

ORIGINAL

RECEIVED

JUN - 8 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In re Applications of)	MM Docket No. 99-153/
)	
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of Station)	
WTVE(TV), Channel 51,)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	
CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a)	
New Television Station On)	
Channel 51, Reading, Pennsylvania)	

To: Administrative Law Judge Richard L. Sippel

**OPPOSITION TO MOTION FOR
LEGAL FEES AND COSTS**

Reading Broadcasting, Inc. ("Reading"), by its attorneys and pursuant to the Presiding Officer's *Order*, FCC 00M-36 (released May 30, 2000), hereby opposes the request of Telemundo Network Group, LLC ("Telemundo") for payment of \$24,947.58 in legal fees and costs. In support, the following is shown:

Telemundo has repeatedly asserted that its document production in this case represents a sub-set of the document production it has done in the federal lawsuit that Telemundo filed against Reading. For instance, Telemundo stated in its May

No. of Copies rec'd 0+6
List A B C D E

25, 2000 “Response of Non-Party Telemundo Network Group, LLC to Reading Broadcasting, Inc.’s Opposition to Objection to Subpoena”:

In addition, Reading is a party to a pending lawsuit in the Eastern District of Pennsylvania captioned *Telemundo Network Group LLC v. Reading Broadcasting, Inc. et. al.* (Civ. No. 99-5601) (E.D. Pa.). In that lawsuit, Reading posed numerous document requests to Telemundo that included those documents sought in the Subpoena.*

*These document requests sought numerous documents in categories much broader than those sought in the FCC proceeding, but at the same time included the documents specified in the Subpoena

In other words, Telemundo was already required to do the document review and analysis in question for the federal litigation that Telemundo itself initiated. Telemundo now asks the Presiding Officer to require Reading pay one-half of those expenses! There is no legal basis whatsoever for such an award, either in the Federal Rules of Civil Procedure (which do not apply to this proceeding) or in the Commission’s Rules (which do apply).

Federal Rule 45(c)(2)(B) states in part: “Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.”(Emphasis added.) (A copy of the Rule and a copy of the commentary on the Rule in Moore’s Federal Practice 3d are attached for reference.) Although the Commission’s procedural rules are based on the Federal Rules of Civil Procedure, this particular provision does not appear in the Commission’s Rules. *See Amendment of Part I*, 52 R.R. 2d 913 (1982). Even if this provision had been incorporated into the Commission’s Rules, it has only been interpreted to require payment of legal expenses in

situations where sanctions are appropriate because counsel has engaged in vexatious or abusive conduct.¹ That is not the case here.

The applicable Commission Rule, Section 1.313, has never been interpreted in any reported decision (see Section 0.445) to require a party to pay a non-party's legal fees and expenses. The rule merely allows the Presiding Officer to regulate the discovery process through protective orders (e.g., that depositions not be taken or interrogatories not be answered) "to assure the proper conduct of the proceeding or to protect any party or deponent [which Telemundo is neither] from annoyance, expense, embarrassment or oppression." The Presiding Officer already has narrowed the scope of the subpoena to protect Telemundo from undue burden. *See Order*, FCC 00M-36 (released May 30, 2000). Accordingly, Telemundo has received precisely the type of protection that Section 1.313 contemplates.

Other non-party witnesses in this case have been subject to even more burdensome requirements without any compensation for legal fees or expenses. (Unlike those other parties, Telemundo voluntarily inserted itself into this proceeding by seeking to broker a settlement of this case.) Rather than seeking protection from undue harassment, Telemundo is attempting to subvert Section 1.313 to shake down Reading for a portion of its legal costs in the federal litigation that Telemundo initiated against Reading.

¹ To the extent that Telemundo argues that Reading was tardy in seeking the documents, Reading notes: (a) Telemundo was required to collect the documents anyway due to the federal litigation; and (b) Reading was initially only given a month to complete discovery, and due to extensions granted by Reading, Telemundo has had more than a month to respond to Reading's subpoena.

