

ORIGINAL

DISTRIBUTION CENTER

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

06 JUN -8 AM 7:52

06 JUN -8 AM 9:32

RECEIVED-FPSC

COMMISSION  
CLERK

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

E.B. Docket No. 04-381

Complainants,

v.

GULF POWER COMPANY,

Respondent.

To: Office of the Secretary

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

**GULF POWER COMPANY'S RESPONSE TO COMPLAINANTS' IMPROPER  
ATTEMPT TO MARK, OFFER AND ADMIT EVIDENCE POST-HEARING**

Gulf Power Company ("Gulf Power") responds as follows to "Complainants' Motion to Formally Admit Into Evidence Complainants' Deposition Excerpts Filed On March 31, 2006 To The Extent Such Excerpts Have Not Already Been Formally Admitted And To Mark Such

CMP \_\_\_\_\_ Excerpts As Sequentially Numbered Exhibits."

COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_ permission to assign sequential exhibit numbers to what they termed "previously filed"  
GCL \_\_\_\_\_ deposition designations. Nowhere in that e-mail did Complainants inform the Presiding Judge  
OPC \_\_\_\_\_ that the deposition designations to which they sought to assign exhibit numbers had never been  
RCA \_\_\_\_\_  
SCR \_\_\_\_\_ marked, offered or received into evidence at trial.

SGA \_\_\_\_\_

SEC   1  

JTH \_\_\_\_\_

DOCUMENT NUMBER-DATE

04927 JUN-8 8

FPSC-COMMISSION CLERK

2. On May 31, 2006, Gulf Power responded to Complainants' e-mail, stating that it did, in fact, object to Complainants' attempt to mark, offer and admit evidence after the conclusion of the evidentiary phase of the hearing. Complainants' e-mail request was denied less than one-hour later. Complainants' Motion followed later that same day (exactly 3 hours and 46 minutes later).<sup>1</sup>

3. The facts relevant to resolving this matter cannot reasonably be disputed. The hearing transcript is clear that at no point during the full day document admission session (April 10, 2006) or more than one week of hearing did Complainants ever mark, offer or otherwise seek to admit the deposition excerpts of Ben Bowen, Rex Brooks, Michael Dunn, Thomas Forbes, Terry Davis, David Tessieri or Roger Spain. The very fact that the deposition designations *do not have exhibit numbers* (thus leading to Complainants' attempt to mark them post-hearing) is dispositive evidence that they were never marked or offered as trial exhibits. Because they were never even marked or offered, it cannot reasonably be argued that Complainants' deposition designations have ever been admitted – formally or “informally” – into evidence in this proceeding.<sup>2</sup> To the contrary, the record is clear that Complainants did not offer the deposition designations; Complainants' Motion cites to no page in the transcript where such an offer was made, let alone where the deposition designations were received into evidence.

4. Complainants blame the Presiding Judge for “an oversight” in not “formally” admitting evidence that Complainants never marked or offered as exhibits. Motion at 3 (“If the

<sup>1</sup> While Complainants' May 30 e-mail stated “[w]e do not believe that any of the parties will have an objection to this approach,” Complainants were sufficiently prepared to draft and file – less than four and a half hours after the objection was lodged -- a five-page written motion, including cites to specific quotes in the transcript.

<sup>2</sup> Gulf Power is unaware of any procedural practice or rule and Complainants cite none (federal, state, local, or administrative) that would allow for testimony or exhibits to be “informally” offered and admitted into evidence.

Court did not formally admit all of Complainants' Deposition Excerpts into evidence, **then that was an oversight** ...”(emphasis added). To support this allegation, Complainants cite to thirteen lines of the Transcript on pages 1291-92. But instead of supporting Complainants' claim of an “oversight,” those transcript pages make clear that the only thing being discussed at that time was *Gulf Power's* offer of its deposition designations into evidence, and Complainants' cross-designations in response.<sup>3</sup> In the passage Complainants quote, where Complainants' counsel stated that he was “tendering it,” the “it” to which he was referring were additional pages of Mr. Bruce Burgess' deposition for cross-designation -- nothing else. At no point on these pages or elsewhere in the transcript were Complainants' deposition designations (that they now wish to incorporate into evidence) marked, offered, “tendered” or admitted.

5. Complainants claim in their Motion to have operated under the belief that their deposition designations were “informally” offered and admitted when they were filed on March 31, 2006. This assertion is belied by (1) Complainants' offer of other written testimony at trial (which, like the deposition designations, had been filed on March 31, 2006), and (2) Gulf Power's observance of evidentiary procedures requiring the actual offering at trial of testimonial evidence upon which it relied for its case-in-chief (both pre-filed written direct testimony and designated deposition testimony).

