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FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., et. al.

E.B. Docket No. 04-381

Complainants,

v.

GULF POWER COMPANY,

Respondent.

To: Office of the Secretary

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

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

Gulf Power Company ("Gulf Power") in response to complainants' third motion to

CMP _____ compel says the following:

COM _____

Introduction

CTR _____

Complainants' third motion to compel takes issue with ten of Gulf Power's supplemental

ECR _____

GCL _____ responses to complainants' second request for production (Request Nos. 1, 2, 4, 5, 6, 7, 8, 12, 14

OPC _____ and 15), and five of Gulf Power's second supplemental responses to complainants'

RCA _____

SCR _____ interrogatories (8, 20, 34, 35 and 46). Complainants' main argument, when stripped to its core,

SGA _____ is that they do not want to accept any burden in the discovery process. Through their requests

SEC 1 _____ and interrogatories, complainants have asked for a significant volume of documents. But

OTH _____

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complainants act appalled and indignant when Gulf Power actually gives them what they requested. Moreover, Gulf Power even provided complainants a gratuitous “road map” to assist their review of the documents (in the event, as Gulf Power suspects, they really don’t want everything they are asking for). Complainants are not forced to find a “needle in the haystack.” They have asked for the entire haystack; they should not be surprised when it is produced. Gulf Power respectfully requests that the Presiding Judge deny complainants’ third motion to compel.

Document Requests¹

Request Nos. 1, 2, 4, 5, 6, and 7: The documents responsive to each of these requests are Gulf Power’s make-ready documents. The Second Discovery Order directed Gulf Power “to produce the documents responsive to [these Requests] in a format that accords with the FRCP.” (Second Discovery Order, pp. 3-4). Federal Rule of Civil Procedure 34(b) provides: “A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.” In Gulf Power’s supplemental responses to these requests, Gulf Power not only included a representation that the documents were produced “as they are kept in the usual course of business,” but also explained in detail how an interested party could locate particular documents within the vast number of documents requested by complainants.

Complainants appear to concede that Gulf Power produced the requested documents “as they are kept in the usual course of business.” (Third Motion to Compel, p. 5). This is all Rule 34(b) requires: “a responding party has no duty to label the documents if it has produced them as they are kept in the ordinary course of business.” Hagemeyer N. America, Inc. v. Gateway Data

¹ The Presiding Judge’s October 11, 2005 Order addressed Request Nos. 8, 14 and 15, so those will not be addressed in this response.

Sciences Corp., 222 F.R.D. 594, 598 (E.D. Wis. 2004) (holding that documents kept in storage facility for over five years were kept in the ordinary course of business, thus no duty to label the documents existed). The choice lies with the party against whom discovery is sought.

Complainants attempt to obfuscate the plain meaning of Rule 34(b) by claiming that Gulf Power has simply produced a gigantic “do it yourself kit.” (Third Motion to Compel, p. 6). But Gulf Power cannot be forced to do more than Rule 34(b) requires. See, e.g., Doe v. District of Columbia, 231 F.R.D. 27, 35-36 (D. D.C. 2005) (holding that “[a]s long as plaintiff produced the documents ‘as they are kept in the usual course of business,’ he was in compliance with the discovery rules”); Hagemeyer, 222 F.R.D. at 598 (“according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business”); In re G-I Holdings Inc., 218 F.R.D. 428, 439 (D. N.J. 2003) (“If the producing party produces documents in the order in which they were kept in the usual course of business, the Rule imposes no duty to organize and label the documents.”); Morgan v. City of New York, 2002 WL 1808233, at *4 (S.D.N.Y. Aug. 6, 2002) (holding that production of over 6000 bates-stamped documents as kept in the regular course of business complied with Rule 34(b)). Thus, Gulf Power, having produced responsive documents as they are kept in the ordinary course of business (along with a road map for navigating the documents), need go no further.

Complainants cite Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976), for their argument that Gulf Power has “in essence told complainants” they must “hunt through all its documents and find the information.” (Third Motion to Compel, p. 6). Complainants’ reliance on Kozlowski is misplaced. In Kozlowski, the discovery at issue was information concerning accidents similar to the accident giving rise to the lawsuit (flammable pajamas). The

responding party contended that its prior claim information was indexed alphabetically by claimant, rather than by product and it would take a “herculean effort . . . to locate the documents.” 73 F.R.D. at 76. This is not the case here. Unlike in Kozlowski, Gulf Power actually produced the information requested. Moreover, Gulf Power explained (with examples) how particular documents could be located (within the broad group of documents requested by complainants) through cross-referencing permits and Distribution Service Orders.

