

PRESIDING OFFICER'S
RULING NO. MC2002-2/10

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Experimental Rate and Service Changes
To Implement Negotiated Service Agreement
With Capital One Services, Inc.

Docket No. MC2002-2

PRESIDING OFFICER'S RULING GRANTING
SECOND MOTION OF CAPITAL ONE SERVICES, INC.
FOR ISSUANCE OF PROTECTIVE ORDER

(Issued November 26, 2002)

On November 25, intervenor and co-proponent Capital One Services, Inc. ("Capital One" or "COS") filed a motion¹ requesting that I issue a protective order, as provided for in § 31a of the rules of practice. (39 C.F.R. § 3001.31a.) The requested protective conditions would apply to information responsive to Office of the Consumer Advocate Interrogatory OCA/COS-T1-29, which asks witness Jean to provide all calculations, and cite all sources, used to derive the 9.8 and 9.6 percent figures reported as the proportions of Capital One's First-Class Mail solicitations that were returned as undeliverable in 2001 and 2002, respectively.

Capital One objected to these questions in a pleading filed the same day, claiming that "revelation of the calculations, and their sources, would divulge

¹ Motion of Capital One Services, Inc. for Protective Order, November 25, 2002.

commercial information of a highly sensitive nature which could damage the company competitively.”² In its Motion, Capital One reiterates its claim of commercial sensitivity, but offers to provide the requested information upon issuance of a ruling providing protective conditions “[b]ecause we understand that it is important to be able to verify, or to authenticate, estimates made as to past returns of First-Class solicitation mail[.]”³ Additionally, in a pleading filed on November 26, OCA states that it does not oppose production of the requested information under protective conditions.⁴

I shall grant Capital One’s motion for application of protective conditions to its response to the contested OCA interrogatory. Capital One has made a colorable claim that disclosure of the requested information could compromise commercially sensitive company information, and its production under protective conditions will enable OCA and other interested parties to review the underlying materials in a secure environment. In view of these circumstances, I find there is good cause for adopting conditions devised to protect the commercially sensitive information requested.

Accordingly, I shall direct that the response to OCA’s interrogatory may be filed under the attached protective conditions, which are identical to those previously adopted in Ruling No. 1 in this docket.⁵

RULING

1. The Motion of Capital One Services, Inc. for Protective Order, filed November 25, 2002, is granted.

² Capital One Services, Inc.’s Objection to the Office of the Consumer Advocate Interrogatories to Witness Donald Jean (OCA/COS-T-1-26(b) and 29), November 25, 2002, at 3.

³ Motion of Capital One Services, Inc. for Protective Order, *supra*, at 1.

⁴ Office of the Consumer Advocate Answer to Motion of Capital One Services, Inc. for Protective Order, November 26, 2002.

⁵ Presiding Officer’s Ruling No. MC2002-2/1, October 17, 2002, Attachment.

2. The response to Interrogatory OCA/COS-T1-29 may be filed under the attached set of protective conditions, which shall govern access to the information therein.

George Omas
Presiding Officer

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. MC2002-2 by Capital One Services, Inc. in response to Presiding Officer's Ruling No. MC2002-2/10 (hereinafter, "these materials"). Individuals seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:
 - (a) an employee of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or
 - (b) a participant in Postal Rate Commission Docket No. MC2002-2, or a person employed by such participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. MC2002-2, shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
3. The final date of any participant's access shall be the earlier of:
 - (a) the date on which the Postal Rate Commission issues its recommended decision or otherwise closes Docket No. MC2002-2;

- (b) the date on which that participant formally withdraws from Docket No. MC2002-2; or
 - (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. MC2002-2 participant on whose behalf that person obtains access. The participant immediately shall notify the Postal Rate Commission and counsel for the party who provided the protected material of the termination of any such business or consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.
- 4. Immediately after the Commission issues its last recommended decision in Docket No. MC2002-2, a participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall certify to the Commission:
 - (a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and
 - (b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.
- 5. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
- 6. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
- 7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. MC2002-2.
- 8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 15, below.

9. Any Docket No. MC2002-2 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.
10. Capital One Services, Inc. shall clearly mark the following legend on each page, or portion thereof, that it seeks to protect under this agreement: 'Confidential-Subject To Protective Conditions In Docket No. MC2002-2 Before The Postal Rate Commission" or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature. Except with the prior written consent of Capital One Services, Inc., or as hereinafter provided, no protected information may be disclosed to any person.
11. Any written materials — including but not limited to discovery requests and responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs — that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to Capital One Services, Inc. representatives and other persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
 - (a) Members of the Commission.

- (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.
 - (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.
 - (d) Reviewing courts and their staffs. Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remain in effect throughout any subsequent review unless overridden by the action of a reviewing court.
14. A participant may apply to the Commission for a ruling that documents, categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. Capital One Services, Inc. shall be given notice of the application and an opportunity to respond. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), and Commission precedent.
15. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify Capital One Services, Inc. (or any other participant who designated the document as confidential) of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.
16. Each person desiring to obtain access to these materials must file a notice with the Postal Rate Commission listing name, title and position at least one day in advance of the day that the person signs a certification at the Commission's docket section in order to receive a copy of the materials. A copy of the notice must also be served in advance on Capital One Services, Inc.

CERTIFICATION

The undersigned represents that:

Access to materials provided in Docket No. MC2002-2 by Capital One Services, Inc. in response to Presiding Officer's Ruling No. MC2002-2/10 (hereinafter, "these materials" or "the information") has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in Docket No. MC2002-2. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain in strict confidence these materials in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

CERTIFICATION UPON RETURN OF
PROTECTED MATERIALS

Pursuant to the Certification which I previously filed with the Commission regarding information provided in Docket No. MC2002-2 by Capital One Services, Inc. in response to Presiding Officer's Ruling No. MC2002-2/10 (hereinafter, "these materials" or "the information"), received on behalf of myself and/or the party which I represent (as indicated below), I now affirm as follows:

1. I have remained eligible to receive access to materials under paragraph 1 of the protective conditions throughout the period these materials have been in my possession. Further, I have complied with all conditions, and have maintained these materials in strict confidence in accordance with all of the protective conditions set out above.
2. I have used the information only for purposes of analyzing matters at issue in Docket No. MC2002-2.
3. I have returned the information to the Postal Rate Commission.
4. I have either surrendered to the Postal Rate Commission or destroyed all copies of the information that I obtained or that have been made from that information.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____