

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  
MOTION OF CAPITAL ONE SERVICES, INC. TO STRIKE  
A PORTION OF THE POSTAL SERVICE'S ANSWER  
AND FOR CLARIFICATION OF PROCEDURES  
(August 26, 2008)**

The United States Postal Service hereby responds in opposition to the Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures, filed August 19, 2008. The pleading filed by Capital One Services, Inc. ("Capital One") is an amalgamation of various components, and raises a number of issues that the Postal Service will address in turn.

**Capital One's Motion to Strike**

Capital One, in its Motion, directs the Commission to strike a portion of the Postal Service's Answer that allegedly contravenes Commission Rule 84(a). The focus of Capital One's Motion to Strike is the portion of the Postal Service's Answer that states, "To the extent this Answer fails to address with sufficient specificity any allegation in the Complaint, the Postal Service denies such allegations." Capital One asserts that this passage should be struck because it fails to comply with Rule 84(a).

The Postal Service opposes Capital One's Motion to Strike. Motions to strike constitute extraordinary relief under the Commission's Rules of Procedure. See 39 C.F.R. § 3001.21(c); P.O. Ruling No. R2006-1/74 (October 10, 2006). There is no need to strike any portion of the Postal Service's Answer in this case. Consistent with past practice and current rules governing complaints,<sup>1</sup> to the extent that Capital One misinterprets, disagrees with, or otherwise wishes to further explore aspects of the Postal Service's Answer, Capital One is free to explore those items via discovery, as it has already begun to do. Moreover, it is worth noting that Capital One's Complaint features a number of paragraphs that each contain multiple factual assertions, which significantly increases the likelihood that individual responses made by the Postal Service would be open to misinterpretation. This fact supports the need for discovery, which the Postal Service does not dispute, but in no way supports Capital One's request for extraordinary relief.

Additionally, Capital One's argument relies on the mistaken proposition that the Postal Service's Answer has forced parties to engage in "unnecessarily broad discovery." The Postal Service filed its Answer on July 21, 2008. Discovery in this case commenced on August 1, 2008.<sup>2</sup> And yet Capital One did not file its Motion to Strike until August 19, 2008. The Postal Service fails to see how Capital One can argue one month after the filing of the Postal Service's Answer, and after discovery has begun, that the Postal Service is somehow responsible for unnecessarily broad discovery

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<sup>1</sup> With respect to the instant Docket, the Presiding Officer has stated, "it's my expectation that we will adhere to current rules for this case." Tr. 1/14, Docket No. C2008-3. Capital One's proposals might be suitable as suggestions for new rules in the rulemaking (Docket No. MC2008-3), but the existing rules have already been applied to this case, and are supported by past practice.

because of certain portions of its Answer. Surely, if there was a need for such extraordinary relief in this case, Capital One would have filed its Motion to Strike soon after July 21, 2008. Alternatively, Capital One could have filed a motion aimed at limiting the issues before the Commission in this Docket. In sum, Capital One's Motion to Strike has not demonstrated the need for such extraordinary relief, would be contrary to existing rules and past practice, would distort the Postal Service's Answer, and thus should be denied.<sup>3</sup>

### **Capital One's Request to Impose Additional Procedures**

Capital One's Motion also requests that the Commission impose additional procedures in this case, beyond those contained in the existing Commission Rules of Practice and Procedure.<sup>4</sup> In short, Capital One seeks to import various aspects of the Federal Rules of Civil Procedure, and the practices of other federal agencies, into the Commission's well-established procedures regarding complaint cases. For the following reasons, the Postal Service opposes Capital One's request to impose additional procedural requirements in this Docket.

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<sup>2</sup> See Order No. 92, Docket No. C2008-3 (August 1, 2008).

<sup>3</sup> The offending language has been commonly used in past complaint cases, with no adverse consequences. Striking it would have the effect of altering the Postal Service's Answer. In the event that the Commission is inclined to adopt the extreme remedy proposed by Capital One, a more appropriate course would be an order directing the Postal Service to amend its answer.

<sup>4</sup> These additional requirements are also not contemplated in the proposed rules for complaints under the Postal Accountability and Enhancement Act (PAEA). See Order No. 101, Docket No. RM2008-3 (August 21, 2008).

1. Initial Disclosures

Capital One's request for mandatory initial disclosures should be denied. Capital One asserts that initial disclosures are "particularly appropriate in this case where the Postal Service has not yet filed testimony." Capital One's request is clearly premature, as a procedural schedule in this Docket has not even been established at this stage.<sup>5</sup> Capital One merely seeks to preempt the normal course of complaint proceedings, by demanding initial disclosures from a wide range of postal employees. Presumably, Capital One may desire to use this list of employees to compel testimony and/or request a deposition of individuals that have any knowledge of the issues in this case. Imposing this additional procedural requirement would cause an undue burden to the Postal Service in identifying numerous employees that may have some knowledge of issues that relate to this case, no matter how tangential. In addition, it would unnecessarily lengthen these proceedings as it would potentially expand the scope of hearings and/or depositions in this Docket.