The crux of complainants’ argument appears to be that Gulf Power has not met its obligations because there may be some non-responsive documents within the documents produced. (Third Motion to Compel, p. 6). This specific argument was addressed and rejected in Hagemeyer N. America, Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594, 598 (E.D. Wis. 2004). In Hagemeyer, the party seeking discovery claimed that the responding party’s documents were disorganized and buried among large amounts of non-responsive documents in a storage facility. The court, finding there had been no attempt to “hide responsive documents among non responsive documents,” stated:

When producing documents, the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of non-responsive documents. However, according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business.

Hagemeyer, 222 F.R.D. at 598. Here, complainants do not even contend (unlike in Hagemeyer) that Gulf Power has attempted to hide responsive documents among large amounts of non-responsive documents. To the contrary, there does not appear to be any dispute that the requested documents have been produced “as they are kept in the usual course of business.” The fact that this means complainants may have to take some additional time to properly review the documents does not mean that Gulf Power has failed to meet its discovery obligations. In fact,

Gulf Power, by providing the “road map” in its discovery responses, has gone beyond the requirements of Rule 34(b). No further response should be required.

Request No. 12: This request sought documents in Gulf Power’s possession relating to the unregulated market for pole space. Gulf Power not only Bates labeled and produced such documents (and identified them by Bates range in its written responses), but also made these documents available for review as they are kept in the usual course of business. The Second Discovery Order provided, with respect to Request No. 12: “Gulf Power also contends that it has produced documents which are relevant and probative of such an ‘unregulated market.’ Gulf Power now must identify those documents by Bates number or some other specific document identifier.” (Second Discovery Order, p. 4). Gulf Power’s supplemental response clarified that this information was, in fact, provided in the original response and again identified the Bates range within which the responsive documents were located. Complainants’ third motion to compel, like many of their prior motions, postures a legal position (and a tenuous one at that) rather than advancing a true discovery issue. Rather than arguing that Gulf Power has not produced the requested documents (or not produced them in the manner most convenient to complainants), complainants argue that the documents produced are not relevant to an unregulated market for pole space for CATV attachments. This is an argument over ultimate relevance of the documents produced -- not a matter of whether Gulf Power has produced the responsive documents. The bottom line is that there is simply nothing more to produce or identify with any greater degree of certainty. Complainants are free to make whatever relevance arguments they want at trial.²

² This is a puzzling relevance argument. The property at issue in this proceeding is pole space. The market for pole space includes any buyer of pole space. But complainants argue that the only buyers relevant are

Interrogatories

Interrogatory No. 8: The Second Discovery Order required Gulf Power to “identify the number of Complainants’ CATV attachments on Gulf Power’s poles, and provide information on when such attachments were connected, where located, and amounts of related compensation received by Gulf Power.” (Second Discovery Order, p. 6). Gulf Power’s second supplemental response noted that “the number of Complainants’ CATV attachments” was set forth in its original response to Interrogatory No. 1. With respect to “when such attachments were connected,” Gulf Power directed complainants to its pole attachment permits, which were produced in folders labeled by attacher. With respect to “where located,” Gulf Power directed complainants to the description of geographic scope at the end of each attachment agreement. With respect to the “amounts of related compensation received,” Gulf Power directed complainants to the make ready work orders prepared at complainants’ request, which state the cost of requested make-ready. In addition to this information, Gulf Power also explained in detail how to navigate its permits and make ready work orders, as well as the interplay between the two.

This interrogatory (and Gulf Power’s response) implicates Federal Rule of Civil Procedure 33(d):

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit,

CATV buyers. In other words, according to complainants’ ill-conceived paradigm, it does not matter what other buyers (Telecom, ILEC, unregulated buyers) are paying for the same space. This not only turns just compensation jurisprudence on its head, but also turns the Alabama Power v. FCC test on its head (“another buyer of the space is waiting in the wings”).

or inspect such records and to make copies, compilations, abstracts or summaries. *A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.*

Gulf Power's second supplemental responses are fully compliant with Rule 33(d). Rule 33(d) requires only that the specification of documents be "in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." See Nagele v. Elec. Data Sys. Corp., 193 F.R.D. 94, 108 (W.D. N.Y. 2000) ("[T]he responding party may refer the requesting party to business records of the responding party produced to the requesting party if the burden of gleaning the information sought is 'substantially the same' for both parties").

