

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**EMERGENCY MOTION TO CLARIFY RULING ESTABLISHING PROCEDURES FOR
THE DEPOSITION OF JESSICA DAUER LOWRANCE**

Earlier this afternoon, the Commission issued a ruling that specified procedures for the Deposition of Jessica Dauer Lowrance. Capital One Services, Inc. (Capital One) seeks clarification of two aspects of that ruling:

First, the Ruling states at page 5, note 6 that "the officer assigned for purposes of taking oaths and clarifying procedures is not authorized to rule on any objections during the deposition." Thus, any objection asserted on privilege grounds—no matter how frivolous or inapplicable on its face—automatically falls under the special procedures of Section III. For example, the Postal Service could object to a conversation with a non-Postal Service lawyer, but even that would fall into the special procedures section, disrupting the flow of the deposition. In that regard, it would be helpful to have an officer at least available who could, if necessary, provide general guidance on privilege claims (without ruling on those claims) so as to avoid the situation in which the parties waste time debating tenuous or marginal claims of privilege.

Second and more importantly, those special procedures seem to imply that counsel—including counsel for Capital One—could be excluded from the room and the

presiding officer left to read questions from the transcript, depriving counsel of the ability to evaluate the tenor of the responses and to ask appropriate follow-up questions. Although we appreciate the need to put potentially privileged information under seal, counsel for Capital One must be permitted to ask the questions and follow-up as necessary. Otherwise the exercise becomes little more than submitting written interrogatories, and no substitute for in-person examination.

For example, the Postal Service could in good faith assert an objection under the deliberative process privilege to an introductory question asking about a meeting in which functionally equivalent NSAs were discussed (e.g., "Did you discuss in that meeting how the functionally equivalent standard would apply?"). Under the Ruling, the making of the objection alone would place that question within the procedures set forth in Section III. Counsel for Capital One and other parties could then be excluded from the room and the question read by the court reporter to Ms. Lowrance. Ms. Lowrance's answer could then be simply "Yes".¹ Counsel for Capital One would not have any ability to ask follow up questions to probe the substance of the discussion. Follow up questions are exactly that – the formulation of the question depends upon the answer to the previous question. Since Ms. Lowrance will no longer be available after August 29, 2008, should the Commission later overrule the objection, Capital One will have been deprived the opportunity to pursue the entire line of questioning.

If Capital One is permitted to ask the questions with appropriate follow up, then it has no objection to a second phase of questioning protected under seal and resolved later after full briefing on the privilege claims.

¹ Even if counsel had asked for the substance of the discussions, the response could easily be a perfunctory one without revealing any details of the discussion.

Respectfully submitted,

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