

ORIGINAL

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

RECEIVED
05 NOV 22 AM 7:25

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

RECEIVED-1880
NOV 22 AM 9:33
COMMISSION
CLERK

To: Office of the Secretary

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

**COMPLAINANTS' RESPONSES TO GULF POWER COMPANY'S
SECOND SET OF INTEROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS**

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 this Court's

MP _____ Orders dated November 10th and 16th, 2005, respectfully submit the following Responses to
OM _____
TR _____ Respondent Gulf Power Company's ("Gulf Power") Second Set of Interrogatories and Requests for
CR _____ Production of Documents to Complainants.

CL _____ **I. GENERAL OBJECTIONS**

PC _____
CA _____ In addition to the specific objections enumerated below, Complainants object to Gulf
CR _____ Power's Second Set of Interrogatories and Requests for Production of Documents as follows:

GA _____
EC 1 _____
TH _____

DOCUMENT NUMBER-DATE

11189 NOV 22 03

COMMUNICATIONS COMMISSION CLERK

1. Complainants object to each Interrogatory or Request to the extent it requires Complainants to provide information not within their possession, custody or control.

2. Complainants object to any Interrogatory or Request that calls for information not within their present knowledge or which seeks to require Complainants to offer a narrative of their case.

3. Complainants object to the Interrogatories or Requests to the extent that they are unreasonably cumulative or duplicative and to the extent that the information requested has already been provided in Complainants' April 18, 2005 Responses to Gulf Power's First Set of Interrogatories and Requests for Production of Documents ("Complainants' April 18th Responses"), has already been produced in Complainants' January 11, 2005 production of documents ("Complainants' January 11th Document Production"), is otherwise already within the possession of Gulf Power, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Complainants object to the Interrogatories or Requests to the extent that they seek discovery of information that is not relevant to any claim or defense raised by Complainants or Gulf Power and/or where the burden or expense of the proposed discovery would outweigh any benefit to Gulf Power of the discovery.

5. Complainants object to the Interrogatories or Requests to the extent that they seek discovery of pure legal conclusions or contentions without any application to specific facts.

6. The foregoing General Objections are hereby incorporated into each of the numbered answers to the Interrogatories or Requests and each Interrogatory or Request is answered subject to and without waiver of these General Objections.

II. RESPONSES TO INTERROGATORIES

Gulf Power Interrogatory No. 1:

Identify the total annual number of Gulf Power poles, for each year from 2001 through the present, to which you have been attached.

Complainants' Response:

Complainants object to this interrogatory on the grounds that it is overly burdensome and improperly seeks to shift Gulf Power's burdens of production and persuasion onto Complainants, and that it is duplicative of Gulf Power's former Interrogatory No. 4. *See* Complainants' April 18th Responses, 11. Gulf Power never moved to compel on Complainants' April 18th Responses and should not be permitted to make a duplicate request, especially near the end of the discovery period. Subject to and without waiving the foregoing objections, Complainants respond by referring to and incorporating their response to Gulf Power's former Interrogatory No. 4, in which Complainants explained that they have provided this information in the form of the Gulf Power invoices, pole survey results, and correspondence regarding the same, submitted to Gulf Power during the January 11, 2005 production and exchange of documents (*see, e.g.*, 000133-35 BRI; 006666-006677COM; 004044COX; 001300MED). *See* Complainants' April 18th Responses, 11. The Florida Cable Telecommunications Association, Inc. represents cable operators in the state of Florida and does not maintain its own attachments on Gulf Power's distribution pole network.

Gulf Power Interrogatory No. 2:

Identify and define any differences between your definition or interpretation of the term "full capacity" and the terms "crowded" or "lack of capacity" under *Alabama Power v. FCC*.

Complainants' Response:

