

ORIGINAL

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

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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

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To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**COMPLAINANTS' PROPOSED AGENDA ITEMS
FOR THE JANUARY 31, 2005 PREHEARING CONFERENCE**

In accordance Chief Administrative Law Judge Sippel's Order, dated January 12, 2005 ("Order"),¹ the Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants") hereby respectfully submit their statement of

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suggested agenda topics to be discussed at the Prehearing Conference set for January 31, 2005.²

¹ *In re Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, Order, EB Docket No. 04-381, FCC 04M-41 (rel. Jan. 12, 2005) (hereinafter "Order").

² Complainants originally contemplated submitting agenda items jointly with Respondent Gulf Power Company and, to that end, provided a copy of their agenda topics to Respondent prior to the date of this filing. Gulf Power, however, indicated that it preferred to submit its own agenda. Accordingly, Complainants are filing this Agenda separately.

DOCUMENT NUMBER-DATE

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1. Deficiencies In Gulf Power's January 11, 2005 Report

Judge Sippel's Order of December 15, 2004 required of Gulf Power that:

In the interest of administrative efficiency, there should be prepared by a qualified consultant or accountant, under Gulf Power['s] direction, a complete accounting (1) by identification, (2) by description of current utilization, and (3) by current plans for future usage, with respect to each pole owned and/or controlled by Gulf Power that is occupied by all or any of the Complainant cable companies.

G[ulf] Power shall report in writing to the Presiding Judge by January 11, 2004, the decision and intentions of Gulf Power in engaging such a qualified third person to conduct such a study. The report should also include any instructions and task assignments furnished to prospective consultants/accountants/surveyors under consideration. * * *

[In addition,] Gulf Power shall provide to Complainants and the Enforcement Bureau, copies of all planning documents presently in existence for current and prospective use of identified poles to which Complainants have cable attached.

Order at 2-3.

In response to the first two paragraphs of this Order, Gulf Power submitted approximately a half-page letter in which it indicated its "intent" "to engage a consultant to perform an accounting of all its poles occupied by at least *one* of the Complainant cable companies." See Letter from Eric B. Langley to Honorable Richard L. Sippel, dated January 11, 2005 (emphasis added)("Jan. 11th Letter"). Gulf Power states that, while the report it "intends" to seek will include pole audit and attacher information, it "may" include such items as "measurements on certain poles to ascertain crowding and code issues"; and "engineering work-up on certain poles." Lastly, Gulf Power "estimates" that a consultant will some five to seven months to prepare this report. *Jan. 11th Letter.*

Gulf Power's response of January 11, 2005 fails to comply with the December 15th *Order*, and, importantly, reveals that Gulf Power does not have the evidentiary support necessary to proceed with this hearing on whether it could meet, for specific, individual poles, the test set forth in *Alabama Power v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002). In particular, Gulf Power's response makes evident that it does not have fundamental information about Complainants' attachments to its poles, including the number of such attachments, the number of its poles with Complainants' attachments that it claims are at "full capacity," and the number of its poles with Complainants' attachments for which it can prove the existence of, and quantify, a pole-specific "higher valued use" under *Alabama Power*. This absence of evidence is particularly striking, because Gulf Power asked for this hearing in order to present such evidence. Instead, Gulf Power apparently proposes to develop partial information about its poles, and Complainants' attachments on them, in 2005, five years after it sought to increase Complainants' pole attachment rates. Putting aside the fact that what Gulf Power is proposing has absolutely no bearing on whether it was entitled to additional compensation for any particular pole in the time frame covered by the underlying Complaint proceeding, even if it were relevant, the information Gulf Power proposes to develop is woefully incomplete:

- a. Gulf Power only commits to employ a consultant to examine attachments by "one" of cable operator Complainants' attachments. Why not all four? It has sought to impose a higher rate, under the specific rubric of a constitutional right to compensation from all four Complainants. The *Order* specifically referred to "each pole owned and/or controlled by Gulf Power that is occupied by all or any of the Complainant cable companies". Gulf Power does not even specify which "one" of the Complainants it proposes to have studied. Gulf Power apparently is

still hoping that it can proceed from some sort of “presumption of crowding,” even though the Order makes clear that any claim to additional compensation from Complainants’ must be addressed to specific, individual poles. Gulf Power is clearly unwilling to present the “complete accounting” called for in the *Order*.

