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

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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' OPPOSITION TO
GULF POWER COMPANY'S MOTION TO RECONSIDER**

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"), by their counsel, and pursuant to 47 C.F.R. 1.294(b), hereby oppose Gulf Power Company's September 30, 2005 Motion to Reconsider certain

CMP _____ rulings in the Court's *Second Discovery Order*.¹ Gulf Power's Motion is not permitted under the
COM _____
CTR _____ Commission's rules but even if the Motion were permitted, or deemed a request for permission to
ECR _____ appeal the *Second Discovery Order* as an interlocutory ruling, Gulf Power's motion is nonetheless
GCL _____
OPC _____ untimely and without basis.

RCA _____ Preliminarily, the *Second Discovery Order* is an interlocutory order that is not subject to
SCR _____ reconsideration. "Petitions requesting reconsideration of an interlocutory ruling made by the . . .

SGA _____
SEC 1 _____ ¹ FCC 05M-44, released September 22, 2005.

OTH _____

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Chief Administrative Law Judge will not be entertained.” 47 C.F.R. § 1.291(c)(3). Interlocutory rulings are generally reviewed only on appeal of the initial decision to the full Commission. A limited number of interlocutory rulings are appealable as of right within five days after the date of the ruling, but discovery rulings unrelated to claims of privilege are not included. 47 C.F.R. §§ 1.301(a), (c)(2). In order to appeal any other interlocutory ruling, or seek modification, the aggrieved party must seek permission to appeal from the presiding officer within five days of the release of the order. 47 C.F.R. § 1.301(b). The presiding officer, in response to such a request for permission to appeal, may dismiss or allow the appeal, or modify the ruling. *Id.* If an appeal is not allowed, or the appeal is dismissed by the Commission, “objection to the ruling may be raised on review of the initial decision.” 47 C.F.R. § 1.301(b)(1). Accordingly, because the time passed for seeking permission for an appeal, and Gulf Power cites no rule that would permit Gulf Power to seek reconsideration, modification or a stay of the *Second Discovery Order* now, Gulf Power’s Motion should be summarily denied and instead Gulf Power should show cause why it should not be held to have violated a valid Court order. However, even if Gulf Power could have properly or timely sought reconsideration or an appeal of the *Second Discovery Order*, reconsideration or an appeal would not be appropriate.

After serving interrogatories and document requests, and reviewing documents at Gulf Power’s headquarters, Complainants filed a Motion to Compel seeking further answers to interrogatories and further production of documents.² In resolving Complainants’ motion, the Court issued its first *Discovery Order* and gave Complainants an opportunity to serve revised, narrowed document requests focused upon the standard set forth in the Eleventh Circuit’s *Alabama Power*

² Complainants’ first Motion to Compel was filed July 11, 2005.

decision³ and upon the claims made by Gulf Power in its January 2004 Description of Evidence.⁴ The *Discovery Order* also required Gulf Power to supplement its answers to a number of Complainants' Interrogatories by August 26, 2005. Finally, the *Discovery Order* stated that if necessary, on August 31, 2005, Complainants could file a motion to compel with respect to Gulf Power's supplemental document production and supplemental answers to interrogatories.⁵

Because Gulf Power's supplemental responses were inadequate, on August 31, 2005, Complainants filed their Second Motion to Compel further answers to six interrogatories and eleven of the revised document requests ("Second Motion").⁶ Gulf Power filed an opposition to Complainants' Second Motion on September 7, 2005.⁷ Complainants filed a brief Reply, requesting leave therefor, on September 9, 2005. Thereafter, on September 22, 2005, the Court issued its *Second Discovery Order*, granted substantially all of Complainants' Second Motion to Compel, and directed Gulf Power to file supplemental responses to six interrogatories and ten of the eleven document requests. Despite the Court's admonition with respect to the manner of producing documents and rejection of Gulf Power's repeated objection that documents had been made available in May, Gulf repeated that objection in its supplemental responses, produced no new documents, and gave very limited supplemental responses to the interrogatories.⁸ For three of the

³ *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power*").

⁴ *Discovery Order*, FCC 05M-38, released August 5, 2005. Complainants' Second Request for Production of Documents was served on August 10, 2005 with responses due August 26, 2005.

⁵ *Id.* at 21.

⁶ Gulf Power had been ordered to supplement its answers to thirteen interrogatories; Gulf Power sufficiently answered seven and Complainants sought further answers on six. *Second Discovery Order* at 6-8. Complainants also sought further documents under eleven of its revised (second set) of document requests. *Id.* at 2-6

⁷ See Gulf Power Company's Response to Complainants' Second Motion to Compel ("Gulf Opposition").

