

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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DOCKET FILE 05/14/06

In the Matter of:

FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION
V.
GULF POWER COMPANY

EB Docket No. 04-381

ORIGINAL

DATE OF HEARING: APRIL 25, 2006 VOLUME: 7

PLACE OF HEARING: WASHINGTON, D.C. PAGES: 887-1190

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IN THE MATTER OF)	EB Docket No.
)	04-381
FLORIDA CABLE TELECOMMUNICATIONS)	
ASSOCIATION, INC.; COMCAST CABLEVISION))	
OF PANAMA CITY, INC.; MEDIACOM)	
SOUTHEAST, L.C.C.; AND COX)	
COMMUNICATIONS GULF, L.C.C.,)	
)	
)	Complainants,
)	
v.)	
)	
GULF POWER COMPANY,)	
)	
)	Respondent.

Federal Communications Commission
 Hearing Room A, TW A-363
 445 12th Street, SW
 Washington, D.C.

VOLUME 7

Tuesday,
 April 25, 2006

BEFORE:

RICHARD L. SIPPEL
 Chief Administrative Law Judge

NEAL R. GROSS
 COURT REPORTERS AND TRANSCRIBERS
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 WASHINGTON, D.C. 20005-3701

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JUDY EASTERDAY, Technical Advisor
PATRICIA KRAVTIN, Technical Advisor

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I-N-D-E-X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
TERRY A. DAVIS	896	907		
BENJAMEN BOWEN	997	1005	1108	1119
ROBERT SPAIN	1121	1130		

<u>EXHIBITS</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>RECD</u>
<u>Respondent</u>			
E	Davis Direct Testimony	900	906
B	Bowen Direct Testimony	1003	1004
F	Spain Direct Testimony	1122	1130

Start Time: 9:00 a.m.
 Lunch: 11:53 a.m. to 1:16 p.m.
 End Time: 4:19 p.m.

P-R-O-C-E-E-D-I-N-G-S

(9:00 a.m.)

JUDGE SIPPEL: Let's go on the record.

The second of day of session -- hearing session. I want to just -- I have -- I just have a preliminary item I want to raise with you or just advise you of. The paralegal is working with -- my paralegal is working with the court reporter in correcting some notations on some documentary evidence that was inadvertently or erroneously received as received evidence, and it should be rejected evidence. She will provide you with the -- with a corrected pages of her evidence inventory sometime later this week so you'll know exactly what's transpiring. We've checked this with the transcript against my notes, and we're confident that we have it right, but we're certainly not going to leave, you know, we're not going to leave counsel out of the picture.

I just want to as Bureau counsel a general -- will you be participating in examination today?

MS. GRIFFIN: Yes, I don't -- I'm not sure yet, Your Honor. We may have some questions.

1 JUDGE SIPPEL: Okay. Fine.

2 MS. GRIFFIN: I don't have anything --

3 JUDGE SIPPEL: That's fine. I just don't
4 want to inadvertently pass you over. I want to be
5 sure that --

6 MS. GRIFFIN: And we're not shy. We will
7 be sure to --

8 JUDGE SIPPEL: Thanks, Ms. Griffin.

9 MS. GRIFFIN: -- make our wishes known.

10 JUDGE SIPPEL: Got you. Thank you. Okay.
11 That's it. Your next witness, Mr. Campbell?

12 MR. COOK: Your Honor, if we could before
13 we start, on the exhibits issue, I'd like to renew an
14 objection we made during the admissions session to the
15 reception into evidence of Gulf Exhibits 1, 2 and 3
16 which we Mr. Dunn's affidavits. We objected to them
17 as hearsay. There is no hearsay exception for them.
18 He testified, and I think Mr. Campbell established
19 through Mr. Dunn that they were submitted before the
20 APCco test had been established by the Eleventh
21 Circuit and that there was nothing in them about
22 capacity or crowding or lost opportunity, and since

1 they are part of the pleadings in the record of the
2 case before, the complaint proceeding before, I
3 thought we had taken an approach that we just could
4 not admit pleadings from the other cases, so I would
5 renew our objection and move to strike Gulf's Power's
6 Exhibits 1, 2 and 3.

