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Before the
FEDERAL COMMUNICATIONS 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

To: Office of the Secretary

CMP _____

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

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**GULF POWER COMPANY'S RESPONSE TO
COMPLAINANTS' SECOND MOTION TO COMPEL**

Gulf Power Company ("Gulf Power"), in response to complainants' second motion to compel, says the following:

Background and Introduction

The Presiding Judge's August 4, 2005 Discovery Order required Gulf Power to supplement its responses to certain of complainants' interrogatories, but found complainants' document request to be "overly broad." The Order further stated, "Complainants will be limited as to future document discovery." (Discovery Order, p. 17). On August 10, 2005, complainants served a second set of requests for production. The second request for production mirrored, in large part, the original requests for production, except that the second set included language in each request asking Gulf Power to "specify by Bates number" each document responsive to the request. On August 26, 2005, Gulf Power served its supplemental interrogatory responses and

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its responses to complainants second set of requests for production. Complainants' second motion to compel seeks: (1) further responses to their second request for production of documents; and (2) further responses to their interrogatories. Both requests should be denied.

Documents: Gulf Power responded fully to complainants' second document request. The bulk of complainants' argument is "we don't want to look through all of the documents you produced." But the Presiding Judge's August 4, 2005 Discovery Order stated: "before filing any further Motion to Compel Production of Documents, Complainants shall inspect documents offered for inspection by Gulf Power." (Discovery Order, p. 21). The Order further provided that "[m]eeting these conditions must be represented as a preamble to any Motion to Compel Document Production that Complainants may elect to file on August 31, 2005." (Discovery Order, p. 21 n. 17). Complainants have not inspected the documents offered for inspection, nor have they represented such in the preamble to their second motion to compel. Complainants' motion to compel further document production should be denied for these reasons alone.¹

Interrogatories: Gulf Power fully supplemented its interrogatory responses as required by the August 4, 2005 Discovery Order. Like complainants' first motion to compel, the second motion engages in legal posturing where complainants do not like certain answers given by Gulf Power (or do not think the answers comport with their understanding of the *Alabama Power v. FCC* test). Elsewhere, complainants' motion raises the same argument they make with respect to the documents: that is, where the answers lay in the documents produced by Gulf Power, complainants simply do not want to review the documents produced. Complainants' motion to compel further interrogatory responses should be denied.

¹ In part I. of the Argument, Gulf Power addresses on a request-by-request basis why (setting aside complainants' disregard of the Discovery Order) Gulf Power should not be required to respond further to complainants' document discovery (with the exception of an error that needs to be correct in response to Request No. 16).

Argument

I. DOCUMENT REQUESTS

Request No. 1:

Complainants themselves acknowledge that this is a “contention” request for production. It is Gulf Power’s *contention* that all poles on which complainants already were attached, which required make-ready to host another attachment, are “instance[s] . . . in which Gulf Power was unable to accommodate additional attachments. Thus, the “documents referring to any instance” of such situation are the make-ready document produced by Gulf Power during the May 27-28 document review. Complainants argue that Gulf Power had not provided sufficient information about “Which documents? Where? What files?” (Second Motion to Compel, p. 4). But Gulf Power already answered these questions: the make-ready documents; at the Engineering & Construction offices; in the completed work order files. It is not as if complainants would have to dig through records at all eleven Engineering & Construction offices to find a needle in the haystack. Make-ready is handled at the local level. Furthermore, the documents are organized chronologically for the most part. Thus, if complainants want to see make-ready documents for a specific area and a specific time period, they can be led to these documents with reasonable accuracy. This is not a “taunt” as suggested by complainants. (Second Motion to Compel, p. 2). It was a good faith offer; it was an offer the Presiding Judge required complainants to accept before filing further motions to compel; and it is an offer that still stands.

