

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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Federal Communications Commission
Office of Secretary

**RESPONSE TO GULF POWER COMPANY'S
JUNE 2005 STATUS REPORT ON POLE SURVEY**

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, hereby respond to Gulf Power Company's ("Gulf Power") June 2005 Status Report on Pole Survey ("June Status Report").¹

The June Status Report is the third such report filed by Gulf Power in connection with the survey of all its poles in its service area. The Court authorized Gulf Power to make this survey because "Gulf Power represent[ed] that it cannot identify specific poles it contends are 'crowded' or at 'full capacity'" without it.² Because this proceeding concerns specific poles that are at "full capacity," Complainants suggested that Gulf Power's representation that it could not identify specific poles ran counter to its "Description of Evidence" that had been filed with the Bureau in

¹ The Court established the timing and content of these monthly reports in *In re Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, Order, EB Docket No. 04-381, FCC 05M-18 (rel. Apr. 1, 2005) (hereinafter "April 1st Order").

² *In re Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, Status Order, EB Docket No. 04-381, FCC 05M-23 (rel. Apr. 15, 2005) (hereinafter "April 15th Status Order") (emphasis in original).

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2004 (which filing generated this proceeding) and that without such necessary proof, this proceeding should be dismissed.³

The Court deferred Complainants' suggestion and instead authorized a six-month survey and directed that each month Gulf Power file a status report identifying, at a minimum: (1) the total number of poles to be surveyed; (2) the number of poles actually surveyed; (3) the number of poles estimated to be at "full capacity;" (4) any problems encountered with the survey; and (5) the time estimated for completing the survey.⁴

Upon review of the June Status report, the two that preceded it, and Gulf Power's discovery responses, there are significant issues that require additional attention.

1. Number of Poles Surveyed and Completion of Survey.

All three of Gulf Power's status reports show that 150,000 poles need to be surveyed. The April report showed that 2,513 poles had been surveyed and the May report showed that 10,429 poles had been surveyed. Curiously, the June report shows no increase in the number of poles surveyed, with the same 10,429 poles reported, all limited to the Pensacola area. Accordingly, with only 10,000 poles having been surveyed in the first three months, 140,000 poles remain to be surveyed by the end of September so that more than 45,000 poles must be surveyed in each of the next three months, or more than 10 times the number that have been surveyed each month to date. Even if we accept Gulf Power's "Statement of Work" representation that the survey completion date is October 23, 2005⁵ (which makes the preliminary report in September impossible and casts doubt on the final report being ready by October 31), the extra three weeks would only reduce the total to be surveyed in each of the next four months to 35,000 poles. Accordingly, there appears to be a

³ Transcript of March 30, 2005 Prehearing Conference at 180-83 (exchange between Counsel for Complainants and the Court) ("March 30th Transcript")

⁴ March 30th Transcript at 194-95; April 1st Order at 2, n. 3.

⁵ June Status Report at ¶ 5.

significant “problem” with completing the survey on time despite Gulf Power’s prediction in its June Status Report.

2. Conditions on Poles Surveyed

Gulf Power also indicates in its June Status Report that “80% of the 10,429 poles collected on first pass are *crowded*.”⁶ The Court has already directed that the issue is “full capacity” because “the term ‘pole crowding’ is ambiguous.”⁷ “Crowding” is also not the relevant term as set forth in the relevant decisions.⁸

3. Absence of any Documents or Information from the “Description of Evidence”

One of the issues in this proceeding concerns the relationship between Gulf Power’s “Description of Evidence” and the survey. The Court noted that the survey supplements “but do[es] not substitute for, evidence proffered in the Description of Evidence” and that such evidence will be relevant in determining “whether Gulf Power has met its burden of proof.”⁹ Indeed, “Gulf Power is expected to have authentic and reliable proof to back up its proffer.”¹⁰

The Court also noted that Complainants’ interrogatories and document requests relate to the Description of Evidence and that “such questions should be answered and not avoided or deferred needlessly to the completion of the Pole Attachment Survey in the fall.”¹¹ Accordingly, the Court directed that “existing evidence related to the Description of Evidence must be produced to the Bureau and the Complainants in discovery” and that the ongoing survey “does

⁶ June Status Report at ¶ 3. Gulf Power’s May Status Report also uses the term “crowded.”

⁷ April 15th Order at 4, 5.

⁸ *Id.* at 5.

⁹ *Id.* at 9.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 8.

not excuse Gulf Power from providing complete interrogatory answers with respect to the proof it had on January 8, 2004, that relate to its Description of Evidence.”¹²

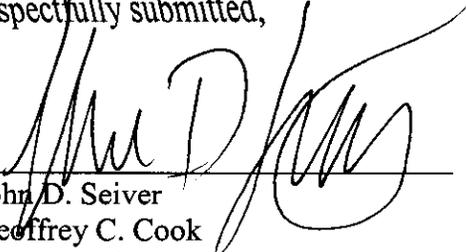
Regrettably, Gulf Power has not produced the evidence that was part of its “Description of Evidence.” In addition to failing to answer specific interrogatories concerning the “evidence” that Gulf Power had “described,” Gulf Power objected to and did not produce documents that should have been part of the specific “evidence” that had been described, deferring until the survey is complete or the expert phase. Although at times Gulf Power would generally cross-reference its document production in January and made many documents made available for inspection in May (essentially permits and make-ready as well as maps from 1996 and 2001), those documents did not specifically identify any conditions of “full capacity” on specific poles, let alone respond to the request for what Gulf Power relied upon when it “described” the evidence for the Bureau in 2004.

We do not ask the Court to resolve any of the discovery issues here as they will be dealt with in Complainants’ Motion to Compel to be filed Monday July 11, 2005.¹³ Complainants respectfully suggest, however, that the Court may nonetheless wish to convene a brief hearing or conference call to discuss issues Nos. 1 and 2.

¹² *Id.* at 7, 8.

¹³ Complainants’ counsel reviewed and designated for copying some 1400 pages of documents and maps while at Gulf Power’s Pensacola headquarters on May 27th and 28th. Gulf Power sent those copies to Complainants by mail with a cover letter dated June 22nd and a box postmarked June 23rd. Complainants received the box of documents on June 27th. The Court directed Complainants to file any necessary motion to compel within 14 days of receipt, which would be July 11th. Order dated May 20, 2005 (No. 05M-27, rel. May 23, 2005).

Respectfully submitted,



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July 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Response to Gulf Power Company's June 2005 Status Report on Pole Survey* has been served upon the following by electronic mail and U.S. Mail on this the 6th day of July, 2005:

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