7 JUDGE SIPPEL: Okay. All right.

8 MR. COOK: The problem with that, of
9 course, is that they have waived that objection
10 already. We dealt with this at the document admission
11 session. It was admitted. Mr. Dunn was on the stand
12 yesterday. No further objection was raised to the
13 admission of his testimony which incorporates those
14 exhibits, of course, and now that he's off the stand
15 to the extent that Your Honor would like an additional
16 foundation, I don't have the ability to lay that
17 foundation.

18 The documents were referred to in his
19 testimony, and the same arguments that we made during
20 the document admission session hold true today as they
21 did yesterday, that they had an opportunity to cross-
22 examine him. There were substantive references to

1 text in those documents. They authenticated documents
2 that were attached as exhibits to the affidavit which
3 have been admitted and relied on in Mr. Dunn's
4 testimony. You can't move to strike his testimony
5 after he's left the stand already.

6 MS. GRIFFIN: I'm not moving to strike his
7 testimony, Your Honor. What I saw as the question on
8 line six and seven is are you the same Michael Dunn
9 that submitted the three affidavits in this proceeding
10 that are marked as Gulf Power Exhibits 1 to 3
11 respectively. Yes. That's it?

12 JUDGE SIPPEL: So?

13 MS. GRIFFIN: I don't know how these
14 affidavits have anything to do with his testimony
15 other than the fact that he said he submitted them,
16 and we never challenged that.

17 JUDGE SIPPEL: Well, I mean there's so
18 much back and forth in the -- even in the pre-trial of
19 this case, about the inadequacy of Gulf Power's
20 proffer of proof -- you know, I don't know what it was
21 -- two years ago -- there are a myriad of reasons as
22 to why I think that should come in, in addition to the

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1 points that Mr. Campbell makes and, you know, it's
2 all a question of weight. I mean this is -- there's
3 not going to be a jury that's going to be misled by
4 Mr. Dunn's affidavits. Nobody's going to get misled
5 by them. So that's a judgment call on my part. It's
6 a discretionary call on my part. You have good
7 arguments to make for keeping it out, but I think that
8 Mr. Campbell has the better of them, and besides that,
9 even -- even if it were an even split, I would still
10 let them in for the reasons I've stated. So let's
11 move forward.

12 MR. COOK: Thank you, Your Honor.

13 JUDGE SIPPEL: Motion denied.

14 MR. LANGLEY: Your Honor --

15 JUDGE SIPPEL: Mr. Langley?

16 MR. LANGLEY: -- you want us to call our
17 next witness?

18 JUDGE SIPPEL: Please do.

19 MR. LANGLEY: Ms. Terry Davis from Gulf
20 Powers.

21 JUDGE SIPPEL: We have a lot of wires in
22 the courtroom these days so I --

1 THE WITNESS: I see that.

2 JUDGE SIPPEL: -- just want to be careful
3 that nobody -- that nobody hurts themselves walking up
4 to the witness stand.

5 THE WITNESS: Okay.

6 JUDGE SIPPEL: Would you please raise your
7 right hand, ma'am?

8 THE WITNESS: Yes, sir.

9 JUDGE SIPPEL: Please be seated.

10 WHEREUPON,

11 TERRY A. DAVIS
12 was called as a witness by Counsel for Respondent and,
13 having been first duly sworn, assumed the witness
14 stand, was examined and testified as follows:

15 JUDGE SIPPEL: Mr. Langley?

16 DIRECT EXAMINATION

17 BY MR. LANGLEY:

18 Q State your full name, please?

19 A My name is Terry A. Davis.

20 Q Are you the same Terry Davis that
21 submitted pre-filed, written direct testimony in this
22 case marked as Gulf Power Exhibit E?

