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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

To: Office of the Secretary

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

**COMPLAINANTS' MOTION TO COMPEL (1) GULF POWER'S PRODUCTION OF DOCUMENTS NEEDED BY COMPLAINANTS TO PREPARE FOR THE HEARING, AND (2) FURTHER RESPONSES TO INTERROGATORIES AS TO WHICH THE PRESIDING JUDGE PREVIOUSLY REQUIRED SUPPLEMENTAL RESPONSES**

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, LLC ("Complainants"), by their attorneys and pursuant to

**CMP** \_\_\_\_\_  
**COM** \_\_\_\_\_ 47 C.F.R. §§ 1.323(c) and 1.325(a)(2) and this Court's Order dated August 5, 2005, respectfully  
**CTR** \_\_\_\_\_ submits their Motion to Compel Gulf Power Company's ("Gulf Power") Production of Documents  
**ECR** \_\_\_\_\_  
**GCL** \_\_\_\_\_ Needed to Prepare for the Hearing, and (2) Further Responses by Gulf Power to Interrogatories as to  
**OPC** \_\_\_\_\_ which the Presiding Judge Previously Required Supplemental Responses. Complainants request the  
**RCA** \_\_\_\_\_  
**SCR** \_\_\_\_\_ opportunity to present oral argument on this Motion.

**SGA** \_\_\_\_\_  
**SEC**   1    
**OTH** \_\_\_\_\_

DOCUMENT NUMBER-DATE

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## BACKGROUND

The August 5, 2005 Discovery Order (“Discovery Order”) provides the context and basis for this Motion. First, the Discovery Order gave Complainants an opportunity to submit revised, narrowed document requests to Gulf Power. Complainants pursued this course by serving their Second Set of Document Requests on August 10, 2005, after first conferring by telephone with counsel for Gulf Power as to the scope of that request and by focusing the request upon the standard set forth in the Eleventh Circuit’s *Alabama Power* decision<sup>1</sup> and upon the claims made by Gulf Power in its January 2004 Description of Evidence. The Discovery Order stated that if necessary, on August 31, 2005, Complainants could file a motion to compel the production of such documents, which will be necessary for both depositions beginning in mid-September as well as the Hearing. Second, the Discovery Order required Gulf Power to supplement its answers to numerous of Complainants’ previous Interrogatories by August 26, 2005.

Complainants respectfully submit this Motion because Gulf Power’s answers to nearly a dozen of the document requests in Complainants’ Second Set have not been answered with sufficient specificity, or have not been answered at all. As we will discuss in more detail below, in most cases, Gulf Power’s response to the document requests that are the subject of this Motion was simply to claim that the responsive documents were among those “made available for inspection” previously, without providing any identifying markers such as precise locations, offices, files, and, most importantly, specific document numbers or titles. Gulf Power’s answer amounts to a taunt – we’re not going to identify which documents we relied upon or will rely upon and Complainants will have to guess what they were and will be. While Complainants have made good faith efforts to inspect Gulf Power documents, as described in their initial Motion to Compel, they cannot fairly be

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<sup>1</sup> *Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002)(“*Alabama Power*”).

expected to search through unspecified Gulf Power documents to find the documents Gulf asserts are the ones it was relying upon when it filed its “Description of Evidence” and made its claims in this proceeding.<sup>2</sup> Instead, it is Gulf Power’s burden to identify and specify the documents upon which it relied to convince the Bureau to designate this matter for hearing and upon which Gulf power intends to rely at the hearing in this proceeding.

In addition, because Gulf Power’s supplemental answers to several of Complainants’ interrogatories fail to comply with the Presiding Judge’s Discovery Order, Complainants move to compel further responses to several of their Interrogatories.

## ARGUMENT

### I. Specific Requests from Complainants’ Second Set of Document Requests

#### Request No. 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.

#### Gulf Power’s Response:

The documents which would reflect instances where Gulf Power could not accommodate an additional attacher on a pole already occupied by complainants would be Gulf Power’s make-ready documents, made available for inspection and copying during the May 27-28, 2005 document review. None of these documents have been Bates labeled.