Request No. 2:

This request seeks “documents referring to the actual costs that Gulf Power has incurred annually because of Complainants’ attachments.” These are the make-ready work orders which Gulf Power made available during the May 27-28 document review. Complainants themselves acknowledge this when they state, “make-ready documents do show costs that have been charged

to and paid for attachments.” (Second Motion to Compel, p. 6). Complainants’ real point in moving to compel further response to this request (aside from their apparent disinterest in reviewing the documents produced) is to advance their *legal* argument about the type and amount of proof required before a property owner can seek just compensation for a taking. But this type of legal argument is not the proper subject of a discovery fight.

Request Nos. 4, 5, 6 & 7:

These requests collectively seek documents relating to pole change-outs and other make-ready performed either at complainants’ request or at the request of another CATV attacher for poles where complainants already were attached. Gulf Power responded the same as it did to Request Nos. 1 and 2. This information was made available during the May 27-28 document review. If it is “cavalier” for Gulf Power to respond in this way, it is even more cavalier for complainants to ignore the Presiding Judge’s Discovery Order requiring complainants to “inspect documents offered for inspection by Gulf Power” before filing “any further Motion to Compel.” (Discovery Order, p. 21). Again, these make-ready documents are not nearly as difficult to manage as complainants suggest.

Request No. 8:

This request seeks documents “referring to Gulf Power’s upgrades, modernization, strengthening or replacement of poles.” Gulf Power objected on grounds of relevancy, overbreadth, burden and vagueness. Gulf Power stands by this objection. Gulf Power does not believe this is not the type of “limited” document discovery contemplated by the Discovery Order. (Discovery Order, p. 17). Complainants’ argument is that the requested documents are relevant to “Gulf Power’s custom of following the utility industry practice of strengthening and replacing poles whenever necessary to provide capacity for new attachments.” (Second Motion to Compel, p. 9). But this point itself is irrelevant. This is complainants’ *legal* argument – that

there is no such thing as a crowded pole because of Gulf power's historical willingness to accommodate attachers by performing make-ready. If this is the case, then *Alabama Power v. FCC* is meaningless. Even if complainants' point is relevant, they still are not entitled to discovery on this issue since it would be a waste of time. Gulf Power already has said in this proceeding that it historically has worked with complainants and others to accommodate new attachments.

Request No. 12:

This request sought documents which support Gulf Power's contention that there is an unregulated market for pole space. Complainants purported to narrow this request "to the extent that the contention applies to CATV attachments." This is an odd limitation, considering that pole space is pole space, whether occupied by CATV, Telecom, ILEC or some other attacher. Gulf Power's response was to reference the attachment agreements and billing information produced within Bates range 00826-2309, and also to reference the documents produced during the May 27-28 document review. Complainants state they "have not seen a single document showing a CATV attacher who is paying an unregulated rate." (Second Motion to Compel, p. 10). But Gulf Power does not contend that there are any CATV attachers paying an unregulated rate – only that an unregulated market for the space exists. Gulf Power has produced its documents which support this contention. Nothing more can be required of Gulf Power, since there is nothing more to give.

Request No. 14:

This request seeks documents related to sources from which Gulf Power obtains *new* poles. This request is similar to Request No. 8 in that it seeks to establish that there is no such thing as "full capacity" in light of Gulf Power's historical willingness (and in the case of this request, resources) to accommodate new attachers through make-ready. Complainants

unabashedly state that they “posed this document request in order ... 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.” (Second Motion to Compel, p. 11). This is just not an issue in this proceeding.

Request No. 15:

This request seeks documents (such as maps) that depict specific Gulf Power poles that Gulf Power contends were at full capacity. Gulf Power responded by saying that all such documents were produced during the May 27-28 document review. Specifically, Gulf Power was referring to the maps within the 1996 and 2001 pole count information. To wit, these were among the documents actually reviewed by complainants at Gulf Power’s headquarters during the May 27-28 document review. Complainants even tabbed certain of these documents for copying (which Gulf Power copied and sent to complainants). If complainants are looking for maps which designate specific poles as “full capacity,” there are no such maps. Bear in mind the last pole count was 2001, more than a year before the novel *Alabama Power v. FCC* “full capacity” requirement came into existence. Gulf Power cannot be held to both the constitutionally unprecedented burden of proving “full capacity,” as well as the burden of prescience.

