

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMISSION
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FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., *et. al.*,

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

**GULF POWER COMPANY'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AT THE DEPOSITIONS OF
COMPLAINANTS' EXPERT WITNESSES**

Gulf Power Company ("Gulf Power") moves this Court to enter an Order compelling complainants to produce at the March 15 and 16, 2006 depositions of their designated experts (Patricia D. Kravtin and Michael T. Harrelson) any and all documents that have been provided to their experts or that their experts have created and/or obtained and provided to them. In support of this motion, Gulf Power shows as follows:

FACTS SUPPORTING THE MOTION

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
RCA _____
SCR _____
SGA _____
SEC 1 _____
OTH _____

1. On March 9, 2006, after coordinating the deposition dates with counsel for complainants, Gulf Power served complainants with notices of deposition for Patricia D. Kravtin and Michael T. Harrelson.¹ The notices requested that the witnesses produce, at their depositions, the following documents:

1. All documents provided to you by the Complainants or their lawyers in connection with this case.

¹ True and correct copies of these notices are attached as Exhibits A and B, respectively.

DOCUMENT NUMBER - DATE

02296 MAR 16 8

FPSC-COMMISSION CLERK

2. All documents you rely upon in rendering any opinions you intend to or will render at trial.²
3. Any and all reports you have generated, produced, seen or received pertaining to this case, including, but not limited to, any drafts of your summary report.
4. Any standards, codes, regulations upon which you rely to support any opinions you intend to or will render at trial.

(Exs. A and B, ¶¶ 1-4.)

2. On March 10, 2006, counsel for complainants e-mailed counsel for Gulf Power and objected to producing the requested documents. Citing the Federal Rules of Civil Procedure, complainants claimed that the documents requested were “protected by the attorney-client and/or work product privilege.”³

3. On the same day, counsel for Gulf Power responded to counsel for complainants and requested that he provide the materials consistent with the wide body of federal case law holding that such documents are not protected from disclosure by the Federal Rules of Civil Procedure. Counsel for Gulf Power also requested a privilege log for all material withheld from production. (Ex. C.)

4. On March 13, 2006, counsel for complainants replied that the Commission’s August 5, 2005 Discovery Order prevents Gulf Power from obtaining this information.

ARGUMENT

5. Neither the Federal Rules of Civil Procedure nor this Commission’s rulings protect from disclosure the information requested by Gulf Power.

² The deposition notice for Harrelson also included the following additional language “including, but not limited to, any attachment agreements between Complainants and other entities which form the basis of your testimony concerning ‘industry standard’”.

³ A true and correct copy of the e-mail “chain” between the parties with respect to this issue is attached as “Exhibit C”.

6. Where the Commission lacks a formal rule governing an issue in question, the Commission often relies upon the Federal Rules of Civil Procedure as instructive authority. *See, e.g., Premiere Network Services, Inc. v. Southwestern Bell Telephone Co.*, 18 F.C.C.R. 11,474, 11,475 (2003) (applying Federal Rule of Civil Procedure 41 where the Commission lacked a formal rule on the dismissal of complaints). In *AT & T Communications v. Illinois Bell Telephone Company*, 5 F.C.C.R. 5582, 5583 (1990), the Commission stated that:

Among the Commission's goals in adopting its discovery rules was creating a full record on which to base a resolution of the issues raised in a complaint. To that end, we follow the federal courts' broad and liberal interpretation of the Federal Rules of Civil Procedure in recognizing that discovery should be allowed if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. (internal citations and quotations omitted) (emphasis added). Thus, the Federal Rules of Civil Procedure are consistent with the Commission's goal of ensuring that a case is decided on a fully developed record.

7. The Federal Rules of Civil Procedure clearly require the production of the information being sought by Gulf Power. First, Rule 30(b)(5) of the Federal Rules of Civil Procedure allows a party to make a request for production of documents, consistent with Rule 34, when serving a deposition notice. *See* FED. R. CIV. P. 30(b)(5). "Rule 34(c) provides that a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45. When Rule 34(c) is read with Rule 26(a)(2), it is clear that all documents provided to a party's expert witness must be produced on request." *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D. N.M. 1996).

