

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
IN OPPOSITION TO MOTION OF CAPITAL ONE SERVICES, INC. TO
COMPEL SUBMISSION OF POSTAL SERVICE PRIVILEGE LOGS
AND TO CONTINUE
(April 16, 2009)**

The United States Postal Service hereby responds in opposition to the Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue, filed April 9, 2009 (hereinafter "Motion"). The instant Motion by Capital One is styled as a motion to compel, but it essentially serves as a motion to extend the discovery deadlines and modify the procedural schedule in this docket by at least sixty (60) days. As background, the procedural schedule in this docket was established on March 30, 2009, in Presiding Officer's Ruling No. 37, and was based upon a Joint Motion of Capital One and the Postal Service. That Joint Motion offered a proposed schedule that was mutually agreed upon by Capital One and the Postal Service after informal discussions between the parties.

Over the past several months, the parties have engaged in numerous informal discussions to resolve discovery disputes, narrow the scope of Capital One's extensive document requests, and even pursue initial settlement discussions. Such informal

communications have been productive, and have avoided significant motions practice before the Commission. At the Prehearing Conference held on March 3, 2009, the Presiding Officer expressed the Commission's desire to move this case forward, and proceed more rapidly toward a resolution, a position which the Postal Service certainly respects. Thus, the Postal Service and Capital One conferred to propose a procedural schedule which satisfied the interests of the Commission in concluding this docket, as well as the needs of the parties for an appropriate amount of time to prepare their respective cases. However, as the instant Motion indicates, Capital One now seeks to modify that procedural schedule and significantly extend the scope of discovery in this docket, and extend all procedural deadlines by at least sixty (60) days, or more than two months. This extension would stretch this case well through the summer months, which is more than fourteen months after this Complaint was initially filed. For the following reasons, the Postal Service opposes Capital One's Motion.

Capital One's Motion, and its discovery strategy in this case to date, have been based upon its stated belief that "documents are at the heart of this case." Motion at 8. This position appears to be based on Capital One's apparent assumption that there are documents in the custody of the Postal Service that will somehow be able to shed light on the *legal* questions at the heart of this case: whether the Postal Service has unduly discriminated against Capital One by not offering Capital One a Negotiated Service Agreement (NSA) *identical* to the Bank of America NSA. Thus, early on in this case, Capital One filed extensive document requests,¹ and, despite the Postal Service's

¹ See COS/USPS-DR-1-17 (filed August 8, 2008). These document requests are subject to a pending Postal Service objection (filed August 19, 2008). Capital One has

pending objections to those requests, successfully sought to bootstrap those document requests onto the emergency deposition of Jessica Lowrance.

From the outset of this case, the Postal Service has failed to see how this type of document discovery is an efficient means of producing record evidence that would materially elucidate the legal issues in this case. Certain emails and draft memoranda found in a select group of individuals' email accounts, even if they were to indicate an intent to discriminate at any given time, do not demonstrate whether or not that discrimination is undue as a legal matter, and certainly do not speak to whether the legal term "functionally equivalent" means "identical" in the context of this case. Nevertheless, the Postal Service has continued to work over the past several months toward reviewing tens of thousands of pages of documents, identifying any applicable privileges, and preparing logs for materials that are privileged.²

This document review process has thus far been a largely cooperative one, including regular meetings with counsel for Capital One to "preview" documents, as

not yet filed a motion to compel regarding these requests, while the parties have been working informally to narrow the scope of the requests.

² In this regard, the Postal Service must emphasize that its interests in asserting legitimate protections from disclosure regarding its internal communications have been by no means frivolous, or undertaken as a delaying or litigation tactic. In most discovery situations before the Commission in the past, inquiries have focused on discovery of information and data related to financial and operational facts pertinent to review of Postal Service rates or services, under the legal and policy provisions of controlling statutes. As even a cursory examination of the administrative record in this case shows, however, the major focus of discovery so far has been on internal, personal communications and documents. While the great majority of such communications have been irrelevant or insignificant in relation to the issues raised by Capital One's Complaint, the Postal Service's need to protect its internal correspondence and advice, especially where its legal liability might be concerned, is extremely important, both as a matter of precedent for future litigation, and as it relates to administrative policy and the free flow of opinions and advice within the Postal Service.

Capital One's Motion correctly represents. Yet the process has been significantly time-consuming to complete, as each "preview session" involves the review of hundreds of pages of emails and attachments that both parties would freely admit are irrelevant to this case. Nevertheless, over the past several weeks, this process has neared its conclusion as the parties have been able to distill an extraordinarily large volume of documents into a much smaller subset that Capital One seeks to produce.

