

RULING NO. C2008-3/24

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Complaint of Capital One Services, Inc.

Docket No. C2008-3

PRESIDING OFFICER'S RULING  
DENYING APPLICATION FOR DEPOSITION

(Issued September 23, 2008)

Capital One Services, Inc. (Capital One) has filed an application for authorization to depose Michael Plunkett, former Manager of Pricing Strategy and Acting Vice President of Pricing, United States Postal Service.<sup>1</sup> The Application also requests that Mr. Plunkett bring certain documentation to the deposition.

Capital One contends that Mr. Plunkett is “the key architect” of the Postal Service’s negotiated service agreement program with specific knowledge related to the issues of the Capital One complaint. Application at 2. Capital One asserts that Jessica Dauer Lowrance, in her deposition, identified Mr. Plunkett as having participated in important policy discussions or meetings on functional equivalency issues, preparing and providing specific documents to the Board of Governors, and able to provide a better understanding of certain issues. *Id.* at 2-3. Capital One argues that a deposition is justified under rule 33(a) because it is possible that Mr. Plunkett will not be able to attend a hearing, it would perpetuate his testimony while being convenient to the parties, and would prevent undue and excessive burden and delay to the parties and

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<sup>1</sup> Application of Capital One Services, Inc. for Authorization to Depose Michael Plunkett of the United States Postal Service, September 4, 2008 (Application).

the Commission.<sup>2</sup> *Id.* at 4. Capital One further justifies the Application as an appropriate remedy under rule 25(c) for issues related to Ms. Lowrance's deposition.<sup>3</sup> *Id.* at 3.

The Postal Service has filed a response in opposition to the Application.<sup>4</sup> It contends that granting a deposition based on the requirements of rule 33(a) is not justified. The Postal Service asserts that Mr. Plunkett remains a Postal Service employee and his departure is not imminent. He would be available to answer written discovery and to appear at a hearing, if appropriate. Response at 3-4. The Postal Service further contends that Capital One's arguments of undue burden or expense are unsupported. *Id.* at 4-5.

*Analysis.* The expectation is for this case to adhere to current Commission rules, including rule 33 concerning depositions. Tr. 1/14. Rule 33(a) requires that:

An authorization to take the deposition of a witness will be issued only if (1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants.

The Postal Service asserts that there is no reason to believe Mr. Plunkett could not be made available for a hearing, if necessary. There is no indication that Mr. Plunkett intends to depart the employment of the Postal Service, or has any other justification been presented that would indicate a need to perpetuate his testimony. *Id.* at 4. Finally, it can not be persuasively argued that a deposition would be less burdensome or unduly expensive as compared to alternative forms of discovery such as written

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<sup>2</sup> Mr. Plunkett is currently studying in Boston while in the employment of the Postal Service. *Id.* at 4.

<sup>3</sup> These issues will be discussed in a separate Presiding Officer's ruling.

<sup>4</sup> Response of the United States Postal Service to Application of Capital One Services, Inc. for Authorization to Depose Michael Plunkett of the United States Postal Service, September 11, 2008 (Response).

interrogatories or requests for admissions.<sup>5</sup> *Id.* at 4-5. The authorization to depose Mr. Plunkett is not justified under current rule 33(a).

Capital One is encouraged to immediately pursue other forms of discovery directed towards Mr. Plunkett. The Postal Service indicates that he is available to answer written discovery. *Id.* at 4. Written interrogatories and requests for admissions appear most appropriate to probe Mr. Plunkett's involvement concerning the issues of this complaint, his understanding of related Postal Service policy, and his interpretation of this policy and direction given to other Postal Service employees.

In directing Capital One to pursue written discovery as opposed to granting an application for deposition, it is expected that Mr. Plunkett, aided by his attorneys, will provide clear, concise, and non-evasive answers to written discovery to the best of his ability. It also is expected that Capital One will pose clear, concise, and not overly burdensome questions or requests for admissions. Although not a perfect substitute for a deposition, with cooperation among the parties alternative means of discovery should allow Capital One to gather information to continue development of its direct case. If this approach proves unproductive, a formal deposition may be reconsidered. The Application is denied subject to renewal pending the outcome of written discovery.

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<sup>5</sup> This is especially true when considering the possibility that the deposition might be required to occur in Boston.

RULING

1. Application of Capital One Services, Inc. for Authorization to Depose Michael Plunkett of the United States Postal Service, filed September 4, 2008, is denied without prejudice. The Application may be refiled and the issues revisited pending the outcome of written discovery.
2. Capital One may immediately proceed to undertake written discovery of Mr. Plunkett.

Dan G. Blair  
Presiding Officer