#### Argument:

This request asks Gulf Power to produce the documents upon which it will rely to meet one of the two key elements of the *Alabama Power* decision – proof of a “lost opportunity,” 311 F.3d at 1370-71, to accommodate an additional attaching party caused by “full capacity” on a specific pole

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<sup>2</sup> See Discovery Order, 21 n.17.

that already includes Complainants' attachments. Yet Gulf Power's answer fails to identify a single responsive document upon which it intends to rely at the Hearing that shows any such example of a lost opportunity. Instead, Gulf Power relies upon a cavalier suggestion that it has already "made available for inspection" such documents, and Complainants should go find them. Which documents? Where? What files? What are the documents' names or numbers? Gulf Power only refers generally to "make-ready documents." As the Presiding Judge has noted several times, Gulf Power has burden to show that it meets the *Alabama Power* standards for specific poles. See April 15, 2005 Status Order. But by failing to identify which "make-ready documents" it intends to rely upon at the Hearing that might show a "lost opportunity," Gulf Power has not met the obligation to answer discovery in good faith. Moreover, Gulf Power's use of the subjective tense, by referring to documents "which would reflect" such instances, suggests that Gulf Power *itself* has not identified documents showing a lost opportunity to provide an attachment to a third party. Gulf Power alleges that "[n]one of these documents have been Bates labeled." But if Gulf Power knows of the existence of any such documents, they should be "itemized" and specifically identified, as the Presiding Judge stated about other documents upon which Respondent intends to rely. See Discovery Order, 6, 20 n.16. It is not up to Complainants to find out which documents in the many files support Gulf Power's contentions. Parties often use references to collections of business records to respond to discovery requests, including interrogatories. In federal court, that process is memorialized under Fed. R. Civ. P. 33(d).<sup>3</sup> However, pointing to a mass of documents to support their own claim or contention in responding to discovery is not appropriate.

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<sup>3</sup> The Commission's discovery procedures derive in part from the Federal Rules of Civil Procedure. See *In re Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures*, 11 F.C.C. 2d 185, 186 (1968).

Plaintiff cannot escape her responsibility of providing direct, complete and honest answers to interrogatories with the cavalier assertion that required information can be found in this massive amount of material. Rather plaintiff must state specifically and precisely which documents will provide the desired information.<sup>4</sup>

Even if Complainants were to examine every document, that would not mean that any particular document is responsive to the request framed by the Complainants which seeks the specific documents pertaining to Gulf Power's contentions, not just all make-ready documents that Gulf Power may have. Clearly, not every document, make-ready or other, in Gulf Power's files is possibly responsive or supportive of its claims.<sup>5</sup>

Request No. 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.

Gulf Power's Response:

Gulf Power objects to this request on the grounds that it is vague and ambiguous. Subject to and without waiving these objections, the documents which would reflect costs incurred as a result of complainants' attachments are the make-ready work orders produced during the May 27-28, 2005 document review.

Argument:

Complainants' document request No. 2 reasonably and straightforwardly asks for the documents supporting the costs that Gulf Power claims to have incurred because of Complainants' attachments. The request is directly relevant to the Hearing in this case, because, as the Hearing Designation Order stated, the primary issue in this proceeding is whether Gulf Power can sustain a constitutional claim for "compensation greater than marginal costs for any

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<sup>4</sup> *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 315 (E.D. Pa. 1980).

<sup>5</sup> Indeed, some of the make-ready documents Complainants found actually refute Gulf's claims and contentions. *See* Complainants' Motion to Dismiss, filed August 1, 2005, at pages 24-25.

attachments” of Complainants. See Hearing Designation Order, ¶ 11. Accordingly, Complainants are clearly entitled to the production of Gulf Power’s records showing the costs it claims to have incurred from Complainants’ attachments. This request is also critical as a matter of law, since the constitutional standard of proof that Gulf Power must satisfy in order to claim compensation greater than marginal costs is measured by “the loss [of] the person whose property is taken.” See *Alabama Power*, 311 F.3d at 1369.