Complainants object to this interrogatory on the ground that it calls for legal arguments and conclusions that will be presented and decided at the hearing in this case, and because it appears to be premised on the assumption that the terms “full capacity” and “crowded” have equal meaning and application in this proceeding. Complainants further object to this interrogatory on the ground that that it is duplicative of Gulf Power’s former Interrogatory No. 6. *See* Complainants’ April 18th Responses, 14. Gulf Power never moved to compel on Complainants’ April 18th Responses and should not be permitted to make a duplicate request, especially near the end of the discovery period. Subject to and without waiving the foregoing objections, Complainants respond by referring to and incorporating their response to Gulf Power’s former Interrogatory No. 6. *See* Complainants’ April 18th Responses, 14-18. In particular, in their former answer, Complainants identified the limited circumstances where a utility pole may be said to be at “full capacity.” *See* Complainants’ April 18th Responses, 18. Complainants reiterate, however, that the Eleventh Circuit Court of Appeals’ *holding* in *Alabama Power Co v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002), specifically made “full capacity” (and not whether the poles could be generally be alleged to be “crowded”) one of the two evidentiary showings that a utility has to make “with regard to each pole” before it may, under a takings claim, seek compensation above the marginal costs of a third party’s pole attachment. Finally, Complainants refer Gulf Power to the discussion of “insufficient capacity” at pages 14-15 of Complainants’ October 20, 2004 Petition for Clarification.

Gulf Power Interrogatory No. 3:

Describe and explain the basis or methodology you have used or propose to use to quantify or measure “full capacity,” “crowding,” or “lack of capacity,” or any combination

thereof for an individual pole to which you are attached. Identify any applicable safety codes, specifications, agreements, or economic or regulatory literature that supports your response.

Complainants' Response:

Complainants object to this interrogatory on the grounds that it is overly burdensome and improperly seeks to shift Gulf Power's burdens of production and persuasion onto Complainants. Complainants have no affirmative burden in this proceeding to "quantify" or "measure" the utility poles to which they are attached. *See Status Order*, FCC 05M-23 (April 15, 2005), 4. Complainants further object to this interrogatory on the ground that that it is duplicative of Gulf Power's former Interrogatories Nos. 6 and 7. *See Complainants' April 18th Responses*, 14-19. Gulf Power never moved to compel on Complainants' April 18th Responses and should not be permitted to make a duplicate request, especially near the end of the discovery period. Subject to and without waiving the foregoing objections, Complainants respond by referring to and incorporating their responses to former Interrogatories 6 and 7. In addition, Complainants note that pole capacity, under normal operating conditions, is not fixed. Rather, it is dynamic in nature, and, as Gulf Power itself has conceded, additional attachments can be (and are) routinely accommodated in the course of normal and customary operating practices of pole owners, including pole rearrangements and change-outs. Thus, as Complainants previously explained, any pole that can be rearranged, strengthened, changed-out, or equipped with extension arms and/or "boxing" arrangements, or that has been rearranged, changed-out or outfitted with extension arms and/or boxing arrangements in the past, in accordance with applicable safety codes and generally applicable engineering principles to allow for the more efficient utilization of capacity for additional attachments would not entitle Gulf Power to claim that a pole is "at full capacity." Only under the limited circumstances identified by Complainants on page 18 of their

response to former Interrogatory No. 6 might a pole be said to be at “full capacity.” See Complainants’ April 18th Responses, 18.

Gulf Power Interrogatory No. 4:

For the pole attachments identified in response to Interrogatory No. 1, identify, for the period from 2000 through the present:

- (a) the total number of Gulf Power poles that you contend were not, are not, or have not been at “full capacity” or “crowded” under *Alabama Power v. FCC*;
- (b) the location and individual pole number of the specific poles you contend were not, are not, or have not been at “full capacity” or “crowded” under *Alabama Power v. FCC*;
- (c) the specific period of time you contend the poles you identified were not, are not, or have not been at “full capacity” or “crowded” under *Alabama Power v. FCC*; and
- (d) the specific reason or reasons why you contend such poles were not, are not, or have not been at “full capacity” or “crowded” under *Alabama Power v. FCC*.

Complainants’ Response:

Complainants object to this interrogatory on the grounds that it is overly burdensome and improperly seeks to shift Gulf Power’s burdens of production and persuasion onto Complainants. It is Gulf Power’s burden, under *Alabama Power*, to “show with regard to each pole that (1) the pole is at full capacity” See 311 F.3d at 1370; *Status Order*, FCC 05M-23 (April 15, 2005), 4. Only after Gulf has put forward its proof as to the specific, individual poles at full capacity and has presented evidence “to get these poles pinned down *one-by-one*,” see Hearing Transcript (Dec. 13, 2004), p. 82 (emphasis added), can Complainants know which utility poles are at issue

and then challenge Gulf Power's claims as to those particular poles. The Presiding Judge authorized Gulf Power to use the Osrose pole audit to assemble such proof, but, as of yet, Gulf Power has not yet specifically identified to Complainants or the court which specific poles it contends are at full capacity. Indeed, even the three poles discussed in Gulf Power's October 17th "Proffer" are not identified in such a way that Complainants are able to determine the location and identity of the particular poles. Accordingly, as the Presiding Judge noted during the telephone conference call of November 9th, this interrogatory, which seeks to have Complainants prove the negative of the first prong of the two-pronged *Alabama Power* test, is an improper attempt to serve a "mirror image" discovery request upon the Complainants.