b. Gulf Power’s January 11th submission also does not say anything about studying, let alone providing evidence on, which poles are alleged to be at “full capacity,” one of two key factors under *Alabama Power*. Instead, Gulf Power commits only to an unspecified pole “audit”; “recording attacher information electronically on a pole-by-pole basis” for unspecified poles and unspecified attachers ; and “assigning unique identifying numbers to each pole” (something it apparently lacks). This information, which Gulf Power does not have now, despite the passage of five years from its attempts to demand a pole rate increase of 500 percent for Complainants’ attachments, will not establish which poles have been or are at “full capacity,” particularly in light of Gulf Power’s pole inventory and customary pole replacement practices. Indeed, while Gulf Power states that it “may” ask a consultant to study “certain poles to ascertain crowding and code issues” and perform “engineering work-up on certain poles,” it does not even commit to examine these foundational issues.³ In its January 8, 2004 “Description of Evidence,” Gulf Power proposed to submit “precise, yet simple, testimony” regarding “crowding,” yet now it fails to advise whether any such evidence was even in existence when it “described” the evidence or commit to even conduct a study now to develop partial evidence on the subject that was the

³ Gulf Power also is non-committal on whether it will have its consultant take “digital photographs of certain poles,” something it claimed it wanted to do in its January 8, 2004 Description of Evidence.

genesis of this proceeding. Such a glaring omission further reveals that Gulf Power does not have the minimum proof necessary to proceed with this hearing.

c. Gulf Power's January 11, 2005 submission says nothing about any loss that Gulf Power claims to have experienced due to its allegedly having had a "higher valued use," either from a third-party or from its own purposes, of the space on specific utility poles utilized by Complainants, the second key element of *Alabama Power's* test that must be met before Gulf Power can establish any constitutional entitlement to compensation above the marginal costs of attachments. *Alabama Power* reiterated the established standard that constitutional takings claims are measured by "loss to the owner." 311 F.3d at 1369. Yet Gulf Power's January 11th report, which was supposed to provide information about pole "utilization" and Gulf Power's "plans for future usage," identifies no third parties who were or are "waiting in the wings" with a higher-valued use of the space occupied by Complainants, and also says nothing about whether Gulf Power itself had to forego any "higher valued use" itself because of Complainants' existing attachments in the communications (not electric) space. In addition, Gulf Power's submission is devoid of information about Gulf Power's customary practices regarding expansion of pole capacity through the use of additional mounting hardware, cables, or taller/stronger poles. By comparison, the documents produced by Complainants to Gulf Power on January 11th show the opposite – that any time a Complainant required a pole adjustment, make-ready work, or a pole change-out, that Gulf Power insisted on obtaining full reimbursement before such work was done. In other words, what evidence there

is shows that Gulf Power has sustained no actual losses, and hence *has no claim* under the Fifth Amendment test as explained in *Alabama Power*, just as Alabama Power itself “had no claim” when it complained that it was denied just compensation. “[N]owhere in the record did APCo allege that APCo’s network of poles is currently crowded. It therefore had no claim. ...”. *Alabama Power*, 311 F.3d at 1370. Nothing developed now or proposed to be submitted would show for the relevant time period that *any* of Gulf Power’s poles were crowded.

d. Gulf Power’s proposal to have a consultant begin to develop attacher information about *current* “attacher information” indicates that it apparently lacks the evidentiary foundation to support its constitutional claims for higher pole attachment rates for the years 2000 to 2001, the relevant years under Complainants’ July 10, 2000 Complaint in PA 00-004.

e. Gulf Power suggests that its proposed consultant, whom it does not identify, will take some five to seven months to perform the limited scope of work outlined by Gulf Power. This time, particularly as Gulf Power commits to examine the attachments of only one of the Complainant cable operators, is certainly excessive. It will significantly extend the time period for this proceeding and require substantial extensions in the proposed schedule. For example, the current schedule contemplates that each side submit interrogatories and document requests beginning on February 1, 2004, but Gulf Power will quite probably contend that it will not be able to answer basic questions about numbers of pole attachments, and which poles it claims meet the Alabama Power test, unless and until it obtains data from an outside consultant. Complainants as well

will need to be able to submit substantial discovery requests after they received any data that is provided by such a consultant to Gulf Power. Indeed, it will be pointless to commence depositions until all data from any consultant is exchanged and been the subject of written discovery.

