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

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

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COMPLAINANTS' RESPONSE TO
RESPONDENT GULF POWER COMPANY'S MOTION FOR EXTENSION OF TIME

In accordance with the Court's Order dated March 18, 2005,[1] 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"), hereby respond to and oppose certain aspects of the Motion for Extension of Time ("Motion") filed by Respondent Gulf Power Company ("Gulf Power" or "Plaintiff") on March 23, 2005.

In seeking a second extension of time to April 15th to respond to Complainants' discovery[2] Gulf Power asserts that the resignation of a key employee responsible for answering the discovery and the need to finalize the details of the "statement of work" for the pole audit (which audit Gulf Power previously agreed to complete by July 15, 2005) made it impossible to

[1] *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, Order, FCC 05M-14, EB Docket No. 04-381 (rel. Mar. 18, 2005).

[2] On March 3, 2005, the Court granted Gulf Power's Unopposed Motion for Extension of Time and scheduled exchange of discovery responses to occur on March 17, 2005, two weeks after the initial discovery due date. *See Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, Order, FCC 05M-10, EB Docket No. 04-381 (rel. Mar. 3, 2005).

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meet the discovery response dates.[3] Gulf Power also seeks to modify the procedural schedule in this hearing to accommodate the additional seven months (three months past the original July 15th due date) that Gulf Power estimates will be required for a third party contractor to complete this pole audit.[4]

Complainants do not object to a discovery extension, although Complainants do object to the last minute notice the night before the due date advising that no responses would be forthcoming. Moreover, Complainants doubt that the responses to be provided on April 15th will be meaningful given other statements by Gulf Power during the March 17th telephone conference and in its Motion. Complainants thus oppose Gulf Power's request to modify the remaining procedural schedule and suggest that at the hearing on March 30th, the parties address not only the delay in the audit but the apparent lack of "evidence" supporting Gulf Power's initial request over a year ago to be heard with respect to its claims of full capacity.

I. Gulf Power's April 15th Extension Request

Gulf Power's inability to respond to Complainants' discovery requests remains a mystery. For example, on January 4, 2004 – well over a year ago – Gulf Power described to the Bureau the types of evidence it would introduce in an evidentiary hearing to satisfy the *Alabama Power v. FCC* test.[5]

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[3] Motion at ¶ 4.

[4] Motion at ¶¶ 5-6.

[5] Specifically, Gulf Power indicated that it would proffer: (1) evidence of pole change-outs to accommodate new attachments of telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an "unregulated rate" for pole space on some poles; (2) evidence of make-ready for twelve different cable operators (and their geographic overlap) that have paid for change-outs of unspecified poles over an unspecified period of time; (3) load studies and business plans addressing the potential impact of unforetold third-party attachments; (4) evidence depicting what crowded poles look like; and (5) unspecified "other" evidence that Gulf Power may later discover. *See* Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test at 3-9 (filed Jan. 8, 2004) ("Gulf Power Description of Evidence").

On the basis of Gulf Power's representations in its Description of Evidence, the Bureau designated this matter for hearing and gave Gulf Power the opportunity "to present the evidence *delineated in its Description of Evidence* during a hearing before an Administrative Law Judge ("ALJ")."[6] Bureau counsel reiterated this point during the January 31, 2005 Prehearing Conference: "... when Gulf Power made this initial description of evidence, a great deal of the evidence occurred several years ago. The make ready work, the testimony about what happened in early 2000. We want to make sure that evidence comes in and relates to its testimony."[7] Thus, the Bureau made clear that the evidence submitted by Gulf Power must consist of that which it identified in the Description of Evidence.[8]

In its Motion, Gulf Power claims that it is not in a position to provide the vast majority of the evidence it told the Bureau it was prepared to produce.[9] In addition, at the December 13, 2004 Prehearing Conference, Gulf Power explained that it needed *Complainants'* facilities maps to help identify where cable operator attachments may be located on "full" or "crowded" poles.[10] Complainants provided these maps and other detailed make-ready requests (including maps, pole locations and diagrams) nearly three months ago. Thus, it is clear that Gulf Power should have had the information necessary for its use if it had none of its own maps or copies of work orders to respond to Complainants' discovery requests. The implication now is that even this information was not helpful to Gulf Power because it truly has no "evidence" of poles at full

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[6] *Hearing Designation Order*, ¶ 5 (emphasis added).