Reading is willing to reimburse Telemundo's copying costs, even at the unstated (but clearly very high) per-page rate sought by Telemundo. No justification whatsoever exists, however, for the request that Reading compensate Telemundo for its legal fees. Any such ruling would be invalid and presumably unenforceable.

Respectfully submitted,

READING BROADCASTING, INC.

By: Thomas J. Hutton
Thomas J. Hutton
C. Dennis Southard IV
Its Attorneys

June 8, 2000

Holland & Knight LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202

Rule 44.1

RULES OF CIVIL PROCEDURE

undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the *third sentence*, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). Cf. *Uniform Judicial Notice of Foreign Law Act* § 3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that § 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, *Conflict of Laws*, § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, *Evidence*, § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, *Evidence* § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl.1961, at 134; N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, loc. cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Jansson v. Swedish American Line*, 185 F.2d 212, 216 (1st Cir.1950); *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950, 957, n. 6 (1st Cir.1952); *Liechi v. Roche*, 198 F.2d 174 (5th Cir.1952); *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir.1954).

1972 Amendment

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

1987 Amendment

The amendment is technical. No substantive change is intended.

HISTORICAL NOTES

Effective Date of Amendment Proposed November 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2,

1975, see section 3 of Pub.L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of Title 28.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the

United States and mileage any copies of things or served on Rule 5(b).

(2) Subparag be served court by v the district the deposition specific the state permits se court of ge the deposition specific the United proper app the service subpoena a who is a r. shall issue manner an U.S.C. § 17

(3) Proo made by fil the subpoe manner of served, cer vice.

(c) Protect

(1) A pa. issuance an sonable ste expense on court on be shall enforce attorney in tion, which earnings and

(2)(A) A mit inspecti papers, docu of premises of production appear for da

(B) Subje person com: tion and copy of the subpo compliance in service, serve in the subpo copying of ar

United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or

of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall orga-

where the nonresident's presence in the local forum is extended beyond the time needed for the unrelated action,⁵⁰ or where the nonresident engages in unrelated business activities while in the forum jurisdiction.⁵¹ Statutes may declare immunity in some instances.⁵² For further discussion of immunity from service, see generally Ch. 4, *Summons*.

§ 45.04 Receiving Subpoenas; Protection, Duty to Respond, and Contempt

[1]—Subpoena Should Not Impose “Undue Burden”; Sanctions Under Rule 45(c)(1)

Those subject to subpoenas are to be protected from undue burden or expense. Rule 45(c)(1) makes the party who issues the subpoena, or the party's attorney, responsible for taking “reasonable steps to avoid imposing [an] undue burden or expense” on the subpoena recipient.¹ The court from which the subpoena issues will enforce this duty and will impose sanctions² on the party or attorney responsible for imposing an undue burden (*see also* Ch. 11, *Sanctions; Signing of Pleadings, Motions and Other Papers; Representations to Court*), or, in the

<i>3d Circuit</i>	<i>But see</i> American Centennial Ins. Co. v. Handal, 901 F. Supp. 892, 895 (D.N.J. 1995) (immunity should be granted, even when cases factually similar, unless grant would obstruct justice).
<i>6th Circuit</i>	LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 998-999 (N.D. Ohio 1994) (immunity not extended to attorney when service of process is in a case related to case in which attorney is appearing).
<i>8th Circuit</i>	Pointer v. Ghavam, 107 F.R.D. 262, 264 (W.D. Ark. 1985) (probate proceedings deemed unrelated to wrongful death action).
<i>10th Circuit</i>	ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995) (actions involved the same facts and most of the same allegations).

⁵⁰ **Nonresident remains in jurisdiction.** *See, e.g.,* Atkinson v. Jory, 292 F.2d 169, 171 (10th Cir. 1961).

⁵¹ **Nonresident conducts other business.** *See, e.g.,* Uniroyal, Inc. v. Sperberg, 63 F.R.D. 55, 58-60 (D. Ohio 1973).

