

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**PARTIAL RESPONSE OF THE UNITED STATES POSTAL SERVICE  
TO ORDER NO. 208 AND MOTION FOR PARTIAL RECONSIDERATION**  
(May 8, 2009)

On April 29, 2009, the Commission issued Order No. 208, which established the framework by which the Postal Service should provide the voluminous set of documents subject to Capital One's discovery efforts in this case.<sup>1</sup> This framework breaks the set of documents into three groups, according to the descriptions in Capital One's April 9, 2009, Motion to Compel:

- (1) all documents identified by an electronic search of key Postal Service employees' files and containing non-privileged material, which should be made available to the requesting party and for specific materials within which the Postal Service may submit a privilege log;
- (2) other documents identified by an electronic search of key Postal Service employees' files and containing privileged material, the privilege log for which the Postal Service should submit in its present state, with a full explanation of the remaining work and a date certain for expected completion; and
- (3) the documents associated with the deposition of Jessica Lowrance, the privilege log for which Capital One claimed had been completed and the Commission consequently ordered to be produced.

Concurrent with the instant filing, the Postal Service is filing (1) approximately 2,300 pages of Group 1 documents under seal, (2) a partial privilege log for Group 2

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<sup>1</sup> PRC Order No. 208, Order on Capital One Motion to Compel and Extension of Deadlines Pursuant Certified to the Commission by Presiding Officer's Ruling No. C2008-3/38, Docket No. C2008-3, April 29, 2009.

documents, and (3) the current draft privilege log for Group 3 documents. This partial response is explained below. In addition, the Postal Service respectfully moves the Commission to reconsider certain aspects of Order No. 208, as discussed below.

***I. Group 1 Documents***

In its April 9, 2009, Motion to Compel, Capital One claimed that Group 1 includes approximately 20,000 nonprivileged documents. Capital One's motion does not, however, mention that, as a result of the Postal Service's allowance of Capital One to preview these documents, Capital One counsel has designated approximately 2,300 pages<sup>2</sup> of these documents as actually relevant to its discovery efforts. Because the requesting party has not expressed an interest in the remaining thousands of pages that it previewed, the Postal Service respectfully submits that it would be unduly burdensome to conduct the exercise of stamping these documents, copying them in duplicate, and preparing them in binders for filing with the Commission. While this work would serve no palpable interest in the case, it would only distract from and potentially delay the Postal Service's laborious efforts to comply in good faith with its myriad other current discovery obligations. The documents remain available for counsel for Capital One's inspection and further review, should that be necessary under the terms of an agreement that the parties executed for preview of the documents. Thus, the Postal Service respectfully requests that its production of certain Group 1 documents, combined with the prior and continued availability to Capital One counsel of remaining Group 1 documents, establishes full compliance with this requirement.

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<sup>2</sup> This count derives from Capital One's number-stamping of pages on the subset that it designated as being of interest. About 2,270 pages are stamped, and the Postal Service has rounded up to account for a relatively small number of unstamped pages.

The Postal Service is filing these documents under seal because it maintains that certain material within them is privileged, commercially sensitive, and statutorily exempt from disclosure under 5 U.S.C. § 552(b) or 39 U.S.C. § 410(c). Because Capital One's preview of these documents was a cooperative effort to expedite discovery, the attendant confidentiality agreement stipulates that applicable privileges and exemptions were not waived by Capital One's provisional access to the documents that the Postal Service offered for preview. Accordingly, the Postal Service submits these documents under seal and respectfully requests that protective conditions be applied to them.

Finally, the Postal Service respectfully submits that a privilege log would be duplicative and unduly burdensome under the present circumstances. The relevant documents are already being filed and may be made available to the requesting party under appropriate protective conditions. If and when particular documents are identified as being salient, the Postal Service is prepared to explain whether and why such documents are privileged or exempt in the context of those documents' admissibility. Given the documents' availability and the concomitant opportunity for addressing specific issues after the fact, it would appear that the rationale for an *ex ante* privilege log, as a preliminary substitute for production, has been rendered moot. Hence, the Postal Service respectfully requests that the Commission reconsider the requirement to produce a privilege log for Group 1 documents at this time.

## ***II. Group 2 Privilege Log***

The documents in Group 2 comprise 26 binders and largely consist of privileged documents that the Postal Service did not offer to Capital One for preview. The Postal

Service has completed privilege logs for 17 of these binders. The Postal Service is filing with the Commission the completed privilege log for 17 of these binders, together with the current, incomplete draft privilege log that Postal Service staff has begun for one additional binder.<sup>3</sup> The latter, partial privilege log may be subject to further review by Postal Service counsel; with its instant response to the requirement that it produce the current version of this log, the Postal Service does not waive its ability to assert privileges or exemptions, or identify documents as non-exempt, upon further review. The Postal Service will proceed with the privilege log for each of the remaining 8 binders in turn. The Postal Service will provide progress updates every two business days as prescribed by the Commission in Order No. 208. The Postal Service estimates that the remaining work on the privilege log will take approximately 20 working days, or, upon accounting for the Memorial Day holiday, until June 5.