Gulf Power Interrogatory No. 5:

Describe and explain your definition, understanding, and/or interpretation of the terms "waiting in the wings" and "higher valued use" as they are used in *Alabama Power v. FCC*.

Complainants' Response:

Complainants object to this interrogatory upon the ground that it calls for legal arguments and conclusions that will be presented and decided at the hearing in this case. Subject to and without waiving the foregoing objection, Complainants respond as follows:

The Eleventh Circuit in *Alabama Power* ruled that utility pole owners receive "much more than" the marginal costs of a third party's attachments under FCC regulations, including the FCC Cable Rate. 311 F.3d at 1370. To sustain a constitutional takings claim for a rate in excess of FCC regulated rates, Complainants understand that a Gulf Power must identify, pole by pole, particular poles that are both (1) at full capacity and prove (2) that it either "missed out" on a "lost opportunity" from a third party "waiting in the wings" or was unable to put pole space to a specific, provable, and quantifiable "higher valued use" itself. *See Id.*

“Waiting in the wings” means, therefore, that there was a third party that would have paid Gulf Power more to get on the same poles as Complainants but that Gulf Power was not able to “sell space” to. This is clear from *Alabama Power*’s emphasis on whether “the cable company’s use . . . foreclose[s] any other use.” *Id.* at 1369. Gulf Power can satisfy the “waiting in the wings” requirement only when it can show that Complainants’ attachments “foreclose[d] an opportunity to sell space to another bidding firm – a missed opportunity” *Id.* This standard does not countenance the use of hypothetical buyers but rather only actual lost opportunities that are foreclosed and provable. If a new attacher was accommodated by Gulf Power (whether through a change-out or other makeready paid for by the attacher), there is no “lost opportunity.”

The term “higher valued use” is associated with *Alabama Power*’s acknowledgment that “the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking.” *Id.* (internal citations omitted). Therefore, “higher valued use” means, as stated above, that Gulf Power has “missed” or “lost” an opportunity to put space on poles occupied by Complainants to a specific, provable, and quantifiable “higher valued use.”

Gulf Power Interrogatory No. 6:

Identify and describe the total number of poles owned by Gulf Power that you requested that Gulf Power perform make-ready and/or a pole change-out upon from January 1, 2000 through the present. Specify the exact location of each pole, the work requested, and final disposition of any request, including denials, work-orders, agreements, or any other document relating to or referring to the specific request.

Complainants’ Response:

Complainants object to this interrogatory on the grounds that it is overly burdensome and improperly seeks to shift Gulf Power’s burdens of production and persuasion onto Complainants

(what the Presiding Judge has called a questionable “mirror image” request); and that it is duplicative of Gulf Power’s former Interrogatory No. 10 and former Document Request No. 7, *see* Complainants’ April 18th Responses, 22, 31. Gulf Power never moved to compel on Complainants’ April 18th Responses and should not be permitted to make a duplicate request, especially near the end of the discovery period. Subject to and without waiving the foregoing objections, Complainants respond by referring to and incorporating their responses to Gulf Power’s former Interrogatory No. 10 and former Document Request No. 7. *See* Complainants’ April 18th Responses, 22, 31. Those answers point out that Complainants produced business records containing the requested information, to the extent that Complainants had any such information, in the form of pole permit applications and Gulf Power’s own make-ready and engineering invoices during the January 11, 2005 production and exchange of documents, as supplemented by documents numbered 006659 COM-006677 COM, which were produced with the April 18th discovery responses and which were broken down for each of the four cable operator Complainants.

Gulf Power Interrogatory No. 7:

Identify and describe any instance in which Gulf Power has denied your request for make-ready and/or a pole change-out from January 1, 2000 through the present.