f. Finally, Gulf Power's January 11th brief report is not specific about any of the details of the "intended" consultant's study. It does not say when its consultant would begin work, what the scope of the project would be, what sources the consultant would examine, or what the "breakdown of tasks" would consist of. Indeed, Gulf Power suggests that both its time estimate of five to seven months, and the tasks of the consultant, "could change," citing not any factors within its own control but, as the sole factor, discovery documents already provided by Complainants. This lack of specifics, when combined with the other deficiencies cataloged above, makes it manifest that this proceeding should be dismissed based upon Gulf Power's fundamental lack of proof for its claims and apparent disregard for its own burden of proof on the claims it over-optimistically alleged it had the evidence to support..

2. Gulf Power's January 14, 2005 Document Production

As with its insufficient showing in its January 11th report, Gulf Power's January 14th document production similarly fails to comply with the *Order*. The *Order* directed that "Gulf Power shall provide to Complainants and the Enforcement Bureau copies of all planning documents presently in existence for current and prospective *use of identified poles to which Complainants have cable attached.*" *Order* at 3 (emphasis added). Gulf Power failed to provide any such planning documents for "identified poles to which Complainants have cable attached."

Instead, Gulf Power produced various load studies that provide no reliable, useful or relevant information about the actual pole capacity of specific poles or even the future pole capacity of poles to which Complainants are attached. The voltage and feeder line loading and substation capacity estimates shed no light on Gulf Power's prior, current or planned future use of space on its distribution poles, the identity or number of current or historical attachers, or whether any opportunities were forgone by Gulf Power (let alone quantifiable lost opportunities) due to the presence of any attacher on Gulf Power's poles.

Moreover, the load studies do not indicate whether a pole is currently or ever was at "full capacity," whether additional capacity exists (either on an existing pole or through a change-out of a pole in Gulf Power's inventory), or if there were insufficient capacity at a particular pole location, why capacity was insufficient or what was done, if anything, to attempt to provide capacity on any identifiable pole at any time. Many of the documents produced by Gulf Power refer to substations and equipment that have no relation to any identified poles to which Complainants are attached. There appear to be no documents suggesting any additional attachments or pole modifications were needed for any of Gulf Power's facilities, or that any modifications were actually performed on poles containing Complainants' attachments. The documents merely discuss replacements of Gulf Power's existing power cables, replacements that would be required regardless of attachments by Complainant cable operators.

In sum, Gulf Power's failure to comply with the *Order* requiring production of all planning documents for "current and prospective use of identified poles" on which Complainants have attachments is another reason why this proceeding should be dismissed.

3. Confidentiality Order

Complainants have drafted and submitted to Gulf Power a proposed Confidentiality Order (Attachment A hereto), but Gulf Power has not yet responded. Complainants respectfully submit that the attached Confidentiality Order should be adopted and entered.

4. Time Period Covered by Complainants' Complaint

In their Complaint dated July 10, 2000, cable operator complainants challenged Gulf Power's attempts to raise its annual per-pole attachment rate from approximately \$6.20 per pole to \$38.06 per pole during the period from July 1, 2000 through the latest expiration date of the pole attachment agreements then in effect, which was December 31, 2001, *see* Complaint in PA No. 00-004, Exhibits 3-5, and sought an order directing Gulf Power to negotiate in good faith regarding new terms and conditions in any new pole agreement. *See* Complaint, Section IV. When the Bureau, in its Order dated May 13, 2003, granted the Complaint, it gave Complainants just what was asked for in the Complaint. While the Bureau ordered that the rates contained in the parties' "prior pole attachment agreements" were to be continued pending further good faith negotiations between the parties, *see* Memorandum Opinion and Order dated May 13, 2003, File No. PA 00-004, it did not adjudicate any complaint by Gulf Power. Indeed, Gulf Power never filed a pole attachment complaint of its own, or a cross-complaint. Even in its January 8, 2004 "Description of Evidence" submitted in PA No. 00-004, Gulf Power did not refer to any time period other than that already placed in issue by the cable operators' Complaint. Accordingly, cable operator Complainants believe that the only appropriate time period for which Gulf Power can seek compensation above marginal costs is the period of time between July 2000 and December 2001.