### ***III. Group 3 Privilege Log***

The Postal Service is filing the current version of its privilege log for Group 3 documents. As clarification, Capital One's motion claims that it "was informed by telephone that the privilege log for [Group 3] documents was finished."<sup>4</sup> This characterization is incomplete, however. Although the Postal Service may have

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<sup>3</sup> The privilege log identifies applicable exemptions and privileges by reference to the applicable paragraph of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). For example, "4" refers to FOIA Exemption 4 or 5 U.S.C. § 552(b)(4). Privileges are indicated in connection with FOIA Exemption 5, which incorporates civil discovery privileges. "5A" means attorney-client privilege, "5D" means deliberative process privilege, and "5W" means attorney work product. Although FOIA Exemption 3 incorporates various statutory exemptions from 39 U.S.C. § 410(c), "3" is generally meant to indicate commercially sensitive information protected by 39 U.S.C. § 410(c)(2). If another 39 U.S.C. § 410(c) exemption applies, it is so indicated.

advised Capital One that it had finished a *preliminary version* of its privilege log suitable for initial review by Capital One counsel, the privilege log as a whole had not, and has not, been finalized, and the Postal Service disputes that it informed Capital One otherwise. In particular, the privilege log has not yet fully been reviewed by Postal Service counsel, and the Postal Service is not prepared to attest that any identification or non-identification of privileges or exemptions reflects its true assessment. The actual circumstances surrounding the Group 3 privilege log are thus similar to those surrounding the Group 2 privilege log. In a good-faith effort to comply with Order No. 208, however, the Postal Service is providing the Group 3 privilege log in its current state. The Postal Service respectfully requests that it be permitted to update and supplement this privilege log under similar conditions to the Group 2 privilege log.<sup>5</sup>

Due to the nature of the underlying requests, the volume of Group 3 documents largely overlaps with Groups 1 and 2. As a result, many of the documents in Group 3 are already being produced or logged in connection with Groups 1 and 2, and the Postal Service respectfully submits that, in the interest of expediency and efficiency, its response to Groups 1 and 2 be deemed a partial response to Group 3 as well, to the extent of the overlap. To compel the Postal Service to analyze and physically process the production of the same documents a second time can only be duplicative and an undue burden on Postal Service resources that could be devoted elsewhere.

The Postal Service respectfully requests the Commission to reconsider its requirement that the Postal Service produce nonprivileged Group 3 documents. The

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<sup>4</sup> Motion of Capital One Services, Inc. to Compel Submission of Postal Service Privilege Logs and to Continue (COS/USPS-DR-1-17, 19-21, 22), Docket No. C2008-3, April 9, 2009, at 7 fn.4.

conceptual simplicity of this requirement does not reflect the practical effort that would be devoted to revisiting the thousands of documents, identifying and segregating nonprivileged ones, double-checking this work, accounting for the overall organization of the set, and physically preparing the documents to be submitted to the Commission. To the Postal Service, this burden appears particularly disproportionate in view of the significant degree of overlap with Groups 1 and 2. As described in Section I above, the Postal Service is providing certain documents contained in Group 1 today, and Capital One has already indicated that it has no interest in the remaining nonprivileged documents that it has already previewed as part of Group 1. Just as production of the latter documents would be irrelevant and unduly burdensome in the context of Group 1, so too would it be for the same documents in the context of Group 1. It stands to reason that nonprivileged Group 3 documents not also included in Group 1 are even less likely to be of any relevance, given such documents' omission from the Boolean search that resulted in Groups 1 and 2. In light of the duplication with non-relevant Group 1 documents on the one hand and the reasonable assumption that other nonprivileged Group 3 documents are likely to be non-relevant, the Postal Service respectfully submits that it would be unduly burdensome to segregate and produce the nonprivileged Group 3 documents at this time, and respectfully requests that the Commission reconsider its Order No. 208 in this regard.

#### ***IV. Conclusion***

By way of response to Order No. 208, the Postal Service is furnishing copies, under seal, of the Group 1 documents identified by Capital One as of interest to its

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<sup>5</sup> See footnote 3 above for an explanation of the coding of privileges and exemptions.

requests, as well as the privilege logs for Groups 2 and 3. The Postal Service has already made all other Group 1 documents available to Capital One, and will continue to do so if further review is requested. The Postal Service respectfully requests reconsideration with respect to a privilege log for Group 1 documents filed herewith and with respect to the production of nonprivileged Group 3 documents.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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