

ORIGINAL

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

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COMMISSION
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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

**COMPLAINANTS' SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO GULF POWER COMPANY**

Pursuant to 47 C.F.R. § 1.325 and the Presiding Judge's Discovery Order dated August 5, 2005, 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"),

CMP _____ submit this Second Set of Requests for Production of Documents to Respondent Gulf
COM _____
CTR _____ Power Company ("Gulf Power" or "Plaintiff"). Respondent must respond in writing
ECR _____ within 10 days of the date of service of these Requests.¹ The instructions and definitions
GCL _____ that follow are integral to the Requests and should be reviewed carefully.

OPC _____

RCA _____

SCR _____

SGA _____

SEC

OTH _____

¹ See 47 C.F.R. § 1.325(2).

DOCUMENT NUMBER-DATE

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DEFINITIONS

1. “Action” refers to the above-captioned matter.

2. “*Alabama Power v. FCC* standard” or “*Alabama Power v. FCC* test”

means the determination by the United States Court of Appeals for the Eleventh Circuit in *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003), that:

... before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.

3. “And” *and* “or” as used herein are inclusive, and shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request matters that might otherwise be construed to be outside its scope.

4. “Any” means one or more.

5. “Attaching entity” includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities (including Gulf Power Company), governmental entities and other entities with a physical attachment to pole(s).

6. “Attachment” or “Pole Attachment” means any attachment by an attaching entity, as defined above, to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

7. “Cable operator” means a person who provides cable service or owns operates or controls, in whole or in part, one or more cable systems.

8. “Change-out” means the replacement or substitution of a pole, or the act of replacing or substituting a pole, whether as part of the make-ready process pursuant to an attachers’ request, as required by any governmental entity, or as necessitated by Gulf Power for the provision of electricity services.

9. “Complainants” means 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. and their predecessors, successors, subsidiaries, parents, divisions or affiliates.

10. “Complaint” means the complaint filed by the Complainants in this action, and any amendments or supplements thereto that have been filed.

11. The terms “communicated” or “communication” include every manner or means of disclosure, transfer or exchange of information, and every disclosure, transfer or exchange, whether face-to-face, by telephone, in writing, whether in hard copy or electronically, by email, by mail, personal delivery or otherwise.

12. “Communications attacher” means a person providing all lawful communications services, including but not limited to, cable services, telecommunications services and/or information services, who attaches to poles owned or controlled by Gulf Power.

13. “Description of Evidence” means *Gulf Power’s Description of Evidence Gulf Power Seeks to Present In Satisfaction of The Eleventh Circuit’s Test*, filed January 8, 2004 with the Enforcement Bureau of the Federal Communications Commission.

14. “Document” means written, recorded or graphic materials of any kind, whether prepared by You or by any other person, and that is in Your possession, custody

or control. The term includes agreements, contracts, letters, emails, telegrams, inter-office communications, memoranda, reports, records, instructions, specifications, notes, notebooks, scrapbooks, diaries, diagrams, photographs, photocopies, charts, graphs, descriptions, drafts, minutes of meetings, conferences, telephone calls or other conversations or communications, recordings, published or unpublished speeches or articles, publications, transcripts of telephone conversations, ledgers, financial statements, microfilm, microfiche, tape, video, disk or diskette recordings and computer printouts. The term "document" also includes electronically stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The term "document" includes the original document (or a copy thereof if the original is not available) and all copies that differ in any respect from the original, including but not limited to any notation, underlining, marking or information not on the original.

15. "FCC" or "Commission" means the Federal Communications Commission.

16. "FCC Formula" refers to the methodology prescribed by the Federal Communications Commission, which appears at 47 C.F.R. § 1.1409.

