

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

The United States Postal Service hereby responds to the Application of Capital One Services, Inc. ("Capital One") for Authorization to Depose Virginia Mayes of the United States Postal Service, which was filed on April 20, 2009. Capital One filed its 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 Ms. Mayes, Manager of Special Studies in the Postal Service's Finance Department, is necessary in this docket under Rule 33(a). Capital One's Application fails to demonstrate any relevant basis for deposing Ms. Mayes under Rule 33(a), however. Thus, the Postal Service respectfully urges the Commission to deny Capital One's Application to depose Ms. Mayes.

Capital One's Application to depose Ms. Mayes 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.¹

Ms. Mayes, as Capital One points out in its Application, is currently a Postal Service employee, and would be available to answer written discovery or appear at a hearing, if appropriate. Unlike the situation involving Ms. Lowrance, Ms. Mayes's departure from the Postal Service is in no way imminent.

By incorporating its assertions from pages 3 through 5 of its Second Application for Authorization to Depose Michael Plunkett of the United States Postal Service ("Second Plunkett Application"), filed the same day as the instant Application, Capital One apparently argues that Ms. Mayes's alleged personal role in the relevant deliberations somehow makes oral testimony superior to written testimony.² 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

¹ 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.

² In the Second Plunkett Application, Capital One claims that "it would be futile to propound a written interrogatory inquiring whether the individual responder intended to unlawfully discriminate." Second Plunkett Application, Docket No. C2008-3, April 20, 2009, at 3. It is unclear why Capital One believes this to be the case. If Capital One's concern is that an interrogatory could be met by objections, the same can be true if the same questions are posed in oral questioning. If Capital One's concern is with its possible desire for follow-up questioning, this is just as viable an option in written discovery as in oral testimony. To presume that Ms. Mayes's sworn, written responses to pending or future interrogatories would be in anything other than good faith, as Capital One implies, is cynical and self-serving.

could not just as easily be supplied at a hearing as at a deposition.³ Further, there is no plausible reason why Ms. Mayes could not be present at a scheduled hearing date, should one be deemed necessary, 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.⁴ Furthermore, the one experience with depositions 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 Ms. Mayes 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 Ms. Mayes 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.” Capital One

³ 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 2-3.

⁴ See Order No. 195 at 35 (stressing that “depositions are only allowed in very limited circumstances” (emphasis added)).

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 Ms. Mayes. Moreover, Capital One does not even attempt to demonstrate why any burden would be “undue” or why any expense would be “excessive.”⁵

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 Rulings have noted the “extended and highly adversarial” nature of Ms. Lowrance’s deposition, the only available benchmark.⁶ 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 Ms. Mayes.

Nevertheless, Capital One persists in echoing here its failed first application to depose Mr. Plunkett, which the Presiding Officer ruled not to demonstrate any actual basis for a

⁵ 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).

⁶ 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.”).

deposition under Rule 33(a)(3).⁷ 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.

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, 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 Ms. Mayes about an extraordinarily wide range of subjects.⁸ The Postal Service opposes the scope of the Application's subject matter and additional requests. The Postal Service submits that if a deposition of Ms. Mayes 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

⁷ P.O. Ruling No. C2008-3/24, Presiding Officer's Ruling Denying Application for Deposition, Docket No. C2008-3, Sept. 23, 2008, at 2-3.

⁸ Application at 4 ("Request" and "Subject Matter of Testimony").

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.⁹

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 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 Ms. Mayes plainly fails to satisfy Rule 33. Therefore, the Postal Service respectfully urges the Commission to deny the Application.

Respectfully submitted,

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⁹ It is important to note that Capital One's Application concedes only to "access to" the Presiding Officer for making "procedural rulings." Application at 3.