1 A Yes, sir, I am.

2 Q And Ms. Davis, I noticed that you brought
3 to the stand with you a notebook. Is that correct?

4 A It is.

5 Q What is that notebook?

6 A This notebook contains my testimony as
7 well as my exhibits. There are numbered tabs here
8 representing the page numbers of my testimony. I've
9 also included FERC form 1 pages and some pages from
10 the roll forward ledger.

11 Q And why have you brought that with you to
12 the stand?

13 A I brought that with me as a reference.
14 There's a large number of numbers included in my
15 testimony. I wanted to be able to succinctly tie the
16 FERC Form 1 pages to the exhibits attached to my
17 testimony.

18 Q And if counsel for Complainants wants to
19 see that notebook, is that okay with you?

20 A Yes, it is.

21 Q Ms. Davis, do you have any corrections
22 that you would like to make to your pre-filed written

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1 direct testimony at this time?

2 JUDGE SIPPEL: Before we move there, do
3 you want to see this notebook?

4 MR. COOK: Yes, Your Honor.

5 JUDGE SIPPEL: Mr. Cook -- would you give
6 it to Mr. Cook while we --

7 THE WITNESS: Yes.

8 JUDGE SIPPEL: -- you search. All right.
9 Let the record reflect that the witness is handing a
10 notebook to Mr. Cook. Mr. Langley, you -- you can
11 proceed then. Can you proceed without the notebook?

12 MR. LANGLEY: I think she needs her
13 notebook to be able to discuss the changes that she
14 needs to make --

15 JUDGE SIPPEL: Oh, of the testimony?

16 MR. LANGLEY: -- to the testimony. Yes,
17 sir.

18 JUDGE SIPPEL: All right. Well, let's
19 just --

20 MR. COOK: Shall I hand it back at this
21 time or just take a moment to leaf through?

22 JUDGE SIPPEL: I think you can take a

1 moment to leaf through. We'll be alright.

2 MR. LANGLEY: And Your Honor, do you have
3 a copy of Ms. Davis' testimony?

4 JUDGE SIPPEL: I have -- yes, I do. Can
5 we move it into evidence at this point?

6 MR. LANGLEY: Well, I --

7 JUDGE SIPPEL: This is Gulf Power Exhibit
8 E?

9 MR. LANGLEY: I thought we would first
10 make the corrections and then move to admit the
11 corrected version.

12 JUDGE SIPPEL: Well, we can identify it
13 for the record. We can identify. This is -- this
14 document is the direct testimony -- written testimony
15 of Terry A. Davis, and it's been marked -- it will be
16 marked by the court reporter as for identification as
17 Gulf Power Exhibit E.

18 MR. LANGLEY: Yes.

19 JUDGE SIPPEL: Correct?

20 MR. LANGLEY: Correct.

21 JUDGE SIPPEL: Okay. All right. We have
22 identified -- and then we can make corrections and

1 then move it in.

2 (Whereupon, the aforementioned
3 document was marked for
4 identification as Gulf Exhibit
5 E.)

6 JUDGE SIPPEL: We're off the record until
7 Mr. Cook has completed.

8 (Whereupon, the matter went off the record
9 at 9:13 a.m. and back on the record at 9:14 a.m.)

10 JUDGE SIPPEL: We're on the record.
11 You've had a chance to look at the notebook, Mr. Cook?

12 MR. COOK: Yes, Your Honor -- this -- I
13 don't think we have any objection to this. However,
14 it does contain some handwritten notations on a lot of
15 the pages that are exhibits in Volume IV of Gulf
16 Power's binder, Exhibits 47 through 53, so I would ask
17 that in the spirit of fairness, and it doesn't have to
18 be right this second, but could we be provided with a
19 copy of this entire notebook just as it is so that we
20 -- when we go to write our proposed findings, we'll
21 also have reference to the same handwritten notations?

22 JUDGE SIPPEL: Well, I think -- please,

1 sir, return the notebook. Thank you ver much, Mr.
2 Cook. I think that the -- the way I'd like to see that
3 approached is that if she's testifying to a particular
4 page that has a notation that she -- that counsel
5 bring this out. In other words -- or another way or
6 doing it is that if she's testifying to a section or
7 a group of pages or even a page, the question can
8 certainly be asked is there any handwritten notes on
9 that. And in fact, I would instruct the witness that
10 if you are referring to something that, in your
11 notebook, that has a handwritten note, to advise
12 before you start answering questions about the
13 document saying that well, I've got some handwritten
14 notes on this.