2. Requests for Admission

Capital One's request to expand the scope of the Commission's Rule 28, pertaining to requests for admission, should also be denied. Rule 28 allows for requests for admission "of any relevant, unprivileged facts." Nevertheless, Capital One seeks to expand this rule to allow for requests for admission that address questions of

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<sup>5</sup> Amazingly, Capital One supports its request for initial disclosures on the grounds that the Postal Service has not yet filed testimony in this case, when nothing in the Commission's Rules require the Postal Service to file testimony at this stage, or to list any individuals that *may provide* testimony at a later point in these proceedings.

“facts, the applications of law to fact, or opinions about either.”<sup>6</sup> Essentially, Capital One seeks the Commission’s pre-approval to file requests for admission that go far beyond the existing boundaries of Rule 28.

Doing so would allow Capital One to immediately explore the Postal Service’s opinion and legal position on a variety of issues, before Capital One has to file its testimony in support of its complaint, and before the Postal Service has even formulated its own testimony, thereby shifting the burden from the Complainant to the Postal Service. Essentially, Cap One is proposing that several stages of an orderly complaint proceeding (discovery, testimony, legal briefs) be telescoped into one early discovery stage reserved for Complainant’s discovery of factual elements of the case. Not only would this be unwieldy and unfair, it would infringe on the Postal Service’s opportunity for due process. These new requirements would clearly put the Postal Service at a disadvantage. The Commission’s Rules of Practice and Procedure have been proven over time to be well-suited for handling a variety of complaints, of varying degrees of complexity. There is no reason to expand the scope of any rule, including Rule 28, to resolve this complaint. Accordingly, Capital One’s request regarding requests for admission should be denied.

### **Capital One’s Request for Additional Discovery Requirements**

Finally, Capital One’s request to require “specificity in objections and certification of responses” should be denied. The arguments Capital One puts forth on pages 9-12

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<sup>6</sup> Capital One’s pleading does not cite to Rule 28 in the Commission’s Rules of Practice and Procedure. Capital One merely cites the more expansive language in the Federal Rules of Civil Procedure regarding requests for admission. Fed. R. Civ. P. 36(a)(1)(A).

of its Motion essentially function as a preemptive motion to compel, and as such, should be rejected. Capital One blatantly ignores the existing, time-tested, Commission rules and practices regarding discovery and merely seeks to have the Commission rule, in advance, on discovery disputes by incorporating, yet again, the Federal Rules of Civil Procedure and the rules and practices of other federal agencies into the instant Docket. Again, Capital One is free to propose incorporating these procedures in the Complaint rulemaking (Docket No. MC2008-3).

First, Capital One's demand for "specific objections" should be ignored. If Capital One wishes to file a motion to compel regarding any response or objection filed by the Postal Service or any other party in this case, it may properly do so under the existing Commission rules. Motions to compel that request additional specificity in a party's reasons for objection are often filed before the Commission. There is no need to request that the Commission issue an order that essentially requires parties to abide by the Commission's current rules.<sup>7</sup>

Furthermore, Capital One's request for "privilege logs" and "certification requirements" is yet another attempt by Capital One to preemptively impose additional discovery requirements by incorporating the Federal Rules of Civil Procedure and the rules and practices of other federal agencies into the Commission's practices and procedures. With its Motion, Capital One is seeking to avoid having to respond to any objections on the grounds of privilege by, as is current Commission practice, filing a

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<sup>7</sup> Indeed, it is unclear what Capital One would consider as sufficient guidance on the concept of "specific objections." Surely, any guidance the Commission could provide would not limit Capital One's ability to file motions to compel to request additional specificity in any party's objections, thus rendering Capital One's instant request superfluous.

motion to compel that may request privilege logs, protective conditions, or *in camera* inspection of documents. These procedural steps are typically undertaken on a case-by-case basis, rather than by a preemptive request to issue a new blanket requirement.

Moreover, Capital One's desire for "certification requirements" ignores the existing Commission rules pertaining to certification, and seeks to impose a new requirement that calls for certification by individual postal employees. Incredibly, Capital One supports its position regarding certification requirements on the grounds that the Postal Service "has not yet identified which individuals will submit testimony under oath, and there are no sponsoring witnesses to whom interrogatories can be directed."<sup>8</sup> The Postal Service is unaware of any requirement that it must identify individuals who will submit testimony in this case, well before Capital One has filed its own testimony in support of its Complaint, and even before a procedural schedule has been issued by the Presiding Officer. Accordingly, Capital One's request to impose these new certification requirements should be denied.

## **Conclusion**

In sum, the Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures should be denied. As discussed above, Capital One has failed to demonstrate the need for the extraordinary relief presented in its pleading that requests the Commission to strike a portion of the Postal Service's Answer. Additionally, for the aforementioned reasons, Capital One's request

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<sup>8</sup> See Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures, Docket No. C2008-3 (August 19, 2008), at 11-12.

to impose a variety of new and unfounded procedural requirements and discovery requirements should be rejected.

Respectfully submitted,

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