

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 MICHAEL PLUNKETT
OF THE UNITED STATES POSTAL SERVICE
(September 11, 2008)**

The United States Postal Service hereby responds to the Application of Capital One Services, Inc. ("Capital One") for Authorization to Depose Michael Plunkett of the United States Postal Service, which was filed on September 4, 2008. Capital One filed its Application for Authorization ("Application") pursuant to Rule 33 of the Commission's Rules of Practice and Procedure. 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 argument primarily rests on its own unfounded and legally defective motions for sanctions against the Postal Service arising out of the deposition of Jessica Dauer Lowrance. Moreover, Capital One has failed to demonstrate in its Application any independent basis for deposing Mr. Plunkett under Rule 33(a). Thus, the Postal Service respectfully urges the Commission to deny Capital One's Application to depose Mr. Plunkett.

I. Rule 25(c) Does Not Support Capital One's Application

As its primary justification for its Application, Capital One incorporates the "facts" alleged in its motions for sanctions against the Postal Service under Rule 25(c).¹ The Postal Service has previously addressed Capital One's unfounded and legally defective motions for sanctions and request for remedies under Rule 25(c), and herein incorporates by reference the arguments in the Postal Service's responses to those motions.² Additionally, nothing in the Commission's Rules of Practice and Procedure supports Capital One's attempt to justify its Application on the basis of arguments it advances under Rule 25(c). Clearly, Capital One wants to have it both ways: improperly demanding Rule 33 deposition remedies in Rule 25(c) motions for sanctions, and also improperly supporting a Rule 33 deposition application via unfounded Rule 25(c) motions. Thus, Capital One's attempt to utilize Rule 25(c) motions for sanctions as its primary justification for its Application to depose Mr. Plunkett should be rejected.

II. Capital One's Other Baseless Allegations Do Not Support a Rule 33 Deposition of Mr. Plunkett

Capital One's Application contains a number of references to alleged Postal Service "misconduct"³ related to the deposition of Ms. Lowrance and in the Postal Service's discovery practices.⁴ These allegations are apparently intended to support

¹ Capital One Motion for Sanctions (August 28, 2008); Capital One Supplemental Motion for Sanctions (September 3, 2008).

² USPS Answer in Opposition to Capital One Services, Inc. Motion for Sanctions (September 4, 2008); USPS Answer in Opposition to Capital One Services, Inc. Supplemental Motion for Sanctions (September 10, 2008). See also USPS Answer in Opposition to APWU Motion for Sanctions (September 9, 2008).

³ Application at 3, fn. 2.

⁴ Application at 4, fn. 4.

Capital One's loose argument that an "appropriate due process remedy would be to grant the deposition of Michael Plunkett" in this docket.⁵ Capital One's assertions regarding the conduct of the Postal Service in the deposition of Ms. Lowrance have already been addressed at length.

The allegations with regard to the Postal Service's discovery practices are similarly baseless. Capital One claims that the Postal Service has filed "overbroad objections and privilege claims" and is being "less than forthcoming" in its interrogatory responses. Surely, if Capital One's allegations had any merit, rather than merely serving as throw-away lines in its attempt to depose Mr. Plunkett, Capital One could make these arguments in detail in a motion to compel. Therefore, Capital One's attempt to justify its Application based on these allegations, and its wholly unsupported due process argument, should be rejected.

III. Capital One's Application Fails to Satisfy Rule 33(a)

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 Application at 3. Capital One provides no legal analysis supporting its intimation that its due process rights have been violated, or explaining why granting a Rule 33 deposition would be an appropriate due process remedy.

Mr. Plunkett, as Capital One points out in its Application, is currently studying in Boston for this academic year. Nevertheless, he remains a postal employee, and would be available to answer written discovery or appear at a hearing, if appropriate.⁶ Unlike the situation involving Ms. Lowrance, Mr. Plunkett's departure from the Postal Service is in no way imminent.

Capital One asserts in its Application that, "it is quite possible that Mr. Plunkett will not be able to attend regularly scheduled hearing dates." Capital One relies on this possibility in an attempt to satisfy either of the first two criteria under Rule 33(a). However, Capital One's argument is without merit, as it fails to recognize that the Postal Service has consistently been able to produce multiple out-of-town witnesses for hearing dates and provide discovery responses from those witnesses in omnibus rate proceedings, with no significant loss of convenience of the parties or the witness. 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. 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.⁷

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

⁶ The need for any particular form of proceedings in this case has not yet been established. A procedural schedule in this docket has not been issued to date, testimony has not been filed, and initial discovery is still underway.

not “result in undue delay or an undue burden to other participants.” Capital One supports this argument with one paragraph, in which it once again maligns the Postal Service’s “track record” in this litigation to bolster its Application. 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.”⁸ Incredibly, Capital One supports its Application primarily on the Postal Service’s alleged (and wholly unfounded) obstreperous behavior at the deposition of Ms. Lowrance, and yet somehow tries to argue that another deposition is necessary because the Postal Service’s behavior at any hearing, in Capital One’s view, would surely be much, much worse. These claims about the Postal Service’s behavior are not supported by any citations to the transcript or any Postal Service pleadings, and 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. 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.

⁷ Capital One’s attempt to incorporate arguments from its Emergency Motion to depose Ms. Lowrance into the instant Application should be rejected. Application at 4, fn. 3. There is certainly no demonstrated “emergency” to depose Mr. Plunkett.

⁸ 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).

IV. Conclusion

It is clear why Capital One desires to hold a deposition of Mr. Plunkett, rather than a regularly-scheduled hearing. As evidenced by its Application, Capital One aims to use Rule 33 to incorporate any and all of its Document Requests into the deposition,⁹ and seeks to question Mr. Plunkett about a wide range of subjects.¹⁰ 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.¹¹

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 suggests that the Commission closely scrutinize 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.

⁹ These Document Requests are subject to Postal Service objections, and are not currently subject to any motions to compel from Capital One.

¹⁰ Application at 6 ("Request" and "Subject Matter of Testimony"). 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 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.

¹¹ It is important to note that Capital One's Application concedes only to the presence of the Presiding Officer for making "procedural rulings." Application at 5.

Respectfully submitted,

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September 11, 2008