5. Need for Clarification of Important Issues

On October 20, 2004, Complainants filed a Petition for Clarification of several important issues. Those key issues included: (a) determining when a pole is at “full capacity” or has “insufficient capacity” and whether these terms are different from a contention that a pole is “crowded”; (b) determining whether and to what extent Gulf Power may reserve space on its poles pursuant to a “bona fide development plan”; and (c) determining how, if at all, Gulf Power’s agreement in the past to “change out” poles with larger poles in exchange for complete reimbursement of the costs of doing so has any bearing upon a constitutional claim for additional compensation. *See* Petition for Clarification, 14-17. Gulf Power never responded substantively to Complainants’ Petition for Clarification; instead it filed a motion to strike; and Judge Sippel deferred any ruling on the Petition. Gulf Power’s report of January 11th and document production of January 14th shed no new light upon these key issues. At the Pre-Hearing Conference of December 13, 2004, Judge Sippel noted that “we [need to] get the pole issues resolved which means a – yes, a working definition of what does it mean to have a fully occupied pole and the other things, all those ramifications.” First Pre-Hearing Conference Transcript at 88 (Dec. 13, 2004). At that same conference, counsel for Gulf Power also explained:

One thing that I think that we would both agree on is that APCO and the FCC, the controlling issue in this case about when a pole is full or when it is crowded and when a utility is entitled to something higher than, as we say the cable rate or as they say marginal costs, is very nuance[d] I think one of the things that you’ll be called upon to do is to bring to life a very difficult to understand standard the 11th Circuit has given us. For example, when is a pole full? When is a pole crowded? Is crowding the same thing as being full?

First Pre-Hearing Conference Transcript at 45 (Dec. 13, 2004). Similarly, Judge Sippel noted the issue of Gulf Power's claiming "full capacity" based upon its alleged need to reserve space:

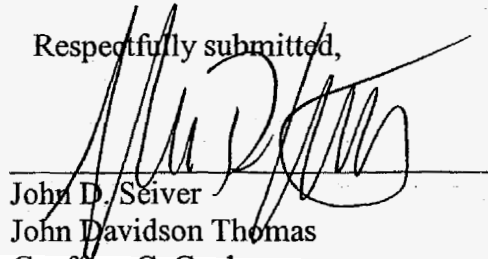
CHIEF ADMINISTRATIVE JUDGE SIPPEL: Are you saying they took the position that they're virtually all full because the ones that we actually don't have physically full, we've got plans to fill them soon or in the future or something like that?"

MR. SEIVER: Exactly, precisely, Your Honor.

First Pre-Hearing Conference Transcript at 40-41 (Dec. 13, 2004).

If this court determines that, despite the demonstrated inadequacy of its evidence as discussed in sections 1 and 2 above, Gulf Power may proceed with this matter, Complainant cable operators respectfully request that Gulf Power be ordered to submit a substantive written response to each of the points in Complainants' October 20, 2004 Petition for Clarification, that Complainants be given an equal opportunity to reply 30 days after Gulf Power's briefing, and that the court then schedule oral argument on these key foundational issues.

Respectfully submitted,



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MEDIACOM SOUTHEAST, L.L.C.,
and BRIGHT HOUSE NETWORKS,
L.L.C.**

January 25, 2005

ATTACHMENT A

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

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

To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel
Chief Administrative Law Judge

STIPULATION AND AGREED CONFIDENTIALITY ORDER

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. (“Complainants”), and Respondent Gulf Power Company (“Gulf Power” or “Respondent”), by undersigned counsel, hereby request that the Court adopt the following stipulation as an Order of the Court governing confidentiality of materials produced in discovery in this proceeding in accordance with the Court’s *Order* FCC 04M-41, released December 15, 2004, as follows:

WHEREAS, Complainants and Respondent will be reviewing and exchanging documents and other information in the course of discovery in this proceeding and sharing such documents and information with representatives of the Commission’s Enforcement Bureau;

WHEREAS, each party has asserted that certain of the materials to be exchanged and reviewed should be used in this proceeding only and reviewed by the parties' experts and consultants, but not be further disclosed as such constitute trade secrets and commercial, proprietary or financial information that is privileged and confidential;

WHEREAS, the court has preliminarily ordered that the parties treat exchanged documents and information as confidential in *Order FCC 04M-41*, released December 15, 2004 Part III, p.3 at footnote 5, until submission to the Court of a comprehensive confidentiality order for signing; and

WHEREAS, at the commencement of the complaint proceeding brought by Complainants against Respondent the parties executed a comprehensive confidentiality agreement that forms the basis for this Stipulation and Agreed Confidentiality Order ("Stipulation and Order"); and

WHEREAS, the parties jointly request the Court to adopt this Stipulation and Order as an Order in this proceeding in furtherance of the Court's direction in the December 15th Order.