Complainants’ Response:

Complainants object to this interrogatory on the ground that its request for identification of instances where Gulf Power has denied *Complainants’* requests for make-ready and/or a pole change-out is not relevant to the standard of proof under *Alabama Power*, which requires, *inter alia*, a utility pole owner to show that it has been deprived of the opportunity to sell space, at a higher rate than Complainants pay, to a third party or to show that Gulf Power itself has incurred

a specific, provable, quantifiable lost opportunity to put pole space to a “higher valued use.”

Subject to and without waiving the foregoing objections, Complainants respond as follows:

Complainants are not aware of any instance in which Gulf Power has denied one of their requests for make-ready or change-out during the specified period.

Gulf Power Interrogatory No. 8:

Identify any poles, ducts or conduits that you own, have owned, or are in the process of acquiring, jointly or otherwise, from 1998 through the present anywhere within your service territory. Identify the location of any such poles, ducts, or conduits. Specifically identify any and all persons or entities that were attached or are currently attached to any of the poles you own and rental rates paid to you as compensation for attachment.

Complainants’ Response:

Complainants object to this interrogatory on the grounds that its request for information about “poles, ducts or conduits” that *Complainants* own or have owned is irrelevant to the issue defined by the Hearing Designation Order in this case, which is whether Gulf Power can meet the *Alabama Power* standard and show, by demonstrating that specific poles of its own containing Complainants’ attachments are at “full capacity” and that, as to those poles, it has incurred a “lost opportunity” to generate more revenue, that it can substantiate a constitutional claim that it is entitled to annual pole rent in excess of that permitted under FCC regulations. Complainants further object to this interrogatory on the grounds that its request for information about “ducts or conduits” is particularly irrelevant to this case, which concerns Gulf Power’s utility *poles* and whether it can show it has incurred a “foreclosed use” for those *poles* for which it can also prove that they cannot, through the usual make-ready procedures, accommodate

additional attachments. Subject to and without waiving the foregoing objections, Complainants respond as follows:

To the best of Complainants' knowledge, Complainants do not own any utility poles on which entities other than themselves are attached.

III. RESPONSES TO DOCUMENT REQUESTS

Gulf Power Document Request No. 1:

Produce all documents that list, catalogue, describe, or depict any Gulf Power pole on which you currently maintain an attachment or have maintained an attachment at any time since January 1, 2000.

Complainants' Response:

To the best of Complainants' knowledge, all documents in Complainants' possession responsive to this request were produced to Gulf Power during the January 11, 2005 production of documents, as supplemented by additional documents on April 18th, 2005. *See* Complainants' January 11th Document Production; Complainants' April 18th Responses.

Gulf Power Document Request No. 2:

Produce all documents, produced, written, reviewed or compiled by any consultant, contractor, expert witness or other person or entity that you have used or are using to document, study, report upon, or otherwise evaluate any and all Gulf Power poles containing your attachments.

Complainants' Response:

Complainants object to this document request on the ground that its request for all documents "produced, written, reviewed or compiled by" any consultant, contractor, or expert

witness is overbroad and purports, particularly in its reference to documents “reviewed or compiled,” to violate the work-product privilege. Subject to and without waiving these objections, Complainants will produce documents prepared by experts whom Complainants have retained to testify in this case, in accordance with the deadlines prescribed by the Presiding Judge for expert summaries and pre-trial written testimony, and in accordance with what Gulf Power, in its discovery responses, has termed “an agreed-upon” “reasonable scope of expert discovery.” See Gulf Power’s April 18, 2005 Response to Complainants’ Document Request No. 3.

Gulf Power Document Request No. 3:

Produce all documents, including but not limited to maps, diagrams, schematics, or depictions that identify all Gulf Power poles to which you are attached that you contend are not at full capacity and/or crowded.

Complainants’ Response:

Complainants object to this document request on the grounds that it is overly broad and unduly burdensome and improperly seeks to shift Gulf Power’s burdens of production and persuasion onto Complainants (what the Presiding Judge during the November 9th conference call called a questionable “mirror image” request). As Complainants explained in their response to Gulf Power’s new Interrogatory No. 4, only after Gulf Power has put forward its proof as to the specific, individual poles at full capacity and has presented evidence “to get these poles pinned down *one-by-one*,” see Hearing Transcript (Dec. 13, 2004), p. 82 (emphasis added), can Complainants know which utility poles are at issue and then challenge Gulf Power’s claims as to those particular poles. Indeed, as the Presiding Judge stated in his October 12, 2005 Order, FCC 05M-50, “the task of identifying and proving ‘full capacity’” “on a pole by pole basis” was assigned, in the Hearing Designation Order, to Gulf Power, and Gulf Power must, by December