[7] Transcript of January 31, 2005 Prehearing Conference at 127-128 (statement of Ms. Lien) ("January 31st Prehearing Conference Transcript").

[8] Gulf Power Description of Evidence, ¶¶ 4-12.

[9] *See* Motion at ¶ 4. *See also* email from Mr. Langley to John Seiver and Brian Josef dated March 16, 2005 (a copy of which was forwarded to Shiela Parker in the Office of the Chief Administrative Law Judge). Complainants do acknowledge that, on January 11, 2005, Gulf Power provided generic and apparently incomplete load studies, pursuant to Judge Sippel's December 14, 2004 Order, but Complainants dispute the relevance of any of that information to the test set forth in *Alabama Power v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (hereinafter "*Alabama Power v. FCC*").

[10] *See* Transcript of December 13, 2004 Prehearing Conference at 86.

capacity despite its prior filings in the underlying proceeding. Perhaps its "Description of Evidence" pertained to evidence it did not possess but only hoped to create.

Indeed, Gulf Power readily confirms this when it states in its Motion that it "cannot identify the specific poles it contends are 'crowded' or at 'full capacity' for the purposes of this proceeding until the audit is complete."[11] If so, this confirms that there was no "evidence" and it would be a waste of time to proceed with an April 15th discovery deadline as the real information will not be available for at least another six months. Moreover, contrary to Gulf Power's assertion that "... an extension of the discovery deadline itself will have absolutely no impact on the remaining deadlines in the December 17, 2004 Scheduling Order ...," Gulf Power's professed inability to identify "full" or "crowded" poles until the completion of the Osmose audit will prejudice Complainants.[12] Complainants' expert witnesses would be denied the opportunity to review, analyze and respond to Gulf Power's evidence, in light of the report, deposition and additional discovery deadlines that would all precede the submission of the results of the audit.

Although an additional month's extension in itself is not a problem, an extension would only be reasonable if, for example, Gulf Power could provide meaningful responses to Complainants' discovery request that Gulf Power produce the evidence it identified in its proffer. Because it appears there is none, there is no reason to extend discovery.

II. Gulf Power's Request To Modify The Procedural Schedule

Following the *Alabama Power v. FCC* decision in November 2002, Gulf Power has known that it must specifically identify "each pole" that is at "full capacity" in order to seek a pole rental that exceeds marginal costs.[13] To the extent Gulf Power "had hoped that statistical

[11] Motion at ¶ 3 (emphasis added).

[12] Motion at ¶ 5.

[13] *Alabama Power v. FCC* at 1370-71.

evidence might be appropriate and satisfy [its] burden," but now believes that it "would have a difficult time making a per-pole showing based on the documents and information currently in [its] possession," Gulf Power has simply decided to change its legal strategy.[14] The Court and Complainants may not be held hostage to a delayed schedule because Gulf Power waited to develop the evidence it needs to make its case, evidence that it "described" a year ago and should have had in its possession many years earlier. Gulf Power has apparently forgotten that the underlying proceeding relates to pole conditions in 2000 – 2001, not 2005.

The Court previously addressed and rejected a procedural schedule change similar to that which Gulf Power urges in its Motion. Specifically, during the January 31, 2005 Prehearing Conference, the Court considered Gulf Power's request whether a temporary stay or revision to existing procedural deadlines would best serve the interests of justice, in light of Gulf Power's 5 – 7 month estimate to complete the pole survey.[15] The Court ruled that, while it might consider brief, minor scheduling adjustments, the Court "certainly didn't contemplate any stay in the real sense of the world [sic]" and wants "to see serious discovery underway while the other issues are being explored."[16] Gulf Power's failure to provide any discovery responses or even allude to the absence of any real responses when it requested its first extension (to which Complainants agreed) coupled with its new request for an additional seven months' time until completion of the Osmose survey, only serves to disprove Gulf Power's commitment to "serious discovery."