Gulf Power’s answer fails to identify a single responsive document. Once again, it relies upon a cavalier suggestion that it has already “made available for inspection” such documents, and Complainants should go find them. As discussed above in reference to document request No. 1, if Gulf Power knows of the existence of any such documents, they should be “itemized” and specifically identified, as the Presiding Judge stated about other documents upon which Respondent intends to rely. See Discovery Order, 6, 20 n.16. In general, make-ready documents do show costs that have been charged to and paid for attachments. But pointing to files and saying that somewhere in there are documents that will show these costs that Gulf Power has itself alleged is not responsive. This is particularly true for this request, which seeks the costs that Gulf Power claims are attributable to Complainants’ attachments, not to other attaching entities.

Request Nos. 4, 5, 6, and 7.

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.

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.

Gulf Power's Response to Requests 4-7:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

Argument:

These four requests ask for documents pertaining to change-outs and other make-ready done specifically at the request of Complainants, or cable television attachers other than Complainants. The requests are based directly upon contentions made in Gulf Power's January 2004 Description of Evidence. In its Description of Evidence, Gulf Power claimed that it had evidence of "where a change-out was required due to lack of capacity" and other "make-ready work for Gulf Power's CATV attachers," and that such evidence allegedly "satisfies parts 1 and 2(a) of the Eleventh Circuit's test." See Description of Evidence, ¶¶ 4-6. Those elements of the "test," of course, involve the showing for "each pole" of both "full capacity" and a demonstrable "higher valued use" provided either by a third party buyer or by Gulf Power itself that was lost. Gulf Power stated that it "seeks to present documentary evidence" regarding such change-outs and make-ready "in



satisfaction of” the Eleventh Circuit’s *Alabama Power* requirements. *Id.* at ¶ 6. In its Second Request for Production of Documents, Complainants’ four requests were specifically narrowed to inquire about Gulf Power’s alleged change-outs and make-ready relating to Complainants’ attachments and those of other cable [CATV] attachers, because the Presiding Judge, in the Discovery Order, ruled that “evidence of change-outs [and make-ready] relating to non-CATV attachments” would be excluded at the Hearing. *See* Discovery Order, 10. Complainants’ therefore asked for the documents pertaining to change-outs and make-ready that Gulf Power claimed in its Description of Evidence that it would “seek to present” at the Hearing in this case. The requests reasonably included documents pertaining to compensation Gulf Power has received for change-outs and make-ready for CATV attachments, since Gulf Power had contended in its Description of Evidence that the documents it had on this subject also satisfied the “higher valued use” requirement of the *Alabama Power* test. Accordingly, Gulf Power’s relevancy objection is not only directly inconsistent with its claims in the Description of Evidence but completely unfounded.

After stating its spurious objection, Gulf Power fails to identify a single responsive document. Once again, it relies upon a cavalier suggestion that it has already “made available for inspection” such documents, and Complainants should go find them. As discussed above in reference to document request No. 1, if Gulf Power knows of the existence of any such documents, they should be “itemized” and specifically identified, as the Presiding Judge stated about other documents upon which Respondent intends to rely. *See* Discovery Order, 6, 20 n.16.

Request No. 8:

Produce, and specify by Bates number, all documents referring to Gulf Power’s upgrades, modernization, strengthening, or replacements of poles containing Complainants’ attachments from 1998 through the present, including documents referring to money Gulf Power obtained to pay for such upgrades, modernization, strengthening, or replacements.



Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, unduly burdensome, vague, and seeks information which is irrelevant to the hearing issues.

