

ORIGINAL

**OFFICIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE
POSTAL REGULATORY COMMISSION**

In the Matter of:)
CAPITAL ONE COMPLAINT) Docket No.: C2008-3

VOLUME #2

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P R O C E E D I N G S

(9:02 a.m.)

1
2
3 CHAIRMAN BLAIR: Good morning. Presiding to
4 Officer's Ruling No. 34, we've scheduled this second
5 prehearing conference in Docket No. C2008-3. I'm Dan
6 Blair, presiding officer in this case. With me on the
7 bench today are my fellow commissioners, Nanci
8 Langley, Tony Hammond and Ruth Goldway.

9 Capital One Services filed a complaint
10 concerning its inability to obtain a negotiated
11 service agreement similar to the one the Postal
12 Service has with Bank of America more than seven
13 months ago. For more than half of that time, the
14 Postal Service has been reviewing documents trying to
15 develop a privilege log for materials on the computer
16 of one of its former employees.

17 Postal Service and Capital One have each
18 been submitting weekly status reports that indicate
19 work is progressing. The Commission is becoming
20 increasingly concerned with the fact that there has
21 been no indication that the end of this process is
22 even in sight.

23 We put our concerns in context. Over the
24 years, the Commission has earned a reputation for
25 expeditiously meeting its responsibilities. This is

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1 the first litigated complaint proceeding following
2 enactment of the Postal Accountability Enhancement
3 Act. The Commission is concerned that unnecessary
4 delays in this case may leave the impression that the
5 Commission does not act promptly to resolve formal
6 complaints under the law.

7 Would any of my colleagues like to add to
8 that? Commissioner Hammond?

9 COMMISSIONER HAMMOND: Yes. Thank you, Mr.
10 Chairman. I totally agree with the Chairman's
11 comments on this matter, and I appreciate you making
12 them. As you know, I didn't even see the need to
13 postpone the February hearing until today. I think
14 that the Commission has been very tolerant of the
15 request in this complaint.

16 I'm glad that the parties reported yesterday
17 that discussions during the past several weeks have
18 been instructive and useful, I've read similar
19 comments in many of the 17 earlier reports filed by
20 the parties, but this Commission has a responsibility
21 to act at some point in time. Now, the old Postal
22 Rate Commission used to dispose of omnibus rate cases
23 in a 10 month time period.

24 The schedule that was filed yesterday
25 proposes that the process in this case go at least 13

1 months before the Commission might even begin
2 deliberation. So I think that's simply too long. I
3 would hope that the parties would propose a more
4 realistic, shortened timeframe, if they could. That's
5 all I have to say. Thank you, Mr. Chairman.

6 CHAIRMAN BLAIR: Thank you, Commissioner.
7 My sentiments, and I want to join your remarks.
8 Commissioner Langley?

9 COMMISSIONER LANGLEY: I, too, am going to
10 join the remarks of Commissioner Hammond and the
11 Chairman. I think that we have been extremely kind
12 and judicious as this has moved forward, but the
13 proposal submitted is a little lengthy considering
14 we've already gone some time, I believe it's seven
15 months, between the last prehearing and this
16 prehearing.

17 Timewise, the PAEA is contemplated to be a
18 process that expedites proceedings and expedites the
19 review of rate requests, so I believe that we really
20 do need to move forward more rapidly on this matter.
21 Thank you.

22 CHAIRMAN BLAIR: Commissioner Goldway?

23 COMMISSIONER GOLDWAY: I think the
24 Commission is unanimous in their concern. My concern
25 is that I want to be sure that whatever schedule is

1 agreed upon is something that both parties agree to.
2 I think the Postal Service, being the Respondent,
3 could be looked at as dragging its feet, and I really
4 want to make sure that the Complainant feels that the
5 schedule is suiting the needs of the supposed injured
6 party.

7 These dynamics lead me to believe that we're
8 just going to stonewall the issue rather than face it.
9 So I'd like to hear from both parties about that to
10 make sure that we can move forward as quickly as
11 possible.

12 CHAIRMAN BLAIR: Thank you, Commissioner.
13 On February 11, 2009, I granted a joint motion to
14 postpone the second prehearing conference to allow
15 further discussion between the parties. Yesterday,
16 Capital One and the Postal Service filed a joint
17 motion proposing a procedural schedule for future
18 litigation in this docket. I view this as a step in
19 the right direction.

20 The proposed schedule calls for submission
21 of the case to the Commission for decision in five
22 months. I would ask counsel for the Postal Service
23 and Capital One to provide additional information for
24 the procedural dates proposed in their motion.
25 Counsel for the Postal Service? And please identify

1 yourself for the record.