8. Second, the materials being sought by Gulf Power are not protected by the attorney-client privilege or the work-product doctrine. Federal case law is clear that “[a]ny information reviewed by an expert will be subject to disclosure *including drafts of reports sent from and to the testifying experts.*” *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83 (E.D. Va. 2001) (sanctioning the government for its conduct in failing to preserve correspondence and draft reports exchanged with its testifying experts) (emphasis added); *see also Johnson v. Gmeinder*, 191 F.R.D. 638, 647 (D. Kan. 2000) (“[A]ny type of privileged material, including materials or documents prepared by a non-testifying expert, lose their privileged status when disclosed to, and considered by, a testifying expert.”); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D. N.M. 1996) (“[I]t is clear that all documents provided to a party’s expert witness must be produced on request.”); FED. R. CIV. P. 26(a)(2)(B) Advisory Committee Comments to the 1993 Amendment (“litigants should no longer be able to argue that materials furnished their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed”). Of course, any information the experts may have obtained from third parties is clearly not privileged.

9. Information exchanged between counsel, represented parties and testifying experts is highly relevant and probative. The *Johnson* court made clear that:

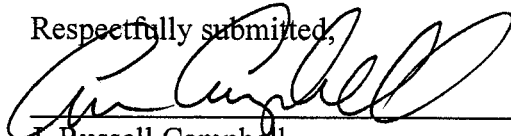
obtaining the materials or documents that a testifying expert considers is crucial if an adverse party is to determine the extent to which the opinion of the expert may have been influenced by counsel or . . . by [a] non-testifying expert. *Without the materials, the opposing party will be denied the opportunity to a full and fair cross-examination of the expert witness.*

Johnson, 191 F.R.D. at 646 (emphasis added). In light of the Commission's purpose to base its decisions on a full record, the information requested by Gulf Power is necessary and appropriate

10. Finally, contrary to counsel for complainants' representation in his March 13, 2006 e-mail, the Commission's August 5, 2005 Order does not prohibit the production of the documents requested by Gulf Power. In this Order, the Commission stated that "[t]he parties must negotiate a scope of documents *used by experts to be exchanged prior to depositions.*" (FCC 05M-38, at 19) (emphasis added). Complainants have not attempted to negotiate; instead, they have simply refused to produce any documents at the depositions of their experts.

11. For the reasons set forth above, Gulf Power respectfully requests that the Commission enter an Order compelling complainants to produce all documents exchanged between them and their designated experts.

Respectfully submitted,



J. Russell Campbell

Eric B. Langley

Allen M. Estes

BALCH & BINGHAM LLP

1710 Sixth Avenue North

Birmingham, Alabama 35203-2015

Telephone: (205) 251-8100

Facsimile: (205) 226-8798

Ralph A. Peterson

BEGGS & LANE LLP

P.O. Box 12950

Pensacola, Florida 32591-2950

Telephone (850) 432-2451

Facsimile: (850) 469-3331

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel has been served upon the following by Electronic Mail and by United States Mail on this the 14th day of March, 2006:

Lisa Griffin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via E-mail

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via E-mail

James Shook
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via E-mail

Director, Division of Record and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

John D. Seiver
Geoffrey C. Cook
Rita Tewari
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Via E-mail

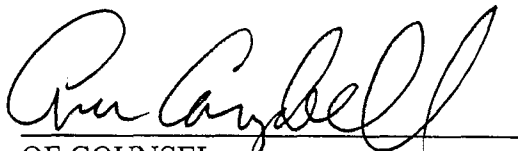
Shiela Parker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via E-mail

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

David H. Solomon
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Federal Energy Regulatory Commission
Docket Room 1A-209
888 First Street, NE
Washington, D.C. 20426


OF COUNSEL

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FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC.,

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v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

NOTICE OF DEPOSITION

Please take notice that, pursuant to 47 C.F.R. § 1.315, respondent Gulf Power Company ("Gulf Power") will take the oral deposition of Patricia Kravtin at the time and location indicated below, before a person authorized to administer oaths and take testimony. The deposition will continue from time to time until completed. You are invited to attend and cross-examine.