9, 2005, *see* November 10, 2005 Order, FCC 05M-53, identify those poles that appear on any map-type documents that Gulf Power contends are at “full capacity.” Subject to and without waiving these objections, Complainants respond as follows:

Complainants have produced all maps/diagrams that reflect Gulf Power poles in the January 11, 2005 document production, *see* Complainants’ January 11, 2005 Document Production, but Complainants do not have data that shows whether those poles can meet the limited circumstances set out in Complainants’ response to former Gulf Power Interrogatory No. 6 for when a pole might be deemed to be at “full capacity.” *See* Complainants’ April 18th Responses, 18. Moreover, as noted above, pole space is dynamic in nature, and, as Gulf Power itself has conceded, additional attachments can be (and are) routinely accommodated in the course of normal and customary operating practices of pole owners, including pole rearrangements and change-outs. Thus, any pole that can be rearranged, strengthened, changed-out, or equipped with extension arms and/or “boxing” arrangements, or that has been rearranged, changed-out or outfitted with extension arms and/or boxing arrangements in the past, in accordance with applicable safety codes and generally applicable engineering principles to allow for the more efficient utilization of capacity for additional attachments would not entitle Gulf Power to claim that a pole is “at full capacity.” Complainants are not aware of any Gulf Power pole that may be said to be at “full capacity.”

Gulf Power Document Request No. 4:

Produce all safety codes, regulations, and/or construction standards, including your own internal safety manuals, policies and/or procedures that govern, relate to, or refer to the pole attachment process, including make-ready, guying, or pole change-outs.

Complainants' Response:

Complainants object to this document request on the grounds that it is overly broad and unduly burdensome and improperly seeks to shift Gulf Power's burdens of production and persuasion onto Complainants (what the Presiding Judge during the November 9th conference call called a questionable "mirror image" request). Complainants further object to this document request on the grounds that such safety codes, such as the National Electrical Safety Code and the Bell Bluebook, are publicly available documents. Subject to and without waiving the foregoing objections, Complainants respond as follows:

To the extent that Complainants have any company-specific policies or internal safety manuals that govern the pole attachment process, they will be produced to Gulf Power after they are made available to and reviewed by counsel of record.

Gulf Power Document Request No. 5:

For each Gulf Power pole to which you are attached that you contend is not at full capacity and/or is not crowded, produce documents that substantiate the basis and reasons for your contention that the pole is not at full capacity or crowded.

Complainants' Response:

Complainants object to this document request on the grounds that it is overly broad and unduly burdensome and improperly seeks to shift Gulf Power's burdens of production and persuasion onto Complainants (what the Presiding Judge during the November 9th conference call called a questionable "mirror image" request). As Complainants explained in their response to Gulf Power's new Interrogatory No. 4 and its new Document Request No. 3 above, only after Gulf Power has put forward its proof as to the specific, individual poles at full capacity and has presented evidence "to get these poles pinned down *one-by-one*," see Hearing Transcript (Dec.

13, 2004), p. 82 (emphasis added), can Complainants know which utility poles are at issue and then challenge Gulf Power's claims as to those particular poles. Indeed, as the Presiding Judge stated in his October 12, 2005 Order, FCC 05M-50, "the task of identifying and proving 'full capacity'" "on a pole by pole basis" was assigned, in the Hearing Designation Order, to Gulf Power, and Gulf Power must, by December 9, 2005, *see* November 10, 2005 Order, FCC 05M-53, identify those poles that appear on any map-type documents that Gulf Power contends are at "full capacity." Subject to and without waiving these objections, Complainants respond as follows:

Complainants have produced all maps/diagrams that reflect Gulf Power poles in the January 11, 2005 document production, *see* Complainants' January 11th Document Production, but Complainants do not have data that shows whether those poles can meet the limited circumstances set out in Complainants' response to former Gulf Power Interrogatory No. 6 for when a pole might be deemed to be at "full capacity." *See* Complainants' April 18th Responses, 18. Moreover, as noted above, pole space is dynamic in nature, and, as Gulf Power itself has conceded, additional attachments can be (and are) routinely accommodated in the course of normal and customary operating practices of pole owners, including pole rearrangements and change-outs. Thus, any pole that can be rearranged, strengthened, changed-out, or equipped with extension arms and/or "boxing" arrangements, or that has been rearranged, changed-out or outfitted with extension arms and/or boxing arrangements in the past, in accordance with applicable safety codes and generally applicable engineering principles to allow for the more efficient utilization of capacity for additional attachments would not entitle Gulf Power to claim that a pole is "at full capacity." Complainants are not aware of any Gulf Power pole that may be said to be at "full capacity."