2 MS. REED: Elizabeth Reed for the Postal
3 Service. Also, Ken Hollies is here with me. As our
4 motion had indicated, over the last several weeks
5 we've been working with Capital One on a variety of
6 issues, and most specifically, to work on a proposed
7 procedural schedule. Part of our thinking in laying
8 out this schedule is that it does allow additional
9 time to wrap up discovery.

10 We have outstanding discovery requests that
11 we are continuing to work on and we expect that those
12 parties will have follow-up. Capital One would have
13 additional interrogatories or document requests. We
14 certainly intend to move this case along as swiftly as
15 possible.

16 Along with your comments about the context
17 of this case, we've essentially been facing the type
18 of discovery and document requests that we haven't
19 faced in prior rate cases in terms of electronic
20 discovery, searches of emails, those sort of things,
21 which have been the main reason for the delay. It's
22 not the traditional discovery that we face in omnibus
23 rate cases, doing electronic searches of emails and
24 retrieval, working with IT folks at headquarters, so
25 that has been a challenge for us.

1 Working with Capital One, we think we have a
2 pretty good framework for moving forward, but we
3 certainly respect your concerns about wanting to move
4 things along.

5 CHAIRMAN BLAIR: Counsel for Capital One?

6 MS. LEONG: Good morning, this is Joy Leong,
7 counsel for Capital One. On our discovery discussions
8 we have made progress. We're able to stipulate to
9 some key documents which we submitted to the
10 Commission in a joint motion. We also made progress
11 with the electronic discovery which, as the Postal
12 Service has said, was completely new to them.

13 So we worked with the IT folks at the Postal
14 Service to identify search terms and to create a
15 universe of documents; however, we have not been able
16 to cull through all of those documents, so there is
17 still remaining document production.

18 One of the reasons for the delay was that
19 near the end of 2008 our discussions broadened from
20 simply, you know, resolving discovery issues to
21 perhaps more of general settlement of the case, which
22 may have been a more efficient way to approach things,
23 and those talks are ongoing. I'll defer to the Postal
24 Service for more details on that, but that was one of
25 the reasons for the schedule that was agreed upon and

1 submitted yesterday.

2 CHAIRMAN BLAIR: Thank you. Given the time
3 that has passed already, I would ask the parties to
4 consider speeding up the proposed procedural schedule.
5 Is that doable? I don't expect an answer necessarily
6 today, but I would like an answer from the parties to
7 see if we could speed that up.

8 MS. REED: Yes. I think, you know, we've
9 done a pretty good job working together over the last
10 several months and we'll certainly consult with each
11 other about how we can squeeze in these deadlines.
12 You know, a lot of it is making sure they have an
13 opportunity to prepare their case once all our
14 discovery responses are in and for the Postal Service
15 to prepare our rebuttal testimony after the hearings.
16 So we can take a look at the schedule and see how we
17 can move things up and report back.

18 CHAIRMAN BLAIR: Along those lines of the
19 schedule, that schedule identified a date for rebuttal
20 testimony from the Postal Service. It would be my
21 expectation that any participant seeking to file
22 testimony in response to the direct case of Capital
23 One would also submit testimony on that date. Is that
24 your intent?

25 MS. REED: Yes, that is our intent if any

1 other parties wish to file.

2 MS. LEONG: Yes. We also wanted to note
3 that before the filing of direct testimony it would
4 probably make sense to narrow the issues, I believe
5 the Commission had suggested in one of its orders that
6 we could have requests for admissions, because there
7 may well be large areas that we can stipulate to.

8 CHAIRMAN BLAIR: All right. I also have
9 another question. Currently, the Postal Service has
10 filed a rate adjustment for market dominant products
11 which is pending before the Commission at the present
12 time. In that are rates for the intelligent mail bar
13 code which would go into effect in November. Do you
14 see this as impacting this complaint case?

15 MS. REED: Is the rates impacting the
16 complaint case?

17 CHAIRMAN BLAIR: Yes.

18 MS. REED: I think it depends on if we
19 continue to pursue settlement discussions. I mean,
20 that has come up in our settlement discussions, but, I
21 mean, moving forward and litigating the case I think
22 we can pursue the schedule on a separate track.

23 CHAIRMAN BLAIR: Can you comment further on
24 any of those settlement discussions to the extent that
25 counsel for Cap One has?