Complainants' argument does not offer any explanation as to *why* they think Gulf Power's responses are inadequate. Instead, complainants resort to generalities: Gulf Power "just will not do what it is told" and Gulf Power's answer "is not a fair and reasonable response." (Third Motion to Compel, p. 18). Furthermore, complainants have not undertaken any analysis of the controlling rule (FRCP 33(d)). For all it appears, complainants prefer to ignore Rule 33(d) as well as the Second Discovery Order's admonition to the parties to heed the message of Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534 (D. Kan. Jan. 7, 2005), and Herdlein Technologies, Inc. v. Century Contractors, Inc., 147 F.R.D. 103 (W.D. N.C. 1993).³ Rule 33(d) was "intended to be used in the situation where an interrogatory makes broad inquiries and numerous documents must be consulted to ascertain facts such as identities, quantities, data, action, tests, [or] results." SEC v. Elfindapan, 206 F.R.D. 574, 577 (M.D. N.C. 2002). This is precisely the situation before the Court. Gulf Power has fully complied with Rule 33(d).

³ Gulf Power addressed each of these cases in fn. 3 of its second supplemental responses.

Interrogatory No. 20: This interrogatory sought information relating to pole change-outs at the request of complainants. Gulf Power's second supplemental response specifically identifies the documents from which the requested information can be ascertained, and provided significant detail as to how to navigate the documents. Like Interrogatory No. 8, this interrogatory implicates Rule 33(d). The same arguments above with respect to interrogatory No. 8 apply to Interrogatory No. 20, and will not be belabored here. Here, though, complainants have not even offered generalities to explain how they contend Gulf Power has not met its burden under Rule 33(d). Instead, they argue only that Gulf Power "once again refused to comply." (Third Motion to Compel, p. 19). This is not helpful.

Interrogatory No. 34: Like complainants' argument with respect to Request No. 12, their argument with respect to this interrogatory makes a legal argument regarding the sufficiency (or relevance) of the evidence produced – not an argument over whether the requested information has been provided. Gulf Power succinctly stated in its second supplemental response that is "has no other further information to provide."⁴

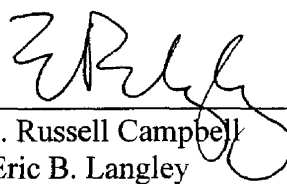
Interrogatory No. 35: This interrogatory was part of complainants' second motion to compel. In ruling on this portion of the second motion to compel, the Presiding Judge stated: "Gulf Power need not respond further to Interrogatory No. 35." (Second Discovery Order, p. 8).

⁴ Complainants' real point, here, has nothing to do with discovery. Their point is that they don't think Gulf Power's reservation of space, through the designation of electrical supply space on its poles via the spec plates provided to complainants, constitutes a "bona fide" reservation of space (a term completely undefined in the regulations, rulemakings, or FCC decisions).

Interrogatory No. 46: Complainants' argument appears to be moot. They conceded that Gulf Power's second supplemental response was "somewhat helpful," but then took issue with the status of deposition discovery. As the Presiding Judge is aware, there are now three depositions set for November 16-18, 2005. Complainants cannot prematurely use an objection to the sufficiency of an interrogatory response as pretext for challenging a deposition discovery issue. Whatever the case, it does not appear that complainants are seeking any further response to Interrogatory No. 46.

Conclusion

Gulf Power has met and exceeded its obligation under the FRCP and Discovery Orders issued by the Presiding Judge. Gulf Power respectfully requests that complainants' third motion to compel be denied.



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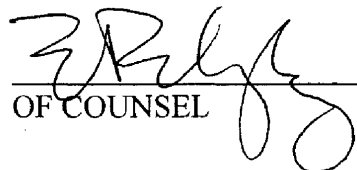
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response To Complainants' Third Motion To Compel has been served upon the following by Electronic Mail and by United States Mail on this the 4th day of November, 2005:

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