

**Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 06M-03

In the Matter of)	EB Docket No. 04-381
)	
Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C.,)	05263
)	
Complainants,)	
)	
v.)	
)	
Gulf Power Company,)	
)	
Respondent.)	

ORDER

Issued: March 13, 2006

Released: March 16, 2006

This is a ruling on “Complainants’ Motion for an Order Regarding Gulf Power’s Failure to Produce Materials Covered by the Scheduling Order of December 14, 2005 and the Addendum Order of December 16, 2005” (“Motion”) filed by Florida Cable Telecommunications, Inc. *et al.* (“Complainants”) on March 1, 2006. Gulf Power Company (“Gulf Power”) filed a “Response to Complainants’ Motion for an Order” (“Response”) on March 8, 2006.

Complainants’ Motion was filed following an informal telephone conference held on February 15, 2006 to address concerns of Complainants about the completeness of Gulf Power’s document production of February 10, 2006. The Presiding Judge had “invited the parties to submit a joint order” that would recite the evidentiary sanctions that could be imposed on any party that was found to have withheld relevant evidence which had been required to be produced under the Presiding Judge’s *Scheduling Order*, FCC 05M-60, issued December 14, 2005, and *Addendum* released December 16, 2005. Specific to