15 Well, let me stop there for just a minute.
16 Are these your handwritten notes --

17 THE WITNESS: Yes.

18 JUDGE SIPPEL: -- or somebody else's?

19 THE WITNESS: No, they're mine.

20 JUDGE SIPPEL: All right. Do you
21 understand what I'm saying?

22 THE WITNESS: Yes, sir, I do.

1 JUDGE SIPPEL: Just say that yes, okay, on
2 this page I have written on the, you know, and then
3 you can answer the question from there.

4 THE WITNESS: Okay.

5 JUDGE SIPPEL: Will that satisfy?

6 MR. COOK: I think so. What -- what I
7 plan to do is since I've had access to this notebook,
8 the pre-filed exhibits, base my questions on a couple
9 of things from here, and I guess if the witness wants
10 to -- I'm referring to a particular page in one of the
11 filed exhibits, and if the witness says well, I have
12 some further comments based upon the notes then we can
13 reach --

14 JUDGE SIPPEL: All right. Well, let's not
15 take it any further than I've taken it, because I
16 think that this will answer your immediate concerns.
17 The other -- so that's one aspect of my ruling. The
18 other is is that the copies of every document that's
19 in that notebook that has her handwritten notes has to
20 be provided to counsel.

21 MR. LANGLEY: And we don't even mind
22 marking it as an exhibit if that is the preferred

1 means of handling it. What she has in that notebook
2 that she's testified to are cross references so that
3 when she's asked about a specific part of a specific
4 calculation, she'll have a notation and know which,
5 for example, FERC Form 1 to flip to.

6 JUDGE SIPPEL: I believe that. I believe
7 that. And maybe what we should do is wait until we go
8 through the testimony and then see, perhaps your
9 concerns or interest in it would be allayed. I know
10 that -- and you know, maybe we'll be able to handle it
11 an easier way when she's finished. I think that makes
12 sense. But I don't see the need to mark it as an
13 exhibit separately unless there's going to be -- and
14 there doesn't seem to be any -- there's no contesting
15 it here. It's just a question of --

16 MR. COOK: I agree with that, Your Honor.
17 In fact, I think it would be inappropriate at this
18 time to mark it as an exhibit --

19 JUDGE SIPPEL: All right.

20 MR. COOK: -- because we haven't seen it
21 in advance.

22 JUDGE SIPPEL: All right. Okay. Don't

1 take it -- you've won. Don't -- don't take it any
2 farther.

3 MR. COOK: Oh, I'm sorry.

4 JUDGE SIPPEL: Please sit down. Please
5 sit down.

6 MR. COOK: Yes, Your Honor.

7 JUDGE SIPPEL: And let's go forward. Mr.
8 Langley?

9 MR. LANGLEY: May I proceed?

10 JUDGE SIPPEL: Yes, sir.

11 BY MR. LANGLEY:

12 Q Ms. Davis, you said that you did have some
13 changes you wanted to make to your --

14 A Yes.

15 Q -- pre-filed written direct testimony?

16 A I have two small changes. They're both
17 found on page ten of my testimony.

18 Q Tell us the first change that you want to
19 make.

20 A The first change is on line 15. The very
21 last word on that line, average, should be replaced
22 with the word total.

1 Q Okay. What is your second change?

2 A The second change is on line 21 of that
3 same page. You see the paren that says two, the two
4 in parentheses, income taxes. It should say income
5 taxes on cost of capital.

