

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

**Complaint of Capital One
Services, Inc.**

Docket No. C2008-3

**RESPONSE OF THE AMERICAN POSTAL WORKERS UNION, AFL-CIO
IN SUPPORT OF MOTION OF CAPITAL ONE SERVICES, INC.
TO COMPEL SUBMISSION OF POSTAL SERVICE
PRIVILEGE LOGS AND TO CONTINUE
(April 17, 2009)**

The American Postal Workers Union, AFL-CIO (APWU) hereby responds in support of the Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue, filed April 9, 2009.

APWU shares the Commission's desire to complete discovery in a timely manner and further this docket along towards a resolution. Unfortunately, as noted in Capital One's Motion, in eight months of active discovery, the Postal Service has provided only a handful of documents in this case, and as of today, has not even submitted a full accounting of the privileges it claims for each unproduced document. Without knowing the types of documents that USPS claims are privileged and the grounds for such claims, it is impossible for the parties to formulate a discovery strategy that would lead to the production of relevant documents necessary for a full and fair adjudication of the complaint. It is simply not possible to anticipate what the Postal Service has not produced and what questions that information may trigger upon production.

While it is true that the Rule 26(a) of the Commission's Rules of Practice allow for follow-up interrogatories, these interrogatories must be filed within seven days of the answer and there is no corresponding "follow-up" rule for document requests. In the instant case, the Postal Service has yet to provide the majority of the information requested and to date has not provided even an approximate date

for such submission. Even assuming follow-up interrogatories provide adequate due process protections, the parties have no idea when those follow-up interrogatories could be filed; we have no idea when the Postal Service will complete its review of documents, when it will provide the parties with its alleged privileges, and when the inevitable motions practice to compel discovery of these documents will begin and end.

Under the current procedural schedule, the initial discovery period ends on Monday, April 20, 2009 and Capital One is to file its direct case on May 11, 2009. It appears that the majority of the discovery directed to the Postal Service will be provided after the conclusion of the initial discovery period and during Capital One's direct case. But it is unclear how Capital One can file a complete case without the submission of requested information from the Postal Service and without an adequate amount of time to review that information. It is equally unclear how other interested parties, the Postal Service and the Commission can ask for meaningful discovery from Capital One, without getting the same from the Postal Service.

Like the Commission, APWU had hoped that Capital One and the Postal Service would have resolved many discovery disputes informally, allowing all interested parties public access to the relevant information. In order to avoid multiple, duplicative demands and disputes, and to preserve limited resources, APWU has not pressed for discovery while Capital One and the Postal Service worked to resolve their discovery disputes. For example, still unresolved is APWU Motion's to Compel Production of the OIG Report, filed August 28, 2008. The Postal Service responded in opposition to that Motion but no ruling has been issued, presumably because the Commission reasoned that in seeking an informal discovery dispute resolution, the Postal Service was actually going to produce relevant information requested by the parties. As made clear by Capital One's Motion, this has not happened.

Therefore, we feel compelled to comment now that the end of the discovery period is near and it seems as though the Postal Service intends to defend itself in this case by attrition. If the procedural schedule is not extended and if the Postal Service is not compelled to produce the privilege logs we are concerned that this

case will set a bad precedent for future complaint cases and may dissuade some of them altogether. Only parties that possess the massive resources needed to fight the Postal Service's discovery stonewalling will be able bring Complaints against the Postal Service. This will eliminate complaints from a whole host of people and organizations that simply cannot afford a nearly year long discovery battle with a large governmental entity.

Accordingly, APWU supports Capital Ones' Motion and respectfully requests that the Commission order the Postal Service to produce the long awaited privilege logs and continue the procedural schedule as requested by Capital One.

Respectfully submitted,

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