Gulf Power Document Request No. 6:

Produce all accounting or financial documents, invoices, billing statements, customer lists, service or maintenance orders that refer to, relate to, or contain information regarding income or revenue received from any and all customers serviced by cable lines attached to Gulf Power poles at any point from signal distribution to customer reception.

Complainants' Response:

Complainants object to this document request on the grounds that its request for “accounting” and “financial” documents, including “invoices, billing statements, customer lists, [and] service or maintenance orders” for Complainants’ own cable television businesses, as opposed to anything having to do with Gulf Power, is utterly irrelevant to the issue in this case, which is whether Gulf Power can meet the *Alabama Power* test of identifying specific poles of its own that are at “full capacity” and as to which it has incurred a “lost opportunity.” 311 F.3d at 1370. Even if Gulf Power could meet the stringent *Alabama Power* requirements as to specific poles, however, it may not rely upon the income of Complainants as a method for claiming an entitlement to a higher pole attachment rate. Gulf Power has in the past argued that Complainants’ cable revenues are relevant to an “income capitalization” method, a method that Gulf Power and its sister company, Alabama Power, have claimed is a potential way of valuing space on utility poles. However, in dismissing an attempt by Alabama Power to proffer a value for pole attachments under this method, the full Commission ruled that “the income approach to valuation is inappropriate because the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment.” See *Alabama Power Review Order*, 16 F.C.C.Rcd. 12209 at ¶56 (2001).

Complainants also object to this document request on the grounds that it is incredibly overbroad (essentially seeking all income or revenue or customer-related data), unduly burdensome in the extreme (particularly coming at the end of the discovery period), and is not limited as to any time period. Moreover, in addition to all of the foregoing objections, the information called for by this document request is highly confidential. Turning over such information would violate the privacy provisions of 47 U.S.C. § 551, and even if such data were relevant (which it is not), it could not be shown to any persons who are employed by Gulf Power, which, on information and belief, has an interest in competing with Complainants to offer communications services. Another legal defect, and indeed an insuperable one, in Gulf Power's request is that it is black-letter law that it is inappropriate to value any claimed taking by the alleged gain (i.e., income) of the taker. Instead, as *Alabama Power* reiterated, "in takings law, just compensation is determined by the loss to the person whose property is taken"; "the question is, What has the owner lost? not, What has the taker gained?" 311 F.3d at 1369. Lastly, it is clear that this request, coming as late as it does, is particularly inappropriate because Gulf Power must have arrived at a method for supporting its claim to a higher pole rate before now that is not dependent upon Complainants' own income or revenues.

Gulf Power Document Request No. 7:

Produce any press release, 10K statements, prospectuses, internal memoranda, or other documents in which you have ever referred to the Cable Rate or Telecom Rate.

Complainants' Response:

Complainants object to this document request on the ground that papers written by *Complainants* that refer to FCC regulated rates are not relevant to Gulf Power's burden of showing that, under the *Alabama Power* standards, Gulf Power is entitled to an annual pole

attachment rate much greater than such rates. In fact, Gulf Power already receives a contractually negotiated rate from Complainants that exceeds FCC rates, which in turn exceed Gulf's marginal costs of attachment. *See* Complaint, ¶ 19 n.4. The issue in this proceeding, as set by the Hearing Designation Order, is whether Gulf Power can establish a constitutional right for compensation greater than its "marginal costs" of attachment. In *Alabama Power*, the Eleventh Circuit explained that the Cable Rate already "provides for *much more than* marginal costs." 311 F.3d at 1370 (emphasis added). It also explained that, unless a utility can satisfy the two-pronged tests of "full capacity" and a "higher valued use" that is foreclosed or lost, "it is *irrelevant* that the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments." *Id.* at 1371 (emphasis added). Accordingly, any documents of Complainants that might refer to FCC Cable Rate or Telecom Rate are not relevant to Gulf Power's burden to show that it can meet the *Alabama Power* requirements for sustaining a claim for more than its marginal costs, let alone the higher FCC formula rates.

