

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
PROPOSE PROCEDURAL SCHEDULE**
(August 26, 2008)

The United States Postal Service hereby responds to the Motion of Capital One Services, Inc. to Propose Procedural Schedule, filed August 19, 2008. In its Motion, Capital One Services, Inc. ("Capital One") submits a proposed procedural schedule that, among other things, requests "Initial testimony *of all participants to be filed at the same time* on October 17, 2008" (emphasis added).

The Postal Service opposes Capital One's Motion and proposed procedural schedule, because the effect of Capital One's procedural schedule would be to shift the burden of proof in this Complaint upon the Postal Service. Requiring the Postal Service to file testimony on the same date as Capital One (and any other participants) would essentially require the Postal Service to prepare its case before Capital One has had to submit its own testimony in support of its Complaint. This would deprive the Postal Service of the opportunity to seek discovery on Capital One's testimony and explore issues at a hearing *prior to* the filing of the Postal Service's testimony. The burden of

proof in any complaint case lies with the Complainant, and as such, Capital One should not be permitted to file its testimony concurrently with the Postal Service.

Therefore, the Postal Service submits that the first procedural step after the close of the initial discovery period should be the filing of testimony by Capital One, followed by a period of discovery on Capital One's testimony. The Postal Service may also require hearings on Capital One's testimony, though the need for a hearing is unclear at this stage. These procedural steps should occur prior to the filing of the Postal Service's testimony in opposition to the complaint. Discovery on testimony in opposition to the complaint should then proceed, followed by hearings (if needed), rebuttal testimony (if needed), and briefs.

The Postal Service suggests that this approach would obviate the need for lengthy initial discovery between the parties. On the other hand, Capital One's proposed procedural schedule not only shifts the burden of proof in this case, but may also increase the likelihood for wide-ranging, open-ended discovery requests, as parties will seek to anticipate any arguments and/or defenses that may be offered on a "universal" initial testimony due date.¹ Furthermore, the Postal Service's proposed approach is consistent with past Commission practice in complaint dockets. See P.O. Ruling No. C86-3/3, Docket No. C86-3, Parcel Post Rate Complaint (December 5, 1986).

¹ See, e.g., Interrogatory of Capital One Services, Inc. to the United States Postal Service (COS/USPS-12), Docket No. C2008-3, filed August 22, 2008 (seeking factual allegations, legal interpretations, and any defense relied upon by the Postal Service in this Complaint, in addition to the nature of the evidentiary support that the Postal Service has or expects to obtain).

Accordingly, the Postal Service respectfully requests that the Presiding Officer issue a procedural schedule that requires the Complainant (and any other parties) to first present initial testimony in support of the complaint, followed by discovery and possible hearings on that testimony, and thereafter set a deadline for testimony in opposition to the complaint.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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August 26, 2008