17. "Gulf Power" means and refers to Gulf Power Company, and each of its affiliated corporations, parents, subsidiaries, divisions and other organizations or operating units, its predecessors and successors-in-interest, and each of its present and former directors, officers, agents, employees, voting trustees, auditors, accountants, attorneys, servants or representatives, including but not limited to employees, consultants, attorneys or other agents having possession, custody or control of documents or

information called for by these requests, and all other persons acting or purporting to act on its behalf.

18. "Identify" or "identity" means to state or a statement of:

- a. In the case of a person other than a natural person, its legal name, the address of its principal place of business, its telephone number, and the name of its chief executive officer;
- b. In the case of a natural person, his or her name, business telephone number, home and business addresses, employer, and title or position;
- c. In the case of a service, the identity of its producer or distributor and its trade name;
- d. In the case of a document,
 - (i) the title of the document,
 - (ii) the author(s),
 - (iii) the title or position of the author(s),
 - (iv) the addressee(s),
 - (v) the title or position of the addressee(s),
 - (vi) the type of document,
 - (vii) the date it was prepared,
 - (viii) the number of pages it comprises,
 - (ix) the identity of all persons indicated as receiving copies of the documents,
 - (x) the identity of all persons who have received copies of, or been shown the document or any part thereof,
 - (xi) its subject matter,
 - (xii) its present location or custodian, and
 - (xiii) a reference to the document, if it has been produced;
- e. In the case of geographic boundaries, location or coverage, a narrative description identifying the states and the areas of such states and all political subdivisions thereof included, in whole or in part, within the geographic boundaries, location or coverage.
- f. In the case of a verbal communication, discussion or meeting,
 - (i) the type of communication, discussion or meeting,
 - (ii) its date or approximate date,
 - (iii) the identity of its participants or attendees,
 - (iv) its general subject matter, and

- (v) a description of any documents or tangible objects used or referred to in the course of the discussion, summarizing, recounting, or referring to the verbal communication, discussion or meeting.

19. “Including” means including but not limited to.

20. “Information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing.

21. “Make-ready” means all work, costs and expenses associated with affixing Complainants’ attachments to poles owned or controlled by Gulf Power, including but not limited to pole change-outs, placement, rearrangement or transfer of facilities or other changes necessary to accommodate Complainants’ attachments or other attachers’ facilities in a network of poles.

22. “Or” means and/or.

23. “Person” means any natural person, corporation, partnership, company, sole proprietorship, unincorporated association or society, incorporated association, institute, joint venture, firm, governmental body or other legal entity, whether privately or publicly owned or controlled, for profit or not-for-profit or partially or fully government owned or controlled.

24. “Pole” means any utility pole owned or controlled by Gulf Power to which attachments are or may be affixed.

25. “Relate to” and “relating to” mean, without limitation, to make a statement about, refer to, discuss, describe, reflect, contain, identify or in any way pertain to, in whole or in part, or being logically, legally or factually related.

26. "Respondents" refers to Gulf Power Company, as defined above, and its agents, representatives, officers, directors and employees.

27. "Safety Space" means the vertical clearance between communications lines and electric lines on poles as set forth in the National Electrical Safety Code (NESC Table 235-5).

28. "Telecommunications" means the transmission, between or among points specified by the users, of information of the user's choosing, without change in the form or content of the information as sent or received.

29. "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or such classes of users as to be effectively available to the public, regardless of the facilities used, and includes without limitation dark fiber.

30. "You," "you," "Your" and "your" mean and refer to Gulf Power Company, as defined above.

31. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun, and vice versa. The masculine form of a noun or pronoun shall be considered to include within its meaning the feminine form of the noun or pronoun, and vice versa.

32. Regardless of the tense employed, all verbs shall be read as applying to the past, present and future as is necessary to make any paragraph more, rather than less, inclusive.

INSTRUCTIONS

1. In accordance with Rule 1.325 of the Federal Communications Commission, answer each document request separately, unless it is objected to, in which

event, state reasons for objection in lieu of an answer, and answer each other portion of the document request to which no objection is asserted.