⁵² *E.g.,* 22 U.S.C. §§ 254a-254e, 288d(b) (immunity of representatives of foreign governments, their families, and household members).

¹ Fed. R. Civ. P. 45(c)(1). Subdivision (c) of Rule 45 is “not intended to diminish rights conferred by Rules 26-37 or any other authority.” *See* § 45App.08[2] (Committee Note of 1991 to Amendment).

² **Sanctions analysis.** Dravo Corp. v. Liberty Mutual Ins. Co., 160 F.R.D. 123, 128 (D. Neb. 1995) (when Rule 45 violation is asserted, court should analyze assertion similarly to Rule 11 violation).

words of the Fifth Circuit, “issuing a vexatiously overbroad subpoena.”³ Appropriate sanctions can include the subpoena recipient’s lost earnings and reasonable attorney’s fees. On the other hand, if the party seeking discovery makes a good faith effort to “negotiate reasonable parameters” for a subpoena that was originally overly burdensome, sanctions should not be awarded.⁴

One court awarded attorney’s fees incurred when a subpoenaing party “unreasonably” insisted that the non-party subject to the subpoena duces tecum review and produce all responsive documents rather than simply deliver the extensive files to the opposing party’s counsel for review and production.⁵ The non-party moving for fees was not required to establish the tort of abuse of process before it could be awarded Rule 45(c)(1) sanctions.

If a person is subpoenaed to produce documents or things, or to permit inspection of certain premises, that person need not appear unless also subpoenaed for a deposition, hearing, or trial.⁶ This is another method of lessening the burden on subpoena recipients under Rule 45.

**[2]—Objection to Subpoena to Produce Documents or Permit
Inspection Must Be Served Within Fourteen Days; Rule
45(c)(2)(B)**

A person subject to a subpoena to produce and permit inspection and copying may serve a written objection to the subpoena regarding any or all of the requests

³ **Overbroad subpoena.** *Tiberi v. Cigna Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994) (court relied on specific provision for sanctions in Rule 45(c)(1) that includes lost earnings and attorney’s fees).

3d Circuit *Composition Roofers Union Local 30 Welfare Trust Fund v. Gravely Roofing Enters., Inc.*, 160 F.R.D. 70, 73 (E.D. Pa. 1995) (20-month time frame for business records was not unduly broad in scope).

5th Circuit *Tiberi v. Cigna Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994) (“vexatiously overbroad subpoena”).

10th Circuit *Broadcourt Capital Corp. v. Flagler Secs., Inc.* 149 F.R.D. 626, 629 (D. Colo. 1993) (subpoena for telephone or financial records of nonparty in securities action was overbroad since records related to period after demise of corporation).

⁴ **Good faith effort avoids sanctions.** *Tiberi v. Cigna Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994) (citing Rule 45(c)(1), court refused to apply sanctions where court found evidence of good faith effort to agree on modification of subpoena duces tecum).

⁵ **Undue burden.** *High Tech Medical Instrumentation, Inc. v. New Image Indus., Inc.*, 161 F.R.D. 86, 88 (N.D. Cal. 1995) (in patent litigation case, party’s patent counsel, who was not representing the party in the litigation, sought and received reimbursement for time spent reviewing documents subject to production).

⁶ Fed. R. Civ. P. 45(c)(2)(A).

CERTIFICATE OF SERVICE

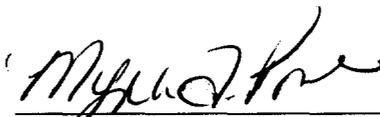
I, Myra Powe, a secretary in the law firm of Holland & Knight LLP, do hereby certify that a copy of the foregoing OPPOSITION TO MOTION FOR LEGAL FEES AND COSTS was served, this 8th day of June 2000, via facsimile, to the following:

The Hon. Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Gene A. Bechtel, Esq.
Harry F. Cole, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Counsel for Adams Communications Corporation

Michael D. Hays, Esq.
Dow, Lohnes & Albertson, P.L.L.C.
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802
Counsel for Telemundo Network Group, LLC



Myra F. Powe