

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**APPLICATION OF CAPITAL ONE SERVICES, INC.
FOR AUTHORIZATION TO DEPOSE MICHAEL PLUNKETT
OF THE UNITED STATES POSTAL SERVICE
(September 4, 2008)**

Pursuant to Rule 33(a)-(b), Capital One Services, Inc. (Capital One) hereby requests that the Commission authorize the taking of testimony by deposition of Michael Plunkett, a current employee of the Postal Service and former Manager of Pricing Strategy and Acting Vice President of Pricing. Rule 33(a)-(b), 39 CFR 3001.33(a)-(b) This Application meets the requirements of Rule 33 and is also supported by Rule 25(c) and the facts laid out in Capital One's Motion for Sanctions under Rule 25(c) (August 28, 2008) and Supplemental Motion for Sanctions (September 3, 2008), which are hereby incorporated by reference.

This Application also requests that Mr. Plunkett bring with him to the deposition all documents (wherever located, including those in any of his former or present offices, home, in files or laptops or hard drives) relating to the issues

in the Capital One Complaint, including, but not limited to, any documents he prepared, reviewed, or has on file that are responsive to Capital One's Document Requests COS/USPS-DR-1-21. The exact description may be found at page 6 herein.

Mr. Plunkett has been the key architect of the Postal Service's NSA program. As Manager of Pricing Strategy and Acting Vice President of Pricing, Mr. Plunkett has had both day-to-day responsibility for relevant NSAs and overall supervisory authority over all NSAs from the first Capital One NSA in MC2002-2 to his departure on academic leave in late May 2008 (including the Bank of America NSA and the proposed Capital One NSA). Before Mr. Plunkett went on leave, he met personally with Capital One representatives to discuss the proposed NSA that is the subject of this Complaint. Ms. Lowrance testified in her deposition on August 27-28, 2008, that she reported directly to Mr. Plunkett during her tenure at the Postal Service. She indicated that in several instances she and Mr. Plunkett were the only participants in important policy discussions or meetings on functional equivalency issues. She also stated that Ali Ayub and Mr. Plunkett were the only ones with knowledge of certain issues from 2005-2007 and that Mr. Ayub is no longer with the Postal Service.

During her deposition, Ms. Lowrance referred dozens of questions to Mr. Plunkett and stated that he could provide a better understanding of issues relating to NSAs that were functionally equivalent to the Bank of America NSA. In fact, in the first half of the deposition (the only part of the transcript available at this time), Ms. Lowrance referred to Mr. Plunkett 57 times. Referrals of

questions to Mr. Plunkett occurred even more frequently during the last hour and a half of the deposition when Ms. Lowrance was questioned about two documents prepared by Mr. Plunkett and provided to the Board of Governors. These were the two documents that the Postal Service refused to produce for over 12 hours at the Lowrance deposition.

As noted in Capital One's Motion for Sanctions under Rule 25(c) (August 28, 2008) and Supplemental Motion for Sanctions (September 3, 2008), the Postal Service's delay and refusal to comply with numerous Presiding Officer Rulings¹ created a situation in which Capital One was forced to question Ms. Lowrance about these two documents from 12:00 midnight to 1:30 AM, after the witness had sat in the conference room for 15 hours. As a result, Ms. Lowrance consistently referred difficult questions to Mr. Plunkett during this period. By all standards of reasonableness, the conditions created by the Postal Service's noncompliance with Presiding Officer Rulings deprived Capital One of a meaningful opportunity to depose Ms. Lowrance on these key documents. The appropriate due process remedy would be to grant the deposition of Michael Plunkett.²

¹ For example, the Postal Service interpreted the ruling to produce documents in Ms. Lowrance's "offices" as referring only to documents in her temporary cubicle rather than her previous office; moreover, the Postal Service was not forthcoming about this unusually narrow interpretation when counsel for Capital One made specific inquiries about the scope of documents reviewed. Transcript of Lowrance Deposition, August 27, 2008, at 8-15. Postal Service counsel also insisted on the first day of the deposition that counsel for Capital One leave the room during the closed session even though the Presiding Officer had already ruled that Capital One could ask follow up questions during the closed session.