Argument:

Request No. 8 asks for documents pertaining to Gulf Power's "upgrades, modernization, strengthening, or replacements of poles containing Complainants attachments." This focused request, which is stated clearly and concisely, is directly relevant to the issue of the capacity of Gulf Power's poles in two ways. First, if Gulf Power is claiming an entitlement to compensation, based upon alleged "full capacity" and "higher valued uses," dating back several years for particular poles, Complainants are entitled to know what measures Gulf Power has taken that affect the capacity of those poles during the past several years. Second, documents pertaining to past strengthening and replacement of poles are directly relevant to and probative evidence of Gulf Power's custom of following the utility industry practice of strengthening and replacing poles whenever necessary to provide capacity for new attachments. Accordingly, Gulf Power's complete refusal to provide any such documents is without merit.

Request No. 12:

In light of the Presiding Judge's ruling that "this hearing is limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments" and his order excluding as irrelevant evidence "relating to non-CATV attachments," 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.

Gulf Power's Response:

Gulf Power does not interpret the Discovery Order to mean that evidence regarding what other attachers pay for the same space

occupied by complainants will be excluded as irrelevant. This would be legally incorrect, and at odds with Gulf Power's burden to demonstrate a more appropriate alternative rate. Gulf Power relied, in part, upon the attachment agreements and billing information for attachers paying more than complainants. These documents are within Bates range Gulf Power 00826-2309, and other such documents were made available at the May 27-28, 2005 document review.

Argument:

The Discovery Order ruled that the hearing would be "limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments" and that Gulf Power would be excluded from presenting evidence relating to "non-CATV attachments." *See* Discovery Order, 10, 11. Complainants understand this ruling to mean that Gulf Power is precluded from offering evidence pertaining to entities other than CATV attachers or what those non-CATV attachers pay, or are willing to pay, to attach to Gulf Power poles.<sup>6</sup> With this context, Complainants' Request No. 12 asked Gulf Power to produce documents that there is, as Gulf Power claimed in its Description of Evidence an "unregulated market for pole space" *for CATV attachments*.

Gulf has not answered this question. First, Complainants have examined the attachment agreements and billing information within Bates range 00826-2309, and Complainants have not seen a single document showing a CATV attacher who is paying an unregulated rate. Gulf Power's reference to these documents, which concern telecommunications attachments by telecommunications companies, not CATV attachers, ducks Complainants' question about whether Gulf Power has any documents showing a cable television company paying an unregulated attachment rate (during or after the year 2000). Second, Gulf Power once again suggests that it has already "made available for inspection" such documents, and Complainants

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<sup>6</sup> Otherwise, Complainants should not be precluded from requesting discovery information about non-CATV attachments.

should go find them. However, as discussed above in reference to document request No. 1, if Gulf Power knows of the existence of any documents showing that a cable television company has paid an unregulated attachment rate, they should be “itemized” and specifically identified, as the Presiding Judge stated about other documents upon which Respondent intends to rely. *See* Discovery Order, 6, 20 n.16.

Request No. 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.

Gulf Power’s Response:

Gulf Power objects to this request on the grounds that it seeks information which is not relevant to the hearing issues.

Argument:

Request No. 14 asks Gulf Power to produce documents pertaining to the sources from which it obtains poles to change-out poles already containing Complainants’ attachments. Gulf refuses to answer, claiming that the request is not relevant. But Gulf’s objection cannot be sustained. The question goes to Gulf Power’s ability to provide, and custom of providing, capacity for attachers on poles containing Complainants’ attachments. In Gulf Power’s Description of Evidence, it claimed that it had evidence involving pole change-outs that it argued would satisfy the *Alabama Power* requirement of full capacity. *See* Description of Evidence, ¶¶ 4-6. Complainants posed this document request in order to test the truth of Gulf Power’s contention, and specifically, to see whether, in fact, as Complainants understand, Gulf Power customarily and regularly draws from its pole inventory sources to change-out existing poles and thereby provide capacity for new attachers.