2. If you are unable to answer a document request fully, submit as much information as is available and explain why Your answer is incomplete. If precise information cannot be supplied, submit (a) Your best estimate or judgment, so identified, and set out the source or basis of the estimate or judgment, and (b) provide such information available to you as best approximates the information requested. Where incomplete answers, estimates or judgments are submitted, and you know of or have reason to believe there are other sources of more complete or accurate information, identify or describe those other sources of information.

3. In responding to document requests, preface each answer by restating the request to which the answer is addressed. Where a request for information includes subparagraphs (*e.g.*, (a), (b), (c)), or subdivisions (*e.g.*, (i), (ii), (iii)), answer each subparagraph or subdivision separately.

4. These document requests are continuing in nature and include all documents and information prepared or received by you between the date of receipt of this request and the date of final determination in the hearing designated in this Action. Unless otherwise expressly provided, each document request covers any document or information prepared, received, distributed, or in effect during the period from January 1, 1998 unless otherwise stated to the date of final determination in the hearing. Your responses to these document requests should be supplemented as soon as you receive and/or become aware of supplemental information but in any case not later than thirty (30) days prior to any hearing addressing the merits of any party's claim or defenses.

5. For any objection that is based on an asserted claim of privilege, state:
- (a) a brief description of the subject matter of the asserted privileged information;
 - (b) the nature of the privileged claimed;
 - (c) the paragraph(s) of the interrogatory to which the information is otherwise responsive;
 - (d) the nature and basis of the privilege claimed;
 - (e) the source(s) of the information; and

the identities of all persons to whom such information has been communicated or with whom it has been shared, in whole or in part.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce, and specify by Bates number, all documents referring to any instance, from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments.

2. Produce, and specify by Bates number, all documents referring to the actual costs that Gulf Power has incurred annually because of Complainants' attachments (including per-pole costs and aggregate costs), as reflected in its accounting books or records of expenses, from 1998 through the present.

3. Produce, and specify by Bates number, all documents referring to compensation that Gulf Power has received from each of the Complainants from 1998 through the present.

4. Produce, and specify by Bates number, all documents referring to Gulf Power poles that have been changed out from 1998 to the present at Complainants' request, including documents referring to compensation received by Gulf Power from Complainants for such change-outs.

5. Produce, and specify by Bates number, all documents referring to Gulf Power poles containing Complainants' attachments that have been changed out from 1998 to the present at the request of cable television attachers other than Complainants, including documents referring to compensation received by Gulf Power from such entities for such change-outs.²

6. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at Complainants' request on Gulf Power poles from 1998 to the present, including documents referring to compensation received by Gulf Power from Complainants for such make-ready work.

7. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at the request of cable television attachers other than Complainants on Gulf Power poles containing Complainants' attachments from 1998 to the present, including documents referring to compensation received by Gulf Power from such cable television attachers for such make-ready work.³

8. Produce, and specify by Bates number, all documents referring to Gulf Power's upgrades, modernization, strengthening, or replacements of poles containing

² Pursuant to the Presiding Judge's ruling excluding as irrelevant "evidence of change-outs relating to non-CATV attachments," Complainants' request inquires about only cable (CATV) attachments. *See* Discovery Order, p. 10.

³ Pursuant to the Presiding Judge's ruling excluding as irrelevant "evidence of change-outs relating to non-CATV attachments," Complainants' request inquires about make-ready only for cable (CATV) attachments. *See* Discovery Order, p. 10.

Complainants' attachments from 1998 through the present, including documents referring to money Gulf Power obtained to pay for such upgrades, modernization, strengthening, or replacements.

9. Produce, and specify by Bates number, all documents which Gulf Power relied or relies upon when it contended, in its Description of Evidence, that "Gulf Power intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments."⁴

10. Produce, and specify by Bates number, all documents which Gulf Power relied or relies upon when it contended, in its Description of Evidence, that it intends to submit "photographic and engineering evidence depicting attachment arrangements on distribution poles" and that it "seeks to introduce evidence of what actual distribution poles look like."

