Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 06M-17

In the Matter of	)	**EB Docket No. 04-381**
Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C.,	)	05478
Complainants,	)	
v.	)	
Gulf Power Company,	)	
Respondent.	)	

MAILED
JUN 15 2006
FCC Mail Room

MEMORANDUM OPINION AND ORDER

Issued: June 8, 2006 **Released:** June 9, 2006

Background

1. On May 31, 2006, the Florida Cable Telecommunications Association, Inc., *et al.*, ("Complainants") filed a "*Motion To Formally Admit Into Evidence Complainants' Deposition Excerpts Filed On March 31, 2006 ....*"[1] Gulf Power Company ("Gulf Power") filed its Objection on June 6, 2006, in accordance with a prescribed pleading schedule. *Order* FCC 06-15, released June 2, 2006. The Enforcement Bureau ("Bureau") has filed no pleading and takes no position on the issue.

2. Complainants' direct case was filed on March 31, 2006. *See Scheduling Order* FCC 05M-60, released December 16, 2005 (parties to file and exchange written testimony and exhibit lists on March 31, 2006). Included with other voluminous documents was a spiral bound volume entitled "Complainants' Designation of Deposition Testimony To Be Accepted Into Evidence" (referred to herein as "Complainants' Designation"). On the first-facing page of the volume, it was stated for all to see:

[1] The issue was earlier suggested in an e-mail which implied that all deposition excerpts were in evidence and that tabbing was appropriate to facilitate citations in post-hearing findings. But actually, the deposition excerpts were not in evidence. So when Gulf Power objected, the objection was sustained. The only recourse was for Complainants to file a formal motion.

> [Complainants] --- respectfully designate the following excerpts from sworn depositions conducted in this case as testimony to be accepted into evidence.

(Complainants' Designation at 1.)

3. Complainants' Designation initially included deposition excerpts of Bruce Burgess, Jeff Smith, Shayne Routh, Mark O'Ceallaigh, Ben Bowen, Rex Brooks, Michael Dunn, Thomas Forbes, Terry Davis, David Tessieri (Osmose), Roger Spain (expert). *See Order* FCC 06M-07, released April 12, 2006 at 2, n.4. After congenial discussion in open court, Complainants withdrew its own excerpted depositions of Messrs. Burgess, Smith, Routh, and O'Ceallaigh, and agreed to formally cross-designated those same excerpts as sponsored by Gulf Power, to be marked as Gulf Power Exhibits 66 through 69. (Tr. at 1551-53.) *Id.* Complainants neither marked and moved in evidence, nor withdrew their request that designated deposition excerpts "be accepted into evidence."

Statements in Court

4. At the hearing, Complainants' counsel referred to the deposition excerpts in Complainants Designation:

> MR. SEIVER: Well, I think I am tendering [Complainants' Designation].
>
> JUDGE SIPPEL: Mr. Seiver, you have a complainant's designation of deposition testimony to be accepted into evidence? Complainants? Is that the document you're referring to?
>
> MR. SEIVER: That is, Your Honor. And we withdrew the affirmative designations of the four complainants as being part of our case in chief, and we designated them as cross-designations to those that have been designated by Gulf.

(Tr. at 1291-92.) In another context, Gulf Power's counsel alluded to an understanding that both sides would be using selected deposition excerpts as evidence:

> MR. CAMPBELL: [W]e do have the right under the rules to use a deposition for any purpose in this proceeding, ---. And we also need to remember this rule [47 C.F.R. § 1.321] with respect to Mr. Seiver's case, because I think they have done the same thing. We have witnesses here and they designated testimony and tendered it as part of their case.

(Tr. 1299-1300.) This comment of counsel is cited here to illustrate the prevailing tenor in the courtroom which was to treat all of these deposition excerpts as mutually uncontested items of evidence.

Discussion

5. Failure by Complainants to mark and offer in evidence the deposition excerpts that are at issue here appears to have been an oversight, apparently prompted by confusion in withdrawing and cross-designating one grouping of deposition excerpts sponsored by Gulf Power, while overlooking those intended to be sponsored by Complainants. In the final analyses, these circumstances do not raise any inference that Complainants knowingly abandoned designated deposition excerpts as evidence, or made a concerted decision not to move them into evidence.

6. There are additional relevant circumstances. Gulf Power exchanged its own deposition excerpts on March 31, 2006. (*See* Gulf Power's Designation of Deposition Testimony, March 31, 2006 at 6-7.) After the Admission Session of April 10, 2006, the Presiding Judge *ordered* that "[a]ll pages of deposition excerpts and attached exhibits/ attachments must be internally paginated ... to accommodate ready reference in examination at hearing and in proposed findings and conclusions." *See Order* FCC 06M-07, released April 12, 2006. Consistent with a misunderstanding that Complainants' Designation excerpts had been received in evidence, Complainants coordinated internal pagination, as directed. Gulf Power never opposed Complainants' request that these excerpts be accepted into evidence, until responding to this motion.

7. Finally, Gulf Power argues that Complainants lost their opportunity to have these excerpts admitted in evidence once the hearing session was concluded, an implied waiver under practice and tradition of the time-honored "adversarial process." But Gulf Power never gave an indication that Complainants' deposition excerpts would become subject to challenge. The Commission's rules of practice contemplate liberal use of depositions at hearings in lieu of live testimony. *See* 47 C.F.R. § 1.321 (use of depositions at hearing). Certainly such deposition usage was contemplated in this case. Both parties diligently culled transcripts and prepared excerpts, combined some in Gulf Power's exhibits, and up until this point, there were no objections. Certainly, there is no element of surprise that raises any concern for fairness. These deposition excerpts, though relevant, are not even case-determinative. But it is conducive to the hearing to consider Complainants' proffered relevant evidence to the extent that Complainants cite and rely on deposition testimony of Gulf Power's employees and agents in proposed findings. *See* 47 C.F.R. § 1.243(f) (Presiding Judge regulates the course of the hearing).

Ruling

8. Based on "*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 Excerpts As Sequentially Numbered Exhibits*", that was filed by Complainants, Florida Cable Telecommunications Association, Inc., *et al.*, and in the interest of clarity of the hearing record,[2] Deposition Excerpts sponsored by Complainants ARE RECEIVED IN EVIDENCE as hearing exhibits, and SHALL BE MARKED AND TABBED as follows:

- Ben Bowen's Deposition Excerpts tabbed Complainants' Exhibit 84
- Rex Brooks' Deposition Excerpts tabbed Complainants' Exhibit 85
- Michael Dunn's Deposition Excerpts tabbed Complainants' Exhibit 86
- Thomas Forbes' Deposition Excerpts tabbed Complainants' Exhibit 87
- Terry Davis' Deposition Excerpts tabbed Complainants' Exhibit 88
- David Tessieri's Deposition Excerpts tabbed Complainants' Exhibit 89
- Roger Spain's Deposition Excerpts tabbed Complainants' Exhibit 90.

SO ORDERED.[3]

FEDERAL COMMUNICATIONS COMMISSION[4]

Richard L. Sippel
Chief Administrative Law Judge

---

[2] This procedure is conducive to clearer and more specific evidentiary designations in proposed findings, conclusions and replies which will facilitate an *Initial Decision*. Counsel for Complainant shall coordinate tabbing with other counsel, and with OALJ's staff.

[3] *Order* pursuant to authority of Presiding Judge under 47 C.F.R. § 1.243(f) (regulate course of hearing) and § 1.243(i) (dispose of procedural requests).

[4] Courtesy copies of this *Memorandum Opinion and Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.