THE PARTIES DO HEREBY STIPULATE AND AGREE AS FOLLOWS:

1. Definitions.
 - a. **Authorized Representative.** "Authorized Representative" shall have the meaning set forth in Paragraph Four.
 - b. **Commission.** "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority including the Enforcement Bureau.
 - c. **Confidential Information.** "Confidential Information" means (i) information required to be provided under the Commission's rules and regulations and orders of the Presiding Officer in EB Docket No. 04-381; and (ii) information submitted by the Submitting Party (as defined herein under Section (1)(f) in EB Docket No. 04-381 and as claimed by Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., Bright House Networks, L.L.C. and Gulf Power Company. Confidential Information includes additional copies of and information derived from Confidential Information.

- d. **Declaration.** “Declaration” means Attachment A to this Stipulation and Order.
- e. **Reviewing Party.** “Reviewing Party” means a person or entity participating in this proceeding.
- f. **Submitting Party.** “Submitting Party” means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Stipulation and Order.
2. **Claim of Confidentiality.** The Submitting Party may designate information as “Confidential Information” consistent with the definition of that term in Paragraph 1 of this Stipulation and Order.
3. **Procedures for Claiming Information is Confidential.** Confidential Information submitted to the Reviewing Party shall bear on the front page in bold print, “ Confidential – Business Proprietary Information - EB Docket No. 04-381.” Confidential Information shall be segregated by the Submitting Party from all non-confidential information. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.
4. **Permissible Disclosure of Confidential Information To Authorized Representatives.**
- (a) Authorized Representatives shall be limited to:
- (1) Counsel of record representing a Reviewing Party in this proceeding, and any legal support personnel (*e.g.*, paralegals and clerical employees) employed by such attorneys.
- (2) Other employees, officers, or directors of a Reviewing Party who have not been, are not currently, and do not reasonably expect to be involved in the marketing of electricity distribution services or all lawful communications services to end users, provided that such employees, officers, directors, consultants or experts are under the supervision of counsel of record.
- (3) Consultants, experts or witnesses retained by a Reviewing Party, who have not been, are not currently, and do not reasonably expect to be involved in the marketing of electricity distribution services or all lawful communications services to end users by that Reviewing Party or a direct competitor of any Reviewing Party, provided that such consultants, experts or witnesses are under the supervision of counsel of record.
- (b) Persons obtaining access to Confidential Information under this Stipulation and Order shall not disclose information designated as Confidential Information to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than in prosecuting this proceeding before the Commission or any Commission staff member, or before any reviewing court. This limitation, however, shall not be read as limiting any Authorized Representative seeking access to Confidential Information under this Stipulation and Order from separately seeking access to Confidential Information for use in another proceeding. Before any Authorized Representative is provided access to Confidential Information pursuant to Sections (a)(1), (a)(2), or (a)(3) of this paragraph, that Authorized Representative must

first sign a declaration stating that the Authorized Representative has personally reviewed this Stipulation and Order and understands and agrees to be bound by the limitations it imposes on the Authorized Representative and provide that signed statement to counsel for the Submitting Party. The form of the declaration to be used is Attachment A to this Stipulation and Order.

(c) No copies or notes of materials marked Confidential may be made except copies or notes to be used by persons designated in paragraph (a) of this section. Any Authorized Representative may copy any Confidential materials unless it bears the legend "Copying Prohibited." Any Authorized Representative may request permission from the Submitting Party to copy any Confidential materials that bears the legend "Copying Prohibited." Each Authorized Representative must maintain a written record of any copies made of Confidential materials and provide this record to the producing Party upon reasonable request. Each Authorized Representative having custody of any Confidential materials shall keep the documents properly secured at all times.