11. Produce, and specify by Bates number, all documents which Gulf Power relied or relies upon when it contended, in its Description of Evidence, that it "seeks to introduce precise, yet simple, testimony (from fact and expert witnesses) regarding the crowding on its network of poles, and the rivalrous nature of its finite pole space."⁵

12. In light of the Presiding Judge's ruling that "this hearing is limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments"

⁴ Pursuant to the Presiding Judge's ruling excluding as irrelevant "evidence of change-outs relating to non-CATV attachments," Complainants' request inquires about only instances where Gulf Power contends it had to change out a pole for its own purposes because of cable (CATV) attachments. *See* Discovery Order (Aug. 5, 2005), p. 10.

⁵ Pursuant to the Presiding Judge's ruling that, when summaries of expert testimony are exchanged, "the parties shall be required to identify all documents seen by testifying experts in connection with formulating testimonial opinions that are subject to cross examination," this request, at the present time, seeks documents relating to the testimony of "fact" witnesses. *See* Discovery Order (Aug. 5, 2005), p. 19 n. 14.

and his order excluding as irrelevant evidence “relating to non-CATV attachments,”⁶ produce, and specify by Bates number, all documents which Gulf Power relied or relies upon in making its contention, in its Description of Evidence, that there is an “unregulated market for pole space,” to the extent that that contention applies to CATV attachments.

13. Produce, and specify by Bates number, all documents referring to the “other evidence bearing on the factors set forth in the Eleventh Circuit’s test, as Gulf Power claimed it had in its Description of Evidence.

14. Produce, and specify by Bates number, all documents referring to sources (i.e., Gulf Power’s own inventory, the inventories of ILECs with whom Gulf Power has joint use agreements, or other, third-party suppliers) from which Gulf Power has obtained new poles, from 1998 through the present, in order to change-out poles containing Complainants’ attachments.

15. Produce, and specify by Bates number, all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power’s retention of its consultant Osmose in February 2005, that depict the specific Gulf Power poles containing Complainants’ attachments that Gulf Power contends were or have been at “full capacity.”

16. Produce all Gulf Power documents, including cost records or other accounting data, that reflect payment to Gulf Power by a cable television attacher other than Complainants’ of an annual pole rental rate higher than that paid by Complainants.⁷

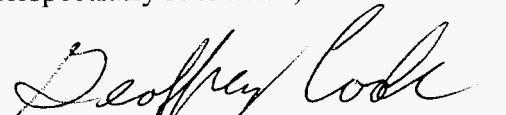
⁶ See Discovery Order (August 5, 2005), p. 10

⁷ Pursuant to the Presiding Judge’s ruling that Gulf Power “has effectively waived ever charging Complainants a \$40.60 rate,” and his Order excluding as irrelevant evidence “relating to non-CATV

17. Produce, and specify by Bates number, all documents upon which Gulf Power relied in filing its Description of Evidence that it has not already produced to Complainants and that it has not already specified in response to previous requests in this Second Request for Production of Documents.

18. Produce, and specify by Bates number, all documents concerning pole space reserved for future use for "core electricity operation" that would be a further response to Interrogatory No. 34, including any Southern Company or affiliate distribution construction specifications, guidelines or standards contained in or part of any book, manual or other documentary compilation.

Respectfully submitted,



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August 10, 2005

attachments," this request asks only for Gulf Power's records pertaining to rates paid by CATV attachers other than Complainants.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Complainants' Second Set Of Requests For Production Of Documents To Gulf Power Company* has been served upon the following by electronic mail, telecopier and U.S. Mail on this the 10th day of August, 2005:

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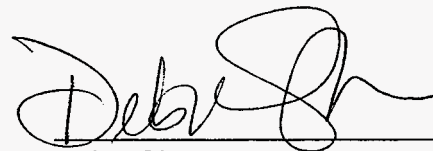
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