

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 TO
SECOND APPLICATION OF CAPITAL ONE SERVICES, INC.
FOR AUTHORIZATION TO DEPOSE MICHAEL PLUNKETT
OF THE UNITED STATES POSTAL SERVICE
(April 27, 2009)**

The United States Postal Service hereby responds to the Second Application of Capital One Services, Inc. ("Capital One") for Authorization to Depose Michael Plunkett of the United States Postal Service, which was filed on April 20, 2009. Capital One filed its Second Application for Authorization ("Application") pursuant to Rule 33 of the Commission's Rules of Practice and Procedure, 39 C.F.R. § 3001.33. In its Application, Capital One argues that a deposition of Mr. Plunkett, former Manager of Pricing Strategy and Acting Vice President of Pricing, is necessary in this docket under Rule 33(a). Capital One's Application fails to demonstrate any relevant basis for deposing Mr. Plunkett under Rule 33(a), however. Thus, the Postal Service respectfully urges the Commission to deny Capital One's Application to depose Mr. Plunkett.

I. Capital One's Reliance on Interrogatory Responses Is Misplaced

Capital One's Application concentrates primarily on a single line in the Presiding Officer's Ruling that denied its earlier application to depose Mr. Plunkett, discussing the Commission's long-established criteria for depositions almost as an afterthought. In

Ruling No. C2008-3/24, the Presiding Officer found written discovery to be the most appropriate means to seek information from Mr. Plunkett.¹ The Presiding Officer reaffirmed that Mr. Plunkett should provide clear, concise, and non-evasive answers to the best of his ability, and that Capital One should propound written discovery in similar good faith. The Presiding Officer cautioned that he might reconsider a formal deposition if this cooperative approach “prove[d] unproductive . . . pending the outcome of written discovery.”²

As Capital One’s own Application acknowledges, written discovery is still ongoing.³ Thus, the “outcome of written discovery,” in the most basic sense of an end result,⁴ has not yet been attained. It would be premature to evaluate the parties’ overall cooperation in written discovery for purposes of determining whether such an extraordinary measure as a deposition is required. Capital One’s haughty speculation that Mr. Plunkett’s future answers are “unlikely [to] result in clarity” is an insufficient reason to jump the gun.

To shore up its plea, Capital One claims that its dissatisfaction with two interrogatory answers warrants an immediate, far-ranging deposition. These responses, however, do not establish that the written discovery process has been “unproductive,” and Mr. Plunkett’s responses plainly comply with the Presiding Officer’s direction. They are clear and concise, and they answer the questions posed.

¹ P.O. Ruling No. C2008-3/24, Presiding Officer’s Ruling Denying Application for Deposition, Docket No. C2008-3, Sept. 23, 2008, at 3.

² Id. (emphasis added).

³ Application at 1-2.

⁴ E.g., American Heritage Dictionary of the English Language (4th ed.) (defining “outcome” as “[a]n end result; a consequence”), available at <http://dictionary.reference.com/browse/outcome>.

Furthermore, that Capital One might have desired the answers to have been phrased differently, or that they should have delved into other details, does not establish that Mr. Plunkett is being uncooperative. In any case, other means for follow-up dialogue, such as further interrogatories, are available without the need for a deposition. Instead of tailoring its follow-up action to the issues covered by the disputed interrogatories, Capital One's motion roves across all conceivable matters at issue in this proceeding. Contrary to the Presiding Officer's judgment that a formal deposition is intended as a measure of last resort, Capital One is simply seeking to reverse the result of its prior application.

II. Capital One's Application Fails to Meet Rule 33(a) Criteria

Capital One's Application to depose Mr. Plunkett should be denied because it fails to satisfy the Commission's Rules of Practice and Procedure. Under Rule 33(a), depositions may be taken 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.⁵

Mr. Plunkett, as Capital One points out in its Application, is currently a postal employee, and would be available to answer written discovery or appear at a hearing, if

⁵ Although the Commission's old complaint rules govern this case, it is notable that these requirements have not changed as a result of the Commission's recent establishment of complaint rules under the Postal Accountability and Enhancement Act of 2006. See Order No. 195, Order Establishing Rules for Complaints and Rate or Service Inquiries, Docket No. RM2008-3, Mar. 24, 2009, at 34-35.

appropriate. Unlike the situation involving Ms. Lowrance, Mr. Plunkett's departure from the Postal Service is in no way imminent.

Capital One argues that Mr. Plunkett's alleged personal role in the relevant deliberations somehow makes oral testimony superior to written testimony.⁶ Assuming that this were true, and it is not, Capital One's unsupported conclusion does not speak to Rule 33(a)'s narrow criteria, since Capital One has not explained why oral testimony could not just as easily be supplied at a hearing as at a deposition.⁷ Further, while the Postal Service does not concede that a hearing is necessary, there is no plausible reason why Mr. Plunkett could not be present at a scheduled hearing date that could justify scheduling a deposition in its stead.

Instead of such relevant considerations, Capital One simply speculates that a deposition is "the most effective way to proceed." Capital One confuses the issue: Capital One's preference as a matter of litigation strategy is not a legitimate basis for this extraordinary discovery method under the Commission's rules; rather, the deposition truly must be necessary.⁸ Furthermore, the one experience with depositions

⁶ Capital One claims that "[o]f course, it would be futile to propound a written interrogatory inquiring whether the individual responder intended to unlawfully discriminate." Application at 3. This cynical, self-serving conclusion proclaims a callow disregard for the Presiding Officer's judgment in Ruling No. C2008-3/24: in the face of identical Capital One arguments about Mr. Plunkett's status and role, the Presiding Officer held that "[w]ritten interrogatories and requests for admission 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." P.O. Ruling No. C2008-3/24 at 3 (emphasis added).