Complainants also take issue with Gulf Power's statement that a delay is necessary to accommodate the additional seven months needed to complete the Osmose audit because "Gulf

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[14] *See* January 31st Prehearing Conference Transcript at 117-118.

[15] Gulf Power first raised this issue in its January 11, 2005 Proposed Additional Agenda Items. *See* Gulf Power's Proposed Additional Agenda Items for January 31, 2005 Prehearing Conference at 2.

[16] *See* January 31st Prehearing Conference Transcript at 113 and 114.

Power did not anticipate conducting a broad accounting study."[17] The Court suggested the pole study only for the benefit of Gulf Power because Gulf Power bears the burden of production and persuasion in this proceeding, as set forth in the *Hearing Designation Order*.[18] The Court made clear, however, that it would not delay the proceeding to accommodate completion of the pole survey, noting: .

> ... you have had this before you came – before the case was set for hearing for a considerable period of time. And you did have an opportunity to develop a lot of this evidence. So to just let this hearing become an exercise in putting information together that should have been available at the time this hearing was commenced at least in large part – now I'm very reluctant to move too much on a hearing schedule.[19]

Despite any ambiguities in Gulf Power's statements during the March 17th conference call, it appears that Gulf Power is relying entirely on the Osmose pole study for its "evidence," blithely asserting that it cannot identify any of its purportedly "full" poles until completion of this new survey.[20] In other words, Gulf Power cannot meet its burden of "production" and its burden of "proof" for any pole to which Complainants were attached or even are attached now.[21]

The relevant inquiry in this hearing proceeding relates to the capacity conditions of Gulf Power's poles in 1999 and 2000, immediately prior to its imposition on Complainants of $38 per pole rental rates, rental rates it asserted were due for *all* of Complainants' pole attachments under the Constitution.[22] It was not until five years after that increased rental was demanded that Gulf Power asserted that any of its poles were ever at full capacity. A further delay for the purpose of creating evidence in 2005 to "prove" capacity as of five years ago is entirely unjustified. Gulf

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[17] Remarks of Gulf Power counsel Eric Langley during March 17, 2005 conference call with Judge Sippel, Lisa Griffin of the Enforcement Bureau, and Complainants' counsel John Seiver and Brian Josef.

[18] *See* January 31st Prehearing Conference Transcript at 113-114.

[19] January 31st Prehearing Conference Transcript at 115.

[20] Motion at ¶ 3.

[21] Prehearing Order, 2 (Oct. 1, 2004).

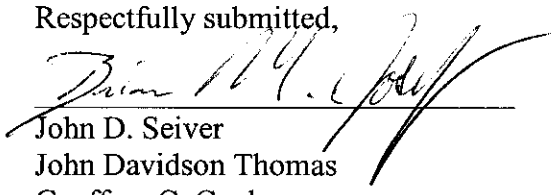
[22] *See, e.g.,* Gulf Power Company's Response to Complaint at 7, 15, 17-19 (filed Aug. 9, 2000).

Power clearly has no relevant evidence to be introduced and this proceeding should be dismissed, not extended or delayed any further.[23]

III. Conclusion

WHEREFORE, Complainants urge that this Court set a prompt deadline for Gulf Power's responses to Complainants' discovery requests to include information delineated in its Description of Evidence and deny Gulf Power's request for a modified procedural schedule to accommodate the completion of its 2005 pole audit. Complainants also request the opportunity to file a dispositive motion to terminate this proceeding.

Respectfully submitted,



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March 29, 2005

[23] If Gulf Power claims an entitlement to pole attachment rates exceeding the Commission's Cable Formula for 2005 based on current pole conditions – an entitlement that Complainants dispute – that would require a separate proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Complainants' Response To Respondent Gulf Power Company's Motion for Extension of Time* has been served upon the following by electronic mail, telecopier and U.S. Mail on this the 29th day of March, 2005:

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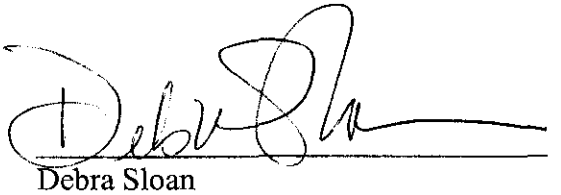

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