DEPONENT: Patricia D. Kravtin
DATE: Wednesday, March 15, 2006
TIME: 9:00 a.m.
LOCATION: COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

DOCUMENT REQUEST

Gulf Power requests that the deponent bring with her, for copying and inspection, the following:

1. All documents provided to you by the Complainants or their lawyers in connection with this case.
2. All documents you rely upon in rendering any opinions you intend to or will render at trial.
3. Any and all reports you have generated, produced, seen or received pertaining to this case, including but not limited to any drafts of your summary report.
4. Any standards, codes, regulations upon which you rely to support any opinions you intend to or will render at trial.

Respectfully submitted,



J. Russell Campbell

Eric B. Langley

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Birmingham, Alabama 35203-2015

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Facsimile: (205) 226-8798

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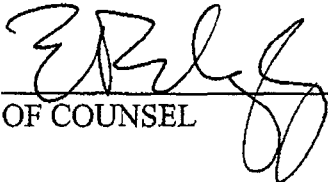
Facsimile: (850) 469-3331

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Deposition has been served upon the following by Electronic Mail and by United States Mail on this the 9th day of March, 2006:

Lisa Griffin Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	Shiela Parker Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail
Rhonda Lien Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	Marlene H. Dortch, Secretary Federal Communications Commission Office of the Secretary 445 12th Street, SW Washington, D.C. 20554
James Shook Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	David H. Solomon Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554
Director, Division of Record and Reporting Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, Florida 32399-0850	Federal Energy Regulatory Commission Docket Room 1A-209 888 First Street, NE Washington, D.C. 20426
John D. Seiver Geoffrey C. Cook Rita Tewari COLE, RAYWID & BRAVERMAN 1919 Pennsylvania Avenue, N.W. Suite 200 Washington, D.C. 20006 Via E-mail	



OF COUNSEL

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC.,

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

NOTICE OF DEPOSITION

Please take notice that, pursuant to 47 C.F.R. § 1.315, respondent Gulf Power Company ("Gulf Power") will take the oral deposition of Michael T. Harrelson, P. E., at the time and location indicated below before a person authorized to administer oaths and take testimony. The deposition will continue from time to time until completed. You are invited to attend and cross-examine.

DEPONENT: Michael T. Harrelson, P. E.
DATE: Thursday, March 16, 2006
TIME: 9:00 a.m.
LOCATION: COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

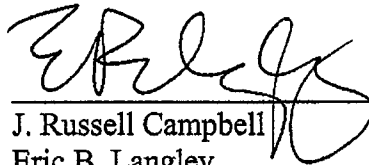


DOCUMENT REQUEST

Gulf Power requests that the deponent bring with him, for copying and inspection, the following:

1. All documents provided to you by the Complainants or their lawyers in connection with this case.
2. All documents you rely upon in rendering any opinions you intend to or will render at trial, including, but not limited to, any attachment agreements between Complainants and other entities which form the basis of your testimony concerning "industry standard".
3. Any and all reports you have generated, produced, seen or received pertaining to this case, including, but not limited to, any drafts of your summary report.
4. Any standards, codes, regulations upon which you rely to support any opinions you intend to or will render at trial.

Respectfully submitted,



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Ralph A. Peterson
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P.O. Box 12950
Pensacola, Florida 32591-2950
Telephone: (850) 432-2451
Facsimile: (850) 469-3331

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Deposition has been served upon the following by Electronic Mail and by United States Mail on this the 9th day of March, 2006:

Lisa Griffin Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	Shiela Parker Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail
Rhonda Lien Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	Marlene H. Dortch, Secretary Federal Communications Commission Office of the Secretary 445 12th Street, SW Washington, D.C. 20554
James Shook Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Via E-mail	David H. Solomon Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554
Director, Division of Record and Reporting Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, Florida 32399-0850	Federal Energy Regulatory Commission Docket Room 1A-209 888 First Street, NE Washington, D.C. 20426
John D. Seiver Geoffrey C. Cook Rita Tewari COLE, RAYWID & BRAVERMAN 1919 Pennsylvania Avenue, N.W. Suite 200 Washington, D.C. 20006 Via E-mail	