Moreover, in the Discovery Order, the Presiding Judge required Gulf Power to respond to a question about poles containing Complainants' attachments that have been "changed out." See Discovery Order, 10 (ruling on Interrogatory No. 20). In sum, Request No. 14 seeks relevant documents that Complainants intend to use in depositions and at the Hearing.

Request No. 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."

Gulf Power's Response:

Gulf Power made all such documents available during the May 27-28, 2005 document review. Certain of these documents were among those copied for complainants following the document review, at complainants' request.

Argument:

Request No. 15 seeks the production of the maps and diagrams, created before it hired its consultant Osmose, that actually depict the *specific* poles containing Complainants' attachments that Gulf Power contends were or are at "full capacity." Gulf Power's answer – essentially that it made "available" such documents already – is another attempt to make Complainants find the needle in the haystack. This question doesn't ask for all Gulf Power's maps and diagrams; it asks only for maps and diagrams that show which specific poles that Gulf contends meet the *Alabama Power* test, to the extent Gulf Power had any such documents before it hired Osmose. Gulf Power's answer – a sort of "we gave you that already" – doesn't answer the question. Complainants have not seen any Gulf Power maps or diagrams created before Osmose was hired in February 2005 that show which individual poles Gulf Power contends were at full capacity. If

Gulf Power knows of the existence of any such maps or diagrams, they should be “itemized” and specifically identified (by Bates number), as the Presiding Judge stated about other documents upon which Respondent intends to rely. *See* Discovery Order, 6, 20

Request No. 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.

Gulf Power’s Response:

Gulf Power already produced a number of CATV attachment agreements reflecting payment to Gulf Power in excess of the rents paid by complainants.

Argument:

Similar to Request No. 12, Request No. 16 asks Gulf Power to produce any documents it has that Gulf Power contends are evidence of a cable television attacher paying an annual pole rental rate higher than that paid by Complainants. Gulf Power claims that it has “already produced” some documents but doesn’t identify any such documents, either by Bates number or other identifying information. If Gulf Power knows of the existence of any documents showing that a cable television company has paid an attachment rate greater than that paid by Complainants, they should be “itemized” and specifically identified, as the Presiding Judge stated about other documents upon which Respondent intends to rely. *See* Discovery Order, 6, 20 n.16.

**II. Interrogatories.**

The Discovery Order granted Complainants’ previous Motion to Compel, at least in part, as to Interrogatories 8, 11, 12, 16, 17, 20, 24, 25, 34, 35, 36, 45, and 46. As to each of these Interrogatories, the Discovery Order required Gulf Power to revisit their answers and provide a more specific answer. However, in several instances involving Interrogatories 8, 20, 25, 34, 35, and

46, Gulf Power has not complied with the Discovery Order and should be required to provide more specific responses.

Interrogatory No. 8

This Interrogatory sought a description of how many attachments Gulf had on each pole containing Complainants' attachments that Gulf claims meet the *Alabama Power* requirements, when such attachments commenced, where they are located and the compensation received by Gulf Power from these attachers. Gulf Power's original answer was a non-answer – that it would respond to the question at a later date. The Discovery Order ruling on Interrogatory No. 8 required, *inter alia*, Gulf Power to “revisit” its answer “to provide information that it currently possess[es] about users, make-ready costs; and per-pole compensation, as that information is requested by this Interrogatory.” *See* Discovery Order, 5. The Discovery Order further required Gulf Power to “itemize” such evidence, to the extent it claimed it had already produced it. However, instead of complying, Gulf Power now contends that it already produced such information in documentary form, and that Complainants should go find it. This new answer, however, is not only inconsistent with its previous answer, but it is clearly incorrect and an attempt to dodge the question. Gulf Power has not produced documents that show how many attachments Gulf had or has on each pole containing Complainants' attachments, when such attachments commenced, or where they are located. Moreover, while the attachment agreements that Gulf Power has produced show an annual rate paid, they provide no information about which poles are covered by those agreements. And, as discussed above in reference to Complainants' Second Request for Documents, Gulf Power's “go look through our make-ready files” answer is not a fair or reasonable answer to Complainants' attempt to find out what compensation Gulf Power has been paid by attachers, at what times, on the specific poles that it claims are at full capacity. *See Herdlein Technologies, Inc. v. Century*

*Contractors, Inc.*, 147 F.R.D. 103, 105 (W.D.N.C. 1993) (“When a party responding to interrogatories chooses to produce its business records in lieu of a conventional response, the responding party must specifically identify the document(s) from which the responding party may derive the answer.”)

