

UNITED STATES OF AMERICA  
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

OFFICE OF CONSUMER ADVOCATE  
ANSWER TO REQUEST OF  
CAPITAL ONE SERVICES, INC.  
FOR A DECLARATORY RULING  
(January 15, 2003)

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The Office of Consumer Advocate (OCA) hereby opposes the request of Capital One for a declaratory ruling concerning the OCA's classification proposals in this docket. On January 8, 2003, Capital One asked "the Presiding Officer to enter a Declaratory Ruling that the OCA's rate proposals will not be considered by the Commission in this proceeding."<sup>1</sup> Capital One relies primarily on *Dow Jones 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."). Secondly, Capital One relies on the *E-COM* case. *Governors of U.S. Postal Service v. U.S. Postal Rate Commission*, 654 F. 2d 108 (D.C. Cir. 1981). In that case the court of appeals held that the Commission could not convert a Postal Service request for a permanent classification into an experiment with a termination date. *Id.* at 115-16.

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<sup>1</sup> [Capital One] Notice of Intent to Object to Admission of OCA Testimony and Request for Declaratory Ruling, January 8, 2002, at 5.

In this docket, the Postal Service has initiated an experimental proceeding and requested rates and a termination date. The OCA proposes *identical* rates and termination provisions. The differences between the Postal Service's request and the OCA's proposal relate to the *eligibility* for a given set of rates. The Postal Service has proposed that new rates only be available to Capital One. The OCA proposes that those same rates be available to a wider class of mailers, including Capital One.<sup>2</sup>

A court case that better relates to the current situation is the *MOAA* case.<sup>3</sup> In Docket No. R90-1, the Postal Service requested the creation of a new rate category for nonpresorted bulk automation-compatible First-Class letters and requested a discount of three cents. PRC Op. R90-1 at V-29. The OCA proposed extending the three-cent discount to automation-compatible courtesy envelopes used by households and small businesses. *Id.* at V-73. Ultimately, the Commission recommended extending eligibility even further, while recommending a two-cent discount. *Id.* at V-51.

In court, the Postal Service complained that there was no evidence to support the Commission's extension of eligibility for the discount and that the Commission had interfered with management's authority to control the implementation of the automation program. 2 F.3d at 421-22. The court agreed that there was insufficient evidence to support the Commission's action. *Id.* at 422. The court went on to note that the Postal Service must be given an opportunity to show that a classification proposal may unreasonably interfere with management plans, *id.* at 424, but that the Commission is

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<sup>2</sup> See Testimony of OCA witness Callow, OCA-T-2, attachment B, last unnumbered page.

<sup>3</sup> Mail Order Ass'n of America v. USPS, 2 F.3d 408 (D.C. Cir. 1993).

perfectly within its authority to “propose a classification change that was a variation of one proposed by the Postal Service . . . .” *Id.*, n.13.

At the present stage of this proceeding, there is no reason to expect the Commission to recommend a decision based on insufficient evidence. (Although striking testimony, or admitting it for a limited purpose,<sup>4</sup> would seem to increase the chance of the Commission’s ultimately relying on insubstantial evidence.) Nor is there reason to believe that the Commission will deny the Postal Service the opportunity to demonstrate that recommendation of the OCA’s proposal would unduly interfere with the management of the Postal Service.<sup>5</sup> It is thus premature to rule on the propriety of the OCA’s proposal to expand eligibility for the rates requested by the Postal Service.

Respectfully submitted,

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SHELLEY S. DREIFUSS  
Director  
Office of the Consumer Advocate

EMMETT RAND COSTICH  
Attorney

1333 H Street, N.W.  
Washington, D.C. 20268-0001  
(202) 789-6830; Fax (202) 789-6819

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<sup>4</sup> APWU has made such a suggestion. Response of American Postal Workers Union, AFL-CIO, to Motion of Postcom et al. To Schedule Rebuttal Testimony, January 8, 2003.

<sup>5</sup> The presiding officer has set February 20, 2003, as the date for submitting rebuttal to witness Callow. Presiding Officer’s Ruling No. MC2002/16, January 13, 2003, at 2.