

**BEFORE THE
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

**NOTICE OF INTENTION TO OBJECT TO ADMISSION OF OCA TESTIMONY
AND REQUEST FOR DECLARATORY RULING**

I. NOTICE OF INTENTION TO OBJECT TO ADMISSION OF TESTIMONY

Capital One Services, Inc. hereby serves notice that, if offered in evidence, it will object to the admission of certain portions of the testimony filed by the Office of the Consumer Advocate (OCA) in support of classification and rate changes not proposed by USPS because the Commission does not have the power to recommend those rate changes. Specifically, the entirety of the offered testimony of OCA witness Callow (OCA-T-2) is inadmissible.

The OCA Trial Brief, dated December 20, 2002, states that the “OCA has proposed two experimental classification provisions – Experimental Automated Address Correction Service and Experimental Volume-Based Declining Block Rates – in lieu of an NSA.” *See* OCA Trial Brief at 1. Those provisions, as found in witness Callow’s

testimony, include both experimental classifications changes and the rates for those classifications. *See* OCA Trial Brief at 2-3.

The Postal Rate Commission has no jurisdiction to recommend a rate change in connection with a classification proceeding in the absence of a rate request from the Postal Service, as has been unambiguously held by the D.C. Circuit. *See Dow Jones & Co. v. United States Postal Service*, 656 F.2d 788, 791 (D. C. Cir. 1981): (“A valid rate change proposal may not issue from a classification proceeding in the absence of a rate request from the Postal Service.”) Notably, this holding by the Court was made notwithstanding the fact that the Postal Service Governors had approved the classification change and rate recommended by the PRC. The Court found the Governors’ approval and the recommended decision “to be void in its entirety” because “established in violation of 39 U.S.C. §3622(a) of the Act” *Id* at 791.

The Classification Schedule proposed by the Postal Service in this proceeding is explicitly limited to Capital One. *See* § 610 “Capital One Negotiated Service Agreement.” The limited nature of this proceeding is made evident by the title of this proceeding, “Changes to Implement Negotiated Service Agreement with Capital One Services, Inc.” The limited nature of the proceeding is also intrinsic to seeking approval of a Negotiated Service Agreement rather than changes in classification and rates of general applicability.

Implicit in the request is the conclusion by the Postal Service that the proposed classification and rates cannot be appropriately addressed by provisions and rates that would apply to all mailers. The appropriate role for the PRC in considering the request is to determine whether the proposed NSA is prudent and will not adversely affect other mailers. Pursuant to that process, the PRC might decide to issue a favorable recommended decision subject to the adoption of specified changes in the Capital One Agreement. The Postal Service's request, however, cannot be used as a vehicle for recommending broader classification and rate changes "in the absence of a rate request from the Postal Service", as held in *Dow Jones*.

The OCA classification proposals are fundamentally different than the Capital One proposed classifications that apply only to Capital One. They cannot be said to be variations of, or enlargements or contractions of the Capital One proposal. As OCA witness Callow testifies: "This testimony proposes two new experimental classifications in First-Class Mail" (Page 3). As such, they are new, unrelated classification proposals that must stand on their own. And, as new classification and rate proposals not requested by the Postal Governors, *Dow Jones* prohibits new rates from being attached to these new classifications.

The D.C. Circuit has also held that the Commission acted in excess of its authority in issuing a recommended decision that approved a classification change only as an experimental rather than a permanent change, and imposing an expiration date. *Governors of U.S. Postal Service v. U.S. Postal Rate Commission* 654 F. 2d 108, 115

(D.C. C.h. 1981). (“[B]y so doing the Rate Commission exceeded its authority and strayed from its ratemaking and classification powers to intrude upon the management functions of the Board of Governors.”). For the Commission in this proceeding to recommend general classification and rate changes either in addition to (or as requested by the OCA, in lieu of) the NSA requested by the Service would even more clearly “intrude upon the management functions of the Board of Governors.”

Additionally, consideration of the OCA testimony would violate notice requirements. The Commission’s September 24, 2002 Notice and Order is explicitly limited to “a proposed three-year experimental classification change ... for ... mailings entered by Capital One Services, Inc.” Order No. 1346 at 1. There is nothing in that Order giving users of the mail or other affected parties notice that a general classification change would be considered.

In summary, witness Callow’s testimony seeks classification and rate changes which are beyond the power of this Commission to recommend and the Governors to approve. The testimony should not, therefore, be accepted by the Commission.

II. REQUEST FOR DECLARATORY RULING

We are pleased the OCA has endorsed the constituent elements of the Capital One NSA, including free address correction service and declining block rates. In fact, with the exception of capping the discounts, OCA has slavishly parroted the terms of the Capital One NSA, and proposes they be available to every mailer without further PRC review. Whatever the merits of these seemingly egalitarian proposals (and they do have

considerable merit, and deserve serious consideration by the Postal Service in the future), as discussed above, the *Dow Jones* case puts these proposals beyond the scope of this proceeding and beyond the jurisdiction of this Commission to recommend. Accordingly, we respectfully request the Presiding Officer to enter a Declaratory Ruling that the OCA's rate proposals will not be considered by the Commission in this proceeding. By ruling now, the Commission and parties will avoid considerable discovery practice, hearing time, and rebuttal directed to these proposals and such a ruling will enhance the ability of the parties and the Commission to focus on the issues that are before the Commission, to wit, whether the evidence of record shows the negotiated Capital One Agreement is likely to produce the positive benefits for USPS and postal stakeholders that will justify recommendation of this Agreement pursuant to the PRA.

Wherefore, we respectfully request the Presiding Officer enter a Declaratory Ruling that the OCA proposals, to the extent they propose changes in Postal Service rates and fees, are beyond the scope of this proceeding, and beyond the jurisdiction of the PRC to recommend.

Respectfully submitted

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