Interrogatory No. 20

This Interrogatory asked for the number of Gulf Power poles that have been changed out to accommodate attachments of Complainants, the location of any alleged change-outs, the reasons for each change-out, and an identification of each instance in which Gulf claims it was not reimbursed for the costs of such a change-out. Gulf Power’s initial response was to object and to refer generally, without any specifics, to other responses. The Discovery Order directed Gulf to answer, stating: “Gulf Power shall respond and provide additional information only in response to Interrogatory No. 20.” But Gulf Power’s new response is a non-answer. Once again, it refers generally, without any specifics, to “make-ready documents produced” already. As set forth in our discussion of Gulf Power’s response to Interrogatory No. 8, this “go find it yourself answer” is not a good faith attempt to comply with the Discovery Order, let alone a complete or proper response to an Interrogatory that seeks to find out the number of Gulf Power poles that have been changed out to accommodate attachments of Complainants, the location of any alleged change-outs, the reasons for each change-out, and an identification of each instance in which Gulf claims it was not reimbursed for the costs of such a change-out. Gulf Power’s Description of Evidence is replete with contentions that it has had to “change-out” poles and that this is evidence of “full capacity” on poles containing Complainants’ attachments. *See* Description of Evidence, ¶¶ 4-6. Gulf Power should be directed to answer the question or sanctioned for refusing to do so.

Interrogatory No. 25



This Interrogatory asked Gulf Power to explain the steps and procedures involved in changing out a utility pole, from the inception of an attacher's request, to completion, including processing, procurement, placement and transfer of existing facilities and equipment, including estimated time periods. Gulf Power's initial response was an objection and refusal to answer. The Discovery Order ruled that Gulf Power "must furnish the information requested regarding steps and procedures for completing a 'change-out' for a CATV attacher." The Discovery Order further stated that, if the answer was provided by means of responsive documents, those documents would have to "demonstrate[e]" "each step of the procedure, such as work orders, parts inventories, diagrams, renderings, billings, and the like." Gulf Power's new answer fails to comply with the Discovery Order. All it has done is reproduce five pages that it had already produced before the Discovery Order and that pertain only to Gulf Power's "permitting procedure." These pages provide information about the internal process that Gulf Power uses to issue a pole *permit*, and they reference Gulf Power's usual process of not performing any make-ready work, including a change-out, until it receives a check in full from the attacher for all make-ready costs. However, these five pages say nothing about the physical processes followed by Gulf Power to effectuate a change-out once it has received payment from the attacher, such as where Gulf Power gets the new pole from, how it accounts for the pole, who performs the change-out, who performs the modification work to existing attachments, who pays for the modification of existing attachments, where the new attacher is located, what Gulf Power does with the extra capacity it gets on a newly changed-out pole, or what times frames apply to the change-out. The Discovery Order's requirement that Gulf "furnish the information requested regarding steps and procedures for completing a change-out" has not been met.

Interrogatory No. 34.