OF COUNSEL

Langley, Eric

From: Geoff Cook [GCook@crblaw.com]
Sent: Monday, March 13, 2006 12:10 PM
To: Langley, Eric
Cc: John Seiver
Subject: RE: Expert witness depositions

Eric,

As we explained in our e-mail of last Friday, we disagree with your attempting to submit a last minute discovery request and the overly broad scope of that request. In our proceeding, Judge Sippel has clearly defined what was to be exchanged by the parties pertaining to experts—summaries and curriculum vitae, together with an identification of “documents seen by testifying experts in connection with formulating testimonial opinions that are subject to cross examination.” See Discovery Order, FCC -5M-38 (Aug. 5, 2005). We have provided you with the summaries, the CV’s, and an identification of documents. You are not entitled to any more or any privilege log.

From: Langley, Eric [mailto:ELANGLEY@balch.com]
Sent: Friday, March 10, 2006 6:16 PM
To: Geoff Cook
Cc: John Seiver; Campbell, Russ; Estes, Allen
Subject: RE: Expert witness depositions

Geoff:

Thanks for your response. It is black letter law that FRCP 26(a)(2)(B) requires that all documents or other information considered by the expert in forming opinions be produced. Numerous federal courts have held that this requires that all draft reports and documents received from counsel be produced -- even if the documents would otherwise be privileged. The judges in those cases were obviously aware of the privilege rules you cite below -- and determined that they are not applicable in the expert disclosure context. This is not a close call.

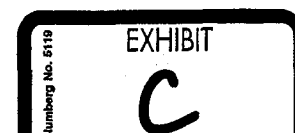
Please let me know if you will produce the requested documents prior to noon on Monday so we can avoid another motion to compel. In the meantime, please take the necessary steps to ensure that none of the requested documents are destroyed by your office or your experts. If you still refuse to produce the documents, please provide us with a privilege log as soon as possible.

Thanks for your attention to this matter.

Eric B. Langley
Balch & Bingham LLP
 1710 Sixth Avenue North
 Birmingham, Alabama 35203-2014
 (205) 226-8772 - Phone
 (205) 488-5680 - Fax
[Download vCard](#)
www.balch.com

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3/13/2006



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From: Geoff Cook [mailto:GCook@crblaw.com]
Sent: Friday, March 10, 2006 10:39 AM
To: Langley, Eric
Cc: John Seiver
Subject: Expert witness depositions

Eric,

We received late yesterday your Notices of Deposition for our expert witnesses, Patricia Kravtin and Mickey Harrelson. In addition to noticing the witnesses themselves for deposition, the notices include a "document request" for various documents. We do not see any authority that would permit the serving of document requests upon these non-party witnesses at this time. In accordance with Judge's Sippel's directions, Complainants will, before the depositions, provide Gulf Power with a list of the documents reviewed by Complainants' experts in connection with formulating their opinions. However, Complainants do object to Gulf Power's attempt to seek production, through its "document request," of materials provided by Complainants' counsel, discussions between counsel and Complainants' experts, and any draft reports. These materials are protected by attorney-client and/or work-product privilege. See, e.g., F.R.C.P. 26(b)(3)-(5). In addition, Complainants object on grounds of undue burden and overbreadth to those portions of the "document request" that seek to have the expert witnesses bring to the deposition copies of all documents they have reviewed (including such publicly available documents as codes and regulations). Gulf remains free to ask the witnesses what materials they have reviewed and inquire about the facts underlying the witnesses' opinions.

We will send you the lists of documents relied upon by Ms. Kravtin and Mr. Harrelson either later today or early Monday.

This electronic mail transmission may contain confidential or privileged information. If you believe that you have received the message in error, please notify the sender by reply transmission and delete the message without copying or disclosing it.

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