⁷ While the Postal Service does not concede that oral testimony would be appropriate, it is notable that Capital One relies on the very possibility of a hearing as an alternative to a deposition. Application at 5.

⁸ See Order No. 195 at 35 (stressing that "depositions are only allowed in very limited circumstances" (emphasis added)).

so far in this proceeding suggests that the technique of depositions as a discovery tool has been, if anything, more inconvenient, more unwieldy, and less effective than the traditional means of discovery and fact-finding through written interrogatories and oral hearings. This conclusion accentuates the judgment to restrict depositions that is embodied in the Commission's rules, the Presiding Officer's prior ruling in this case, and the Commission's long-established practice in contentious proceedings. Capital One has failed to demonstrate why Mr. Plunkett would be "unavailable" at a hearing in this case, or why a deposition is "deemed necessary to perpetuate the testimony of the witness" in lieu of a hearing.

Thus, Capital One's entire Application rests on a claim that deposing Mr. Plunkett is necessary "to prevent undue and excessive expense to a participant" and that it will not "result in undue delay or an undue burden to other participants." Apart from its irrelevant rehashing of its prior attempt to emphasize Mr. Plunkett's role, Capital One supports this argument with one paragraph, in which it hypothesizes a hearing scenario that would be "extended and highly adversarial." Capital One fails, however, to quantify the supposed burden or expense that would be involved in a regularly-scheduled hearing for Mr. Plunkett. Moreover, Capital One does not even attempt to demonstrate why any burden would be "undue" or why any expense would be "excessive."⁹ Incredibly, Capital One tries to argue that a deposition is a preferable alternative because a hearing would inevitably be "extended and highly adversarial," and yet Capital One's own submissions and the Presiding Officer's observations in his

⁹ Capital One's Application is completely silent on the question of whether or not the taking of the deposition "will not result in undue delay or an undue burden to other participants." Rule 33(a)(3).

Rulings have noted the “extended and highly adversarial” nature of Ms. Lowrance’s deposition, the only available benchmark.¹⁰ These claims about the Postal Service’s behavior are not supported by any citations to the transcript or any Postal Service pleadings, have been shown to be without merit in motions practice, and thus should be given no weight as a basis for supporting Capital One’s Application to depose Mr. Plunkett. Nevertheless, Capital One persists in echoing its first application to depose Mr. Plunkett, which the Presiding Officer ruled not to demonstrate any actual basis for a deposition under Rule 33(a)(3).¹¹ Capital One’s Application plainly fails to satisfy any of the threshold requirements for depositions contained in Rule 33(a). Therefore, the Postal Service respectfully urges the Commission to deny Capital One’s Application.

III. Proposed Scope of Deposition Is Overbroad

Capital One’s Application suggests that it aims to use Rule 33 to incorporate any and all of its Document Requests into the deposition. Many of these Document Requests are subject to Postal Service objections, however. Indeed, most of these Document Requests have been the subject of the parties’ ongoing discussions to narrow the scope of the search for documents in this case. Capital One’s Application,

¹⁰ See P.O. Ruling No. C2008-3/30, Presiding Officer’s Ruling on Motions by Capital One and American Postal Workers Union for Sanctions Against the Postal Service, Docket No. C2008-3, Oct. 15, 2008, at 2-4, 9-10 (reflecting on “contentious” procedural history of deposition and parties’ apparent inability “to agree on almost any issue concerning the deposition,” and determining that all parties appeared to have shared responsibility for difficulties); P.O. Ruling No. C2008-3/7, Ruling on Procedural Requests Related to the Deposition of Jessica Dauer Lowrance, Docket No. C2008-3, Aug. 28, 2008, at 3 (“This deposition has proven to be highly contentious. . . . It appears that more time has been spent on argument from counsel than on collecting testimony.”).

¹¹ P.O. Ruling No. C2008-3/24 at 2-3.

in effect, seeks to expand the scope of the document search far beyond what the parties have been working toward over the past several months.

Capital One seeks to question Mr. Plunkett about an extraordinarily wide range of subjects.¹² The Postal Service opposes the scope of the Application's subject matter and additional requests. The Postal Service submits that if a deposition of Mr. Plunkett is authorized, the scope of the proceeding should be limited to issues that directly pertain to Capital One's request for an NSA. The freewheeling scope foreseen by Capital One only increases the chances that a deposition would become "extended and highly adversarial," further undermining Capital One's own justification for such a deposition.

The Postal Service also reserves its rights to object with regard to the scope of the subject matter of the deposition and any document requests or interrogatories that may be bootstrapped into the deposition procedures that may be employed. Unlike hearing procedures, any objections offered by Postal Service counsel at the deposition will not be ruled upon, and the answers will go on the record.¹³

IV. Conclusion

The Commission's usual practices and procedures in complaint cases and in other dockets are time-tested, and are well-understood by all participants. The use of Rule 33, on the other hand, was apparently unprecedented prior to the Lowrance deposition. Additionally, the Lowrance deposition had the unique character of being an emergency procedure because of some unusual circumstances. Thus, the Postal

¹² Application at 6 ("Request" and "Subject Matter of Testimony").

¹³ It is important to note that Capital One's Application concedes only to "access to" the Presiding Officer for making "procedural rulings." Application at 5.

Service respectfully urges the Presiding Officer to reject any Application for deposition under Rule 33, particularly when other means of inquiry are still possible in lieu of holding a deposition. In this case, Capital One's Application to depose Mr. Plunkett fails to satisfy Rule 33. Therefore, the Postal Service respectfully urges the Commission to deny the Application.

Respectfully submitted,

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