² In its Motions, Capital One has requested that the Commission take additional steps to demonstrate that its rulings and orders are enforceable, to deter future misconduct by the Postal Service, and to move forward to ensure the transparency under the PAEA.

Moreover, the deposition of Mr. Plunkett would be fully justified under the Commission's existing rules, even though those rules were formulated prior to the PAEA's increased emphasis on the complaint process.³ Rule 33(a) provides that 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.

Mr. Plunkett, who is still a Postal Service employee, has been sent by the Postal Service to study at a university in Boston for a year. Thus, it is quite possible that Mr. Plunkett will not be able to attend regularly scheduled hearing dates. Because so many people are involved in scheduling a hearing, a hearing date cannot revolve around Mr. Plunkett's availability and could change on short notice. A deposition would perpetuate his testimony while allowing the parties to find the most convenient time for Mr. Plunkett.

³ Just as with Ms. Lowrance, written interrogatories were no substitute for the testimony of Ms. Lowrance, they would be completely inadequate here. Capital One's Emergency Motion to Amend Date of Requested Deposition to August 27, 2008, sets forth several reasons why a deposition was essential: for example, "the Postal Service has indicated that '[n]o specific procedures, processes, or proposed responses were developed to respond to mailers requesting an NSA similar to the Bank of America NSA.' Decisions on these NSA requests were thus made on an ad hoc basis, making the personal knowledge of those who participated in the decisions even more important in this discrimination case." See *id.* at 2. Those same reasons apply with equal force here. Furthermore, the Commission should take into account the Postal Service's track record thus far in this case of filing overbroad objections and privilege claims and of being less than forthcoming in its responses to written interrogatories. See, e.g., Objection of the United States Postal Service to Interrogatories of Capital One Services, Inc. (COS/USPS-2(b), 7, 8, and 10) (August 18, 2008).

More importantly, however, the deposition is necessary to prevent undue and excessive expense, burden and delay to the Commission and the participants. Because of Mr. Plunkett's major role in decisions relevant to this case, if his deposition is not taken, Capital One would definitely request his cross-examination at a hearing before all the Commissioners. Given the Postal Service's track record, it is probable that the type of delay, obfuscation, and noncompliance as occurred in the Lowrance deposition would be repeated at the hearing. In such case, the hearing would be interrupted multiple times for document production arguments, motions, rulings, and appeals, and the time and energy of everyone at the hearing, especially the Commissioners, would be wasted. A deposition with access to a single Presiding Officer for procedural rulings is a much more appropriate way to conduct discovery and would allow the Commission to use its time more efficiently.

The following information is provided in compliance with Rule 33(b):

Name:

Michael Plunkett
Former Manager, Pricing Strategy (on leave)
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

Time and Place:

10:00 AM on the date 10 days after complete production of relevant documents under COS/USPS-DR-1-21 or such other time thereafter as is convenient to Mr. Plunkett
Presiding Officer for C2008-3
Hearing Room or other location
Postal Regulatory Commission
901 New York Avenue, NW

Washington DC 20268-0000

Request:

To appear for a deposition in Docket No. C2008-3, and to bring all documents wherever located, filed or stored, including e-mails and electronic documents, relating to the issues in the Capital One Complaint, including, but not limited to, any documents he prepared, reviewed, or has on file (hard copy or electronic) that are responsive to Capital One's Document Requests COS/USPS-DR-1-21.

Subject Matter of Testimony:

Negotiations and decisions relating to a Capital One NSA that is similar to the Bank of America NSA and requests for NSAs similar to the Bank of America NSA; relevant communications with other Postal Service employees, Bank of America representatives, and Capital One representatives; knowledge relating to key issues in C2008-3, including, but not limited to, whether or not Capital One is "similarly situated" to Bank of America, or what constitutes a functionally equivalent agreement to the Bank of America NSA under current circumstances, whether the Postal Service unduly discriminated against Capital One, and whether the Postal Service granted an undue preference to Bank of America, whether the Postal Service considered the effect on competition of the Bank of America NSA; background and knowledge relating to a memorandum from the Postmaster General to the Board of Governors on the Bank of America NSA and a presentation by Anita Bizzotto to the Board of Governors on the Bank of America NSA.

For the foregoing reasons, Capital One requests that the Commission grant its Application for Authorization to Depose Michael Plunkett.

Respectfully submitted,

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