6 Q And why are you making that change?

7 A That title that I just described is more
8 descriptive of what is shown on my exhibits.

9 JUDGE SIPPEL: Say that again, income
10 taxes on?

11 THE WITNESS: Cost of capital.

12 JUDGE SIPPEL: Cost of capital. And this
13 is on line 21?

14 THE WITNESS: Yes, sir.

15 JUDGE SIPPEL: Thank you.

16 BY MR. LANGLEY:

17 Q Ms. Davis, are those all of the
18 corrections that you want to make to your pre-filed
19 written direct testimony?

20 A Yes.

21 Q And with those changes, if I were to ask
22 you the same questions today, would you provide the

1 same answers?

2 A Yes.

3 MR. LANGLEY: Your Honor, we tender the
4 witness for cross examination. And we offer into
5 evidence Terry Davis' testimony and tender the
6 witness.

7 JUDGE SIPPEL: Is there any objection to
8 receipt of the testimony in evidence at this time?

9 MR. COOK: No, Your Honor.

10 JUDGE SIPPEL: Thank you, Mr. Cook. Then
11 Gulf Power Exhibit E which has been so identified is
12 hereby received in evidence as Gulf Power Exhibit E.
13 I take it a hard copy is being provided to the court
14 reporter at some point, correct? Thank you.

15 (Whereupon, the aforementioned
16 document, having previously
17 been for identification as Gulf
18 Power Exhibit E, was received
19 in evidence.)

20 JUDGE SIPPEL: Okay. Ms. Davis is
21 tendered as a cross -- for cross examination. Please
22 proceed -- Mr. Cook.

1 MR. COOK: Very good, Your Honor. Thank
2 you. Good morning, Ms. Davis. My name is Geoffrey
3 Cook. We'll be asking a few questions about the
4 testimony that's been admitted.

5 THE WITNESS: Good morning.

6 CROSS EXAMINATION

7 BY MR. COOK:

8 Q You are not -- you are not offering
9 testimony regarding the capacity of any of Gulf
10 Power's poles, are you?

11 A No, I'm not.

12 Q Okay. And you're not offering testimony
13 regarding any inability of Gulf Power to sell or lease
14 space to a party other than the complainants here,
15 correct?

16 A Would you repeat that question?

17 Q Yes. You're not offering any testimony
18 regarding any inability of Gulf Power to sell or lease
19 pole space to a party other than complainants,
20 correct?

21 A No, I'm not.

22 Q Okay. Your testimony only concerns

1 replacement cost calculations that you have prepared,
2 the replacement cost methodology that you have used,
3 and the calculation of the monetary differences
4 between your replacement costs and what the
5 complainants have paid? Is that correct?

6 A I think that's accurate.

7 Q Okay. And by definition, replacement
8 costs are separate and distinct from actual or what's
9 also referred to as historic or embedded costs. Is
10 that correct?

11 A That is true.

12 Q Okay. Replacement costs are based upon
13 the average cost of a new pole, correct?

14 A Yes.

15 Q Okay. And now in Mr. Dunn's testimony, he
16 testified that replacement cost was developed by Gulf
17 Power as a measure of the fair market value of space
18 on Gulf poles. Is that your understanding of that?

19 A Yes, that's a fair characterization.

20 Q Okay. In this litigation, Gulf Power
21 wants to charge the replacement cost rental rates for
22 every single pole that complainants are on, correct?

1 A That's true.

2 Q Okay. But your calculation of the
3 replacement cost value is not tied to the actual
4 conditions on the poles to which a cable operator
5 complainant is attached, correct?

6 A That's correct. My replacement cost
7 methodology is a -- based on averages.

8 Q Right. In fact, you testified at your
9 deposition when you looked at the replacement cost for
10 a 40-foot pole, you were quote "looking at it to avoid
11 actual field conditions that a cable operator might be
12 experiencing with his attachments to a particular
13 pole," right?

14 MR. LANGLEY: Your Honor, I -- I'd like to
15 object until she has an opportunity to at least see
16 her deposition testimony.

17 MR. COOK: Well, I can -- Your Honor, I
18 believe that's appropriate to ask from memory first.

19 JUDGE SIPPEL: Yes, you may. Mr. Cook --
20 yes, Mr. Cook is correct. Go forward.

21 THE WITNESS: I do not recall that.

22 MR. COOK: Okay.

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