Complainants further object that this document request is incredibly overbroad and unduly burdensome – it is not limited to documents pertaining to Gulf Power and would apparently require every piece of paper that the Complainants have to be examined, including attachment agreements, correspondence, and memoranda involving other utilities and telephone company pole owners. In addition, as for public documents, Gulf Power may readily access past years' press releases and securities filings by using publicly available records (i.e., through NEXIS and EDGAR on the Securities and Exchange Commission's website).

Subject to and without waiving the foregoing objections, Complainants believe that they have already produced, in the January 11th Document Production, all non-privileged documents

pertaining to Gulf Power since the inception of this case that refer to the Cable Rate or Telecom Rate.

Gulf Power Document Request No. 8:

Produce all joint use pole agreements, including but not limited to all drafts thereof, between you and any entities other than Gulf Power.

Complainants' Response:

Complainants object to this document request on the grounds that its request for pole agreements that do not involve Gulf Power are not relevant to this case. For example, rates paid by Complainants to other utilities are irrelevant to rates on Gulf Power poles (different electric utilities would use different cost accounts from different Federal Energy Regulatory Commission ("FERC") Form 1 statements, and telephone utilities would use Automated Reporting Management Information System ("ARMIS") accounts not used by electric utilities).

Complainants further object to this request on the grounds that it is overly broad (it literally calls for potentially thousands of pole agreements), unduly burdensome, and is not limited as to time.

Moreover, this request is unduly vague in its use of the phrase "joint use"; it is not clear what Gulf Power intends that term to mean. Subject to and without waiving the foregoing objections, Complainants respond as follows:

To the best of Complainants' knowledge, Complainants have no "joint use" pole agreements with other entities where "joint use" has the meaning often ascribed by Gulf Power of co-owning or jointly controlling poles.

Gulf Power Document Request No. 9:

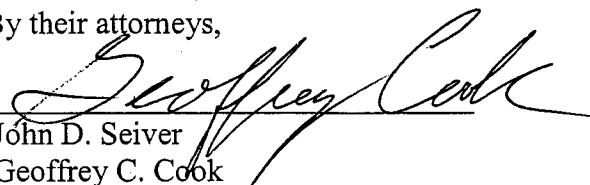
Produce all documents referring to, relating to, or regarding any surveys, audits, pole counts, or attachment counts pertaining to poles owned by you or Gulf Power conducted by you, your agents, or any other person or entity from 2000 through the present.

Complainants' Response:

Complainants object to this document request on the grounds that it is unduly burdensome, vague, and overly broad. Subject to and without waiving these objections, Complainants respond by referring Gulf Power to Complainants' response to former Gulf Power request for production number 5, which explained that to the extent these documents exist at all, they have been previously produced in the January 11, 2005 document production, as supplemented by documents appended to Complainants April 18th discovery responses. *See* Complainants' April 18th Responses, 29.

Michael A. Gross
Vice President,
Regulatory Affairs and
Regulatory Counsel
**FLORIDA CABLE
TELECOMMUNICATIONS ASS'N, INC.**
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303
(850) 681-1990

By their attorneys,



John D. Seiver
Geoffrey C. Cook
Rita Tewari
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006
(202) 659-9750

Counsel for

**FLORIDA CABLE TELECOMMUNICATIONS
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.**

November 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Responses to Gulf Power Company's Second Set of Interrogatories and Requests for Production of Documents*, has been served upon the following by electronic mail and U.S. Mail on this the 18th day of November, 2005:

J. Russell Campbell
Eric B. Langley
Jennifer M. Buettner
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2015

Lisa Griffin
Federal Communications Commission
445 12th Street, S.W. – Room 5-C828
Washington, D.C. 20554

Ralph A. Peterson
BEGGS & LANE, LLP
501 Commendancia Street
Pensacola, Florida 32591

Sheila Parker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W. – Room 4-C266
Washington, D.C. 20554

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

James Shook
Federal Communications Commission
445 12th Street, S.W. – Room 4-A460
Washington, D.C. 20554

David H. Solomon
Federal Communications Commission
445 12th Street, S.W. – Room 7-C485
Washington, D.C. 20554

Jonathan Reel
Federal Communications Commission
445 12th Street, S.W. – Room 4-C261
Washington, D.C. 20554



Debra Sloan