6. As stated above, Gulf Power even laid out the road map for Complainants to follow by marking, offering and having admitted their deposition designations during their case-in-chief. At no point while Gulf Power was marking, offering and having its deposition designations admitted into evidence at the hearing did Complainants question why Gulf Power

<sup>3</sup> This offer and receipt of Gulf Power's deposition designations and Complainants' cross-designations happened, as it should have, prior to the close of Gulf Power's case-in-chief.

was taking these steps at trial. Complainants never informed Gulf Power or the Court of their belief that all deposition designations had previously been marked, offered and admitted into evidence. Complainants never indicated that all deposition designations had been “informally” admitted. Instead, Complainants participated in the process, objecting to some deposition designations in an attempt to prevent their admission and cross-designating other deposition excerpts. The first time Complainants ever suggested that deposition designations were offered and admitted “informally” was in their May 31 Motion.

7. Complainants’ Motion also tries to shift the focus to Gulf Power, stating that Gulf Power’s counsel somehow “acknowledged” that Complainants had “tendered” their deposition designations. Motion at 5. To support that claim Complainants cite page 1300 of the Hearing Transcript, where counsel for Gulf Power stated that Complainants have “designated testimony and tendered it as part of their case.” But this has nothing to do with marking, offering or receiving the deposition designations into evidence.

8. Complainants also claim that all parties have “been on notice” since March 31, 2006 that Complainants had requested that the deposition designations “be admitted into evidence.” Motion at 3. This is akin to arguing that because a document was listed on a pre-trial exhibit list, it should be deemed to have been marked, offered and received as evidence at hearing. That is not how the system works. The admission of evidence is not, as Complainants now suggest, a mere formality. It is an adversarial process which allows opposing parties the opportunity to challenge, test and rebut potential evidence *in the context of the trial itself*.

Because Complainants failed to follow the “formalities,” their deposition designations were never admitted into evidence.<sup>4</sup>

9. Complainants claim that there can be no prejudice to Gulf Power in admitting this post-hearing evidence. Motion at 4.<sup>5</sup> This is not true. Admitting these deposition designations post-hearing would prevent Gulf Power from lodging objections to the deposition testimony, filing cross designations of deposition testimony or rebutting /clarifying any such evidence at the hearing. In an effort to support their claim of “no prejudice,” Complainants argue that Gulf Power “attended, and registered objections at, each of their depositions.” Motion at 4. However, the depositions in this case were taken -- by agreement -- under “the usual stipulations” which preserved for trial all objections (save objections to form), as well as arguments and rulings on those objections.

10. Complainants’ contentions in the Motion assume that their failure to offer certain deposition designations was accidental or, as Complainants suggest, someone else’s fault. Of course, it could easily have been a strategic decision made by the Complainants at trial. For example, Complainants may have made the “game time” decision that they did not want to afford Gulf Power the opportunity to cross-designate deposition testimony. Whatever the case, the game is now over, and Complainants should not have the opportunity to call a different play after reviewing the game film.

<sup>4</sup> Complainants, for reasons unknown, also refer to Gulf Power’s filing on March 31, 2006 of deposition designations from Mr. David Tessieri. Motion at 3. Though Gulf Power designated portions of Mr. Tessieri’s deposition testimony, Gulf Power (deliberately) never offered the Tessieri designations as evidence. Therefore they are not evidence.

<sup>5</sup> If Complainants do not think Gulf Power will be prejudiced by the evidence they now seek to introduce, why are they seeking to introduce it?

11. The evidentiary phase of the trial is over (at least the first phase) and that part of the record is closed. Complainants should not now be permitted to alter the record evidence developed during the hearing. Gulf Power respectfully requests that the Presiding Judge deny Complainants' Motion.

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

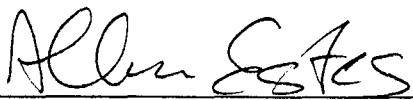
Ralph A. Peterson  
**BEGGS & LANE, LLP**  
P.O. Box 12950  
Pensacola, Florida 32591-2950  
Telephone (850) 432-2451  
Facsimile: (850) 469-3331

**Counsel for Respondent**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Response to Complainants Attempt To Mark, Offer and Admit Evidence Post-Hearing has been served upon the following by United States mail and E-mail on this the 6th day of June, 2006:

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

  
\_\_\_\_\_  
OF COUNSEL