Request No. 16:

Gulf Power’s response to this request contains an error. The phrase “of CATV” should be deleted from the response. Though there may be members of the Florida Cable Telecommunications Association who pay more than the other named complainants, Gulf Power has no documents responsive to complainants’ specific request. Gulf Power will supplement its response accordingly.

II. INTERROGATORIES

Interrogatory No. 8:

After sorting through complainants' recitation of the background, there appear to be two issues raised by complainants. First, complainants argue that Gulf Power's supplemental response did not include information about which poles are covered by which attachment agreements. Most of the attachment agreements produced contain information to this effect. Some include maps; others include geographic scope. (See, e.g., Gulf Power 850-51, 998, 1010-11, 1035, 1497, 1531, 1601, 2069). Second, complainants argue that they should not be forced to look through Gulf Power's make ready files to determine "what compensation Gulf Power has been paid by attachers." (Second Motion to Compel, p. 14). Presumably, complainants are talking only about "compensation" for make-ready (rather than annual rents). But the only place Gulf Power tracks make-ready payments on a per pole basis is within the make ready work orders themselves. These documents were produced during the May 27-28 document review. If complainants wish to see the make-ready documents for a specific attacher during a specific time period, they most likely can be directed to a specific file drawer at a specific Engineering & Construction office. Complainants have not made any such request. Gulf Power should not be required to respond further to this interrogatory.

Interrogatory No. 20:

This interrogatory seeks information relating to pole change-outs at the request of complainants. Gulf Power's supplemental responses referred to the make-ready documents produced during the May 27-28 document review. Complainants, here, rely on the "there's-just-too-many-documents" argument. Setting aside the fact that complainants were ordered by the Presiding Judge to "inspect documents offered for inspection by Gulf Power" before moving to compel further document discovery, this is not like complainants will be looking for a needle in a

haystack: *complainants are seeking information about their own attachments.* They know (presumably) where their make ready projects have been and probably even which specific Engineering & Construction office handled the project. In short, they should know specifically where to look (both in terms of times and places). This is a situation where the operational realities of the field are completely at odds with complainants' discovery arguments.

Interrogatory No. 25:

Gulf Power stands by its supplemental response to this interrogatory. If complainants want further detail about the change-out process, they can ask questions at the September 14-16, 2005 depositions in Pensacola. This appears to be one of the intended categories of examination. (See Deposition Notices, identifying "Gulf Power's pole attachment procedures and methods" as a category of examination).

Interrogatory No. 34:

Gulf Power stands by its supplemental response to this interrogatory. Complainants argue that Gulf Power's response "says nothing about notifications or reservations given to existing attachers." (Second Motion to Compel, p. 17). But this ignores the fact that all attachers were "prospective" attachers at one point and thus would have received the notification referenced in Gulf Power's response. The remainder of complainants' argument relies on *their* interpretation of what constitutes a "bona fide development plan" – a phrase not defined by the FCC or the courts.

Interrogatory No. 35:

Gulf Power stands by its supplemental response to this interrogatory.

Interrogatory No. 46:

The August 4, 2004 Discovery Order with respect to Interrogatory Nos. 45 and 46 required Gulf Power to "provide responsive information on methodology/formulas used to

calculate the ILEC rate information provided.” (Discovery Order, p. 16). Gulf Power’s supplemental response to Interrogatory No. 45 noted that its original interrogatory response did, in fact, include the ILEC rate formula, and further noted that the ILEC rate formula could also be found within the joint use agreements produced as Bates range Gulf Power 2089-2148. But complainants’ motion to compel appears to demand *more* than what the Presiding Judge ordered. If Gulf Power has misunderstood the Discovery Order, it is willing to further supplement its responses to Interrogatory Nos. 45 and 46, but Gulf Power believes it has fully complied with the Discovery Order.

Conclusion

Gulf Power respectfully requests that the Presiding Judge DENY complainants’ second motion to compel, except to the extent noted above with respect to Request No. 16.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response To Complainants' Second Motion To Compel has been served upon the following by Electronic Mail and by United States Mail on this the 7th day of September, 2005:

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