This document review process has also resulted in the creation of privilege logs, which are also a subject of the instant Capital One Motion. The Postal Service recently completed the privilege log pertaining to the files on Jessica Lowrance's computer.³ This single privilege log alone is approximately 900 pages long, and covers roughly 8500-9000 emails retrieved from Ms. Lowrance's computer.⁴ The Postal Service is also working to complete the privilege log for the additional documents (produced via Boolean search) that the Postal Service has identified as privileged. It should also be noted that the Postal Service has permitted Capital One to "preview" hundreds of documents that the Postal Service could have arguably chosen to assert privileges for,

³ At the deposition of Ms. Lowrance, the Postal Service was ordered to produce a privilege log for any documents (including emails) not produced at the deposition. P.O. Ruling No. C2008-3/3 at 4 (August 26, 2008). The electronic files on Ms. Lowrance's computer were not produced at the deposition because the emergency nature of the deposition did not allow for sufficient time for the Postal Service to retrieve all of Ms. Lowrance's electronic files at the time. To comply with P.O. Ruling No. C2008-3/3, the Postal Service has employed several administrative personnel toward completing this task over the last roughly eight months.

⁴ The Postal Service and Capital One scheduled a meeting at Postal Service Headquarters on April 9, 2009, the day the instant Motion was filed, to preview more documents, including the Lowrance privilege log. Capital One chose to cancel that meeting in order to complete and file its Motion.

in the interests of moving this process toward resolution. The Postal Service must also, after the documents have been previewed by Capital One, review any documents Capital One has identified to guard against any inadvertent disclosures of privileged material, particularly for attorney-client privileged material or confidential data from third parties.

The Postal Service concedes that this latter privilege log for the electronic documents retrieved via Boolean search (referred to as "Set B" in Capital One's Motion) is not yet complete, given the tens of thousands of pages involved. However, the Postal Service contends that this does not justify extending the discovery deadline in this docket by "at least sixty days," as Capital One proposes. Throughout this document review process, Capital One has had a more than sufficient opportunity to submit additional interrogatories to explore new areas of inquiry, or file follow-up interrogatories, in order to illuminate the real substantive legal issues at the heart of Capital One's Complaint. Capital One now seems to argue in its Motion that it is unable to formulate any interrogatories or prepare its direct case until it has reviewed the privilege log for each document, no matter how arcane, that was retrieved via the Postal Service's Boolean search.

In the Postal Service's view, this type of reasoning will only lead to an interminable delay in this docket. The Boolean search performed several months ago was limited to the email accounts of a small group of postal employees who were closely involved with the Bank of America NSA. This search surely did not encapsulate the email accounts or hard drives of dozens of postal personnel who have ever worked on the Bank of America NSA, discussed the instant Complaint, or even speculated

about functionally equivalent contracts or the Postal Service's legal obligations under title 39. Suppose, for example, that Capital One were to continue its document discovery in this docket for sixty more days, and still not find any documents that support Capital One's view that it is entitled, as a matter of law, to an identical NSA to the Bank of America NSA. Since "documents are at the heart of this case," would not Capital One again seek to extend the discovery deadline, and seek to run an even broader Boolean search of Postal Service documents in search of the supposed "smoking gun"?

The Postal Service agrees with Capital One's assertion that "the document discovery in this complaint case is unprecedented." Motion at 2. The Postal Service regrets that the review of documents and preparation of privilege logs has not yet been completed to date, but it is not from an institutional lack of effort or from a desire to delay the instant docket. The document discovery in this case has far exceeded the discovery in the most complex omnibus rate cases. As the Postal Service has consistently stated, the document review process has required significant efforts from a number of administrative personnel normally focused on other tasks, in addition to paralegal support devoted full-time to this case. Nevertheless, this document review process is nearing completion, and the Postal Service plans on continuing to work with Capital One to complete this process in due course. In fact, the parties held another "preview session" on Wednesday of this week, despite any delay caused by the instant motions practice, and made additional progress on previewing documents.

The Postal Service readily admits that the opportunity to discover facts in a contentious proceeding is an important due process right. Nevertheless, discovery

procedures are not unlimited or unconstrained, in light of other important goals, such as proportion and timely completion of the Commission's legal responsibilities. Even in omnibus rate cases, the most complex proceedings that the Commission has conducted in the past, discovery rights have frequently been tempered by equitable and practical considerations, such as burden and duplication of effort.

The Postal Service maintains that a further delay in this docket of sixty days or more is not appropriate at this stage of the proceedings, and would only serve to continue to delay the eventual resolution of this case. It is the Postal Service's understanding that if Capital One were to require additional motions practice, or follow-up discovery as a result of the Postal Service's completed privilege logs, this would still be permissible under the existing procedural schedule and Commission rules. However, the Postal Service submits that any additional extension of this proceeding for two months or more would not serve the interests of the Commission in resolving this case in an efficient manner, and would only serve to drag out Capital One's unprecedented document discovery even further. Therefore, the Postal Service respectfully urges the Commission to deny Capital One's Motion.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing and Product Support

Elizabeth A. Reed

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-3179; Fax -6187
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