." P.O.R. C2008-3/17 at 1 (September 16, 2008). At that point, Capital One and the Postal Service entered into informal discussions to resolve discovery disputes, which continued until the March 3,

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<sup>3</sup> Capital One does not know the specific directories selected by Postal Service or the exact number of documents identified. The Postal Service has stated that there may be some overlap between the documents in Set C and the documents in Sets A and B.

2009, prehearing conference. The Postal Service has filed portions of the privilege log over the months, but last week, Capital One was surprised to learn that the privilege log for Set C documents is now close to 900 pages. Again, we have yet to see the completed log.<sup>4</sup> Nor have any non-privileged documents from Set C been produced (other than those provided at the August deposition).

As the Commission has already recognized, the burden is on the party withholding documents on grounds of privilege -- here the Postal Service -- "to establish that the privilege is properly claimed." Technically, if the party asserting the privilege does not take the initial step of identifying withheld documents and specifying the privilege claimed for each document -- a step accomplished through filing a privilege log within a reasonable time -- that party has failed to carry its burden and the documents should be produced. The Commission could find that the Postal Service's failure to produce completed privilege logs 7 months after they were due and 11 days before the close of discovery is sufficient grounds to deem the privilege waived. Alternatively, the Commission could set a firm deadline for the completed logs and remove any prejudice to other parties resulting from the unwarranted delay by extending subsequent deadlines.<sup>5</sup>

## **II. CONCLUSION**

At this point, it would be a waste of the Commission's time and resources for Capital One to file motions to compel. We cannot provide identifying information to the Commission

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<sup>4</sup> Shortly before filing this motion today, Capital One was informed by telephone that the privilege log for Set C documents was finished. The completed log has not yet been filed at the Commission or sent to Capital One.

<sup>5</sup> Capital One realizes there are extenuating circumstances that justify the latter approach. Because this case has presented novel discovery questions and the parties took some time to try to resolve the matter informally, the Postal Service could argue that it should not be placed at a "substantive" disadvantage by having its privileges waived; on the other hand, Capital One believes that the Postal Service's delay should not place Capital One at a substantive disadvantage by forcing it to present its case prematurely without documents or adequate discovery.

for a large proportion of the responsive documents -- although we know that hundreds of them exist; nor can we argue against the assertion of privileges for those unidentified documents without knowing which privilege is being asserted for which document or indeed whether any privilege is being asserted. From our preview of documents in Set A, we believe that documents are at the heart of this case. Carefully drafted interrogatory responses are unlikely to admit discrimination, but contemporaneous documents such as emails and uncensored drafts can reveal intent and may be essential to demonstrating discrimination. Without privilege logs, Capital One cannot move forward to obtain key documents; without documents, Capital One cannot prepare a complete presentation to support its claims.

Capital One respectfully requests an order compelling submission of the three privilege logs described above -- in completed form -- and adjusting the procedural schedule by at least 60 days to compensate for the Postal Service's delay in filing the logs. To the extent necessary, the Commission should also order the immediate production of responsive documents for which the Postal Service asserts no privilege.

Respectfully submitted,

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