⁸ Complainants will be filing a Third Motion to Compel on those supplemental responses, directed as well to the three document requests that were not supplemented at all (addressed only in the Motion to Reconsider), with a request for rulings consistent with Fed. R. Civ. P. 37.

revised document requests (numbered 8, 14 and 15) Gulf Power failed to provide any documents or supplementation of its earlier responses, and instead filed the instant Motion to Reconsider.

Gulf's argument in its Motion to Reconsider simply repeats the losing arguments that were made in its Response to Complainants' Second Motion to Compel.⁹ As to Document Request No. 8, for example, Gulf asserts that the documents were beyond the scope of the initial *Discovery Order*, irrelevant, and only related to legal argument about how "full capacity" may be determined. The Court rejected Gulf Power's position when it determined that the documents would be relevant to Gulf's claims of full capacity. Moreover, as Complainants will make clear in their Third Motion to Compel, if these documents are somehow irrelevant or moot because Gulf Power has "admitted its historical willingness" to perform make-ready and changeouts,¹⁰ then that admission combined with the refusal to produce documents, means that none of its "historically" changed-out poles can be found to be, or have been, at "full capacity."

As to Document Request No. 14, Gulf repeats its argument with respect to Document Request No. 8, above. As with Request No. 8, the Court rejected Gulf's argument and ordered production. Gulf suggests that the Court's ruling "eviscerates" the *Alabama Power* decision, but it is only Gulf Power's claim of full capacity that would be "eviscerated" if it refuses to respond or identify those situations where poles could not be changed out. Gulf indicated "virtually any pole" can be changed out and, as above, has also admitted its historical willingness to do so. Accordingly, "virtually" all of Gulf Power's poles have capacity, and only those that could not be changed out (none ever specifically identified) could be subject to additional compensation because Gulf received reimbursement of the cost of make-ready *and* changeouts performed for the attachers *plus*

⁹ Compare Gulf Opposition at 4-6 *with* Motion to Reconsider at 1-5.

¹⁰ See Motion to Reconsider at 2.

annual rental from attachers. Because this case is about costs, Gulf's argument in its Response (repeated in its Motion to Reconsider) does not change anything.

As to Document request No. 15, Gulf Power's argument is again essentially identical to its argument in responding to Complainants Second Motion to Compel and begs the underlying question. Citing its Response to the Second Motion to Compel, Gulf states that it has maps "depicting" full capacity poles, Gulf Power "clarifies" that to mean that it actually has no maps that "designate" specific full capacity poles.¹¹ Which is it? If Gulf Power will use these maps to support its contentions as to full capacity, then it must show which of the poles "depicted" are the ones at "full capacity" or lose the chance to use these maps to support its claims. Moreover, if Gulf Power cannot "designate" specific full capacity poles, or stands fast in its refusal to produce a document that does so "designate," then Gulf's Power will simply fail in its burden of proof.

Gulf Power seems to be saying that proof of "full capacity" exists in multiple places and files but someone else needs to find and sort it out. The Court made it clear that Complainants do not have that burden, but the discovery "shell and pea" game played by Gulf Power would shift the burden to Complainants to disprove Gulf's assertions. Gulf also says if the proof is not there, it still should nonetheless be able to proceed with this case or otherwise it would be penalized for a lack of "prescience."¹² Gulf cannot have it both ways. If it has the proof, it must produce it. If it does not, or the proof is difficult to find, then Gulf must so acknowledge and bear the consequences of the failure to meet its burden of proof.¹³

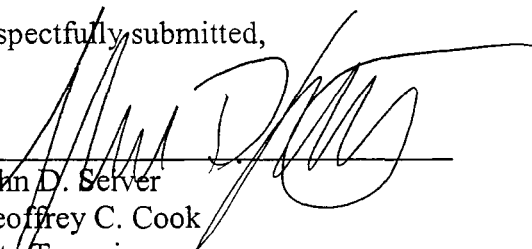
¹¹ *Id.* at 5.

¹² Gulf Response at 6.

¹³ Gulf Power persists in claiming an "extrapolation" to determine the number of full poles although that is not what the law provides or this Court has allowed. *Compare* September 22, 2005 Order (FCC 05M-45) *with* Preliminary Report on Pole Survey at ¶ 3.

WHEREFORE, for the foregoing, Gulf Power's Motion to Reconsider should be denied.

Respectfully submitted,



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October 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Complainants' Opposition to Gulf Power Company's Motion to Reconsider* has been served upon the following by electronic mail and U.S. Mail on this the 6th day of October, 2005:

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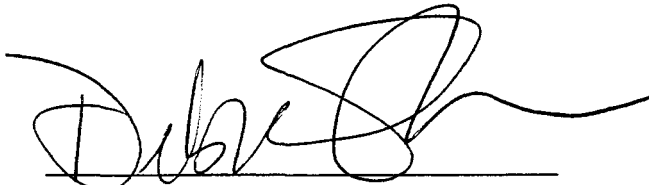
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