1 MS. REED: Well, I'd say that we've had good
2 faith discussions on both sides and it has involved
3 consulting with different groups in the Postal
4 Service. So they haven't been just initial
5 discussions between the attorneys, we are involving
6 our clients and getting feedback on those issues and
7 are making some progress.

8 CHAIRMAN BLAIR: Thank you. Commissioner
9 Goldway?

10 COMMISSIONER GOLDWAY: I wanted to ask about
11 the new information that the Postal Service needs to
12 provide that involves electronic communications. I
13 anticipate that this is going to be a regular request
14 in complaint proceedings in the future, and I want to
15 be sure that you are committed to developing a system
16 that doesn't just respond to this particular case, but
17 that it is something that can be used in the future.

18 MR. HOLLIES: Commissioner Goldway, the
19 Postal Service is, in fact, a leader among federal
20 agencies in developing processes and procedures for
21 responding to discovery involving what's characterized
22 as electronically stored information, or ESI. That
23 does not mean, however, that we necessarily have
24 resources that are sitting there available in terms of
25 personnel to work on this.

1 We do have several people dedicated to this
2 case exclusively, we have procedures more broadly for
3 identifying and preserving information that may be
4 implicated by a given case and we have techniques for
5 searching that information. However, as is the case
6 with all ESI, there is a need for reviewing documents
7 for privilege implications. Is there an
8 attorney/client? Is there something that's
9 confidential? Is there a trade secret type
10 implication for a given document?

11 That's where the time comes, and that's
12 where this complaint is, in some sense, mired. To the
13 extent there's been a slow response from the Postal
14 Service, it's because it does not have 30 people it
15 can throw all of those people's time to processing
16 documents in this case. We are working expeditiously,
17 we are doing things we have never done before, and
18 while we do have ways of identifying, preserving and
19 keeping available necessary documents, we're still
20 going through this for the first time in a Commission
21 proceeding.

22 COMMISSIONER GOLDWAY: Is the Complainant
23 satisfied that adequate resources have been put into
24 this search?

25 MS. LEONG: Commissioner, we have actually

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1 not had very much document production, and what has
2 been produced has been, I would say not entirely
3 relevant. I do think the bottleneck is the ability of
4 the Postal Service to have a legally trained person to
5 review documents for privileges.

6 We haven't seen, other than the one that was
7 filed that you received, an extensive privilege log,
8 so one of the concerns I have is that, you know, in
9 the initial discovery period in a month, we really
10 need to see the documents well before then in order to
11 file motions to compel or to respond to privilege
12 claims. That's where I see the first obstacle coming
13 up.

14 So we have been somewhat frustrated;
15 however, there have been other issues going on so
16 we've been trying to work with the Postal Service
17 instead of trying to do motion practice.

18 MS. REED: If I may. Just to follow-up on
19 that point, one of the resource challenges we've had
20 is in I believe November and December we had two
21 paralegals working on this full-time in addition to
22 I'd say four or five administrative assistants that
23 were helping out preparing the privilege log, and the
24 paralegals would help review, and I think four of
25 those administrative assistants are no longer working

1 for us because they're on a contract basis, and we're
2 down to only one paralegal just because we have
3 certain resource and budgetary constraints in the Law
4 Department and in headquarters, as a whole, which has
5 slowed, you know, the ability of the Postal Service to
6 review all those documents.

7 I mean, because it's a wide-ranging search.
8 I mean, we prioritized the search after working with
9 Capitol One but still produces thousands of emails.

10 COMMISSIONER GOLDWAY: As the Chairman said,
11 I think we're concerned about the precedent that this
12 case sets in terms of the length of time that it
13 takes. If this is a bottleneck, and I expect it will
14 be an issue in subsequent cases, I think it's really
15 important for the Postal Service to focus on this to
16 be sure that it can respond quickly to complainants
17 and that these cases don't drag on.

18 So I'd like to hear a report again next time
19 about how satisfied everyone is with the results of
20 the search so that we know that you're addressing this
21 problem and that it won't be as much of a problem in
22 the future.

23 MS. REED: Right. Your point is very well-
24 taken. I can say absolutely we have learned quite a
25 bit about the process. Like I said, this is a type of

1 discovery we never faced with traditional rate cases.
2 We have learned quite a bit. I'm pretty confident
3 moving forward just with the institutional knowledge
4 that we've built up from doing this kind of electronic
5 discovery in the rates practice that it'll improve for
6 future cases.

7 COMMISSIONER GOLDWAY: Thank you. So when
8 you report to us just give us an update on how
9 efficient the search --

10 MS. REED: Sure.

11 COMMISSIONER GOLDWAY: -- has become and how
12 satisfied the Complainant is with the documents that
13 have been presented. Thank you.