This Interrogatory asked Gulf Power about whether it informs attachers when pole space is reserved for future use for its own “core electricity operation” and to identify and describe all such reservations and notifications. Gulf Power’s initial answer was “yes,” but it failed to identify a single instance in which it had provided any such notice that it was reserving space. The Discovery Order stated that Gulf Power “must supplement” its answer “[i]f the information is reasonably obtainable or retrievable.” But Gulf Power’s new answer merely says that the only “written reservation/notification” that is given to “prospective attachers regarding reserved space.” This response says nothing about any notifications or reservations given to existing attachers. The answer is still incomplete. Indeed the precedent in a case brought by Gulf Power’s parent company established that before a utility may reserve space for its own use, it must justify the need and specifically identify a bona fide future need for the space.<sup>7</sup> Can Gulf Power identify a single specific instance in which it has advised an attacher, particularly Complainants, that it has actually demonstrated a bona fide need for space and then properly reserved space for its own operations? If the answer is no, fine, but Gulf Power should be compelled to admit this, or identify such instances.

Interrogatory No. 35

This Interrogatory asked whether Gulf Power claims that it requires the use of reserved pole space currently occupied by Complainants and if so, to provide identifying information. Gulf Power initially failed to provide any answer whatsoever to this Interrogatory. The Discovery Order accordingly directed Gulf Power to respond. The response now provided by Gulf Power does not answer the question. Gulf Power says it “does not track its future space needs on a pole by pole basis,” but Gulf Power does not say whether it claims to have had the need, at any time from mid-2000 to the present, to re-take space actually occupied by Complainants. This question may not be avoided, because it goes directly the part of the *Alabama Power* test that asks whether the utility can

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<sup>7</sup> *Southern Company v. F.C.C.*, 293 F.3d 1338, 1348-49 (11<sup>th</sup> Cir. 2002).

show that it has a “higher valued use” of its own for space on particular poles occupied by Complainants. And because Gulf Power has generally claimed it has the need for the space, it must demonstrate that such need is bona fide. If Gulf Power can’t specifically identify a bona fide requirement it has to re-take space for its own purposes on specific poles occupied by Complainants, then it must concede the point.<sup>8</sup>

Interrogatory No. 46

This Interrogatory asked Gulf Power to identify the pole attachment rental rates it pays to other joint user pole owners, the space it leases from such owners, and the methodologies for calculating the rates it pays. Gulf’s original answer to No. 46 failed to identify the rates (even though it did identify rates to a different question in Interrogatory No. 45). The Discovery Order required Gulf Power to respond further as to Interrogatory No. 46. Gulf Power has not done so – it has provided no response whatsoever, either as to rates or rate methodologies, for Interrogatory No. 46. Accordingly, it should be compelled to respond.

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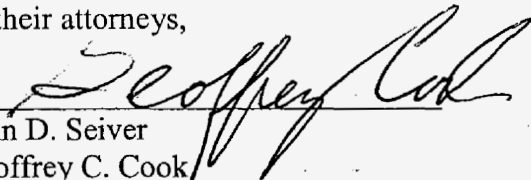
<sup>8</sup> Gulf Power’s current answer indicates generally, without admitting that it can identify no specific need to reserve space, that, even if such a need were to arise, its policy and practice is to permit attachers to “pay the cost of [pole] modifications necessary to maintain their attachments,” thereby vitiating any claim that Gulf Power is ever deprived of the opportunity to put space on its poles to a “higher valued use” of its own.

**CONCLUSION**

**WHEREFORE**, on account of the foregoing, Complainants respectfully request that he Court enter an Order compelling Respondent to respond fully to Complainants discovery requests as set forth herein, and award such other relief as is just.

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ASSOCIATION, 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.**

August 31, 2005

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Motion to Compel (1) Gulf Power's Production of Documents Needed by Complainants to Prepare for the Hearing, and (2) Further Responses to interrogatories as to which the Presiding Judge Previously Required Supplemental Responses*, has been served upon the following by electronic mail and U.S. Mail on this the 31st day of August, 2005:

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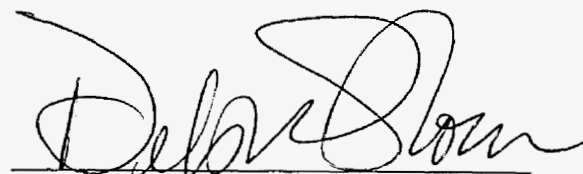
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