(d) Within 60 days of termination of this proceeding, including all appeals and petitions, all originals and reproductions of any Confidential materials, shall be returned to the Submitting Party.

5. Declassification. A Reviewing Party or Authorized Representative may apply to the Commission for a ruling that documents or categories of documents, stamped or designated as confidential, are not entitled to such status and protection. The Submitting Party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), or are subject to existing nondisclosure obligations to a third party.

6. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

7. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed.

8. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of Confidential Information which an Authorized Representative has obtained under the terms of this Stipulation and Order, such Authorized Representative shall promptly (within two (2) business days) notify the Submitting Party (or other person who designated the document as confidential) of the pendency of such subpoena or order to allow that party time to object to that production or seek a protective order.

9. Client Consultation. Nothing in this Stipulation and Order shall prevent or otherwise restrict counsel for Reviewing Parties from rendering advice to their clients and, in the course thereof, relying generally on examination of Confidential Information, provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of or reference to any Confidential Information except under the procedures of paragraph 5 above.

10. Use. Reviewing Parties or Authorized Representatives obtaining access to Confidential Information under this Stipulation and Order shall use the information only for preparation of and filings in this proceeding and any related appeals or review proceedings, and shall not use such information for any other purpose, including business or commercial purposes, or governmental or other administrative or judicial proceedings. The prior sentence shall not, however, be read as limiting any Reviewing Party or Authorized Representative obtaining access to Confidential Information under this Stipulation and Order from separately seeking access to Confidential Information for use in another proceeding. Any Reviewing Party or Authorized Representative may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if that Authorized Representative complies with the following procedures:

(a) Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

(b) The portions containing or disclosing Confidential Information must be covered by a separate letter referencing the Stipulation and Order in this proceeding;

(c) Each page of any Reviewing Party's filing that contains or discloses Confidential Information subject to this Stipulation and Order in this proceeding must be clearly marked: "CONFIDENTIAL -- SUBJECT TO PROTECTIVE CONDITIONS IN EB DOCKET NO. 04-381 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION;" and

(d) The Confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission and the Submitting Party. Such Confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the producing party and an opportunity to comment on such proposed disclosure). Any Reviewing or Submitting Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. Any Reviewing or

Submitting Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection (c) of this paragraph is not removed.

11. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

12. Violations of Stipulation and Order. Should a Reviewing Party or Authorized Representative that has properly obtained access to Confidential Information under this Stipulation and Order violate any of its terms, it shall immediately convey that fact to the producing party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Submitting Party, in writing, of the identity of each individual known or reasonably suspected to have obtained the Confidential Information through any such disclosure. Nothing in this Stipulation and Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any Reviewing Party or Authorized Representative using Confidential Information in a manner not authorized by this Stipulation and Order.

13. Non-Termination. Unless otherwise ordered by the Commission or a court of competent jurisdiction, within sixty (60) days after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives and Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party and other attorney work product. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Stipulation and Order unless such Confidential Information is released from the restrictions of this Stipulation and Order through agreement of the parties.

14. Responsibilities of Parties. The Reviewing Parties and Submitting Party are responsible for employing reasonable measures to control, consistent with this Stipulation and Order, duplication of, access to, and distribution of Confidential Information.

15. Effect of Stipulation and Order. This Stipulation and Order constitutes an agreement between the Reviewing Party or Authorized Representative, executing the attached Declaration, and the Submitting Party.

Dated this ___ day of _____, 2005

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Counsel for Respondent

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION¹

Richard L. Sippel
Chief Administrative Law Judge

¹ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.

ATTACHMENT A

DECLARATION

I, _____, hereby declare under penalty of perjury that I have personally reviewed the Stipulation and Agreed Confidentiality Order in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Stipulation and Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that this Stipulation and Agreed Confidentiality Order is a binding agreement with the Submitting Party.

(printed name)
(representing) -----
(title) -----
(employer) -----
(address) -----
(phone) -----
(date) -----

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainants' Proposed Agenda Items has been served upon the following by telecopier and U.S. Mail on this the 25th day of January, 2005:

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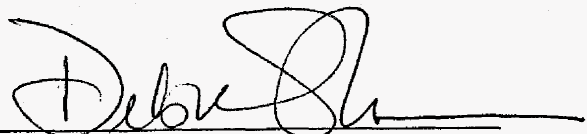
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