14 CHAIRMAN BLAIR: Thank you, Commissioner.
15 Any other Commissioners wish to comment? Okay. Thank
16 you. As you can tell, there's a sense of frustration
17 on the part of the panel with the time limits of the
18 proceedings of this case. I hope that the parties can
19 come together and recognize and respond to these
20 concerns that are expressed here this morning.

21 I will issue a written ruling -- well,
22 first, before I do that, does any other participant
23 wish to comment on the proposed procedural schedule?
24 If not -- I'm sorry. Please identify yourself for the
25 record.

1 MR. MORGAN: Jeremiah Morgan for Valpak
2 Direct Marketing Systems and Valpak Dealer
3 Association. I spoke with counsel for the Postal
4 Service yesterday and they assured us that they have
5 some responses to our pending interrogatories, will be
6 forthcoming. I just wanted to bring those to the
7 Commission's attention. They've been pending since,
8 well, the first one was due at the end of September,
9 and there were several filed in October as well.

10 CHAIRMAN BLAIR: Does Postal Service counsel
11 wish to respond and give the Commission an indication
12 of when responses to those interrogatories will be
13 ready for the record?

14 MS. REED: Yes. We have a couple
15 outstanding interrogatories to the public
16 representative as well. We hope to in the next couple
17 of weeks either file responses or give a status report
18 on to when we expect responses. Whatever procedural
19 schedule we come up with, we certainly plan on having
20 the responses out by the conclusion of discovery so
21 the parties can file follow-up.

22 CHAIRMAN BLAIR: If you could follow-up on
23 today of what the outstanding interrogatories are and
24 when they were filed I think it would enlighten the
25 Commission further and inform the Commission's further

1 considerations in this case as well.

2 I'm, you know, hearing again of
3 interrogatories filed in September with no response
4 and we're now in March which would leave an interested
5 viewer to understand that this case is not proceeding.
6 So while I'm glad to see a procedural schedule agreed
7 to by the parties, we're very concerned over the pace
8 at which this has been accomplished.

9 MS. LEONG: Mr. Chairman, may I just ask
10 what is the timeframe to receive a listing of the
11 interrogatories that are still outstanding?

12 MS. REED: We could in a week provide a list
13 of all the outstanding interrogatory responses and
14 either give you responses to those that are
15 outstanding or provide a status report.

16 CHAIRMAN BLAIR: Is there a way you could do
17 that by close of business on Friday?

18 MS. REED: Sure. We can do that.

19 CHAIRMAN BLAIR: Okay.

20 MS. LEONG: And that would include the date
21 that the interrogatories were filed by parties?

22 MS. REED: Right. Yes, yes.

23 MS. LEONG: And your expected responses?

24 MS. REED: Yes, yes. We'll provide an
25 expected response date for any that are not ready to

1 be filed on that day.

2 MS. LEONG: Thank you. Chairman Blair,
3 there are also several motions outstanding, or
4 responses to motions, so would you want those also
5 added to the list?

6 CHAIRMAN BLAIR: I think that would be
7 helpful in making a comprehensive list. Did the
8 Postal Service counsel hear that?

9 MS. REED: Yes. Yes.

10 CHAIRMAN BLAIR: Thank you.

11 MS. LEONG: And those were pending under the
12 Commission's ruling. Would there be a deadline set
13 for those or will they continue to be pending?
14 There's kind of an open-ended extension of time.

15 CHAIRMAN BLAIR: We'd like to see the list
16 of the pending motions and then the presiding officer
17 and the Commission will take action on that at that
18 point. Do the parties wish to make any further
19 comments? I will be issuing a ruling on the joint
20 motion shortly. Let me assure the parties, if they
21 can find an opportunity to move more quickly, the
22 Commission will be grateful.

23 Are there any other issues which we should
24 be addressing here today? Any comments from my fellow
25 Commissioners? If not, this prehearing conference is

1 adjourned. Thank you very much.

2 (Whereupon, at 9:25 a.m., the prehearing
3 conference in the above-entitled matter was
4 concluded.)

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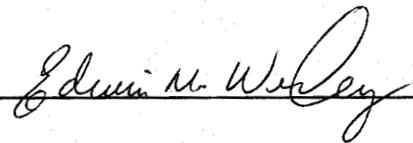
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DOCKET NO.: C 2008-3
CASE TITLE: Capital One Complaint
HEARING DATE: 3-3-09
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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Postal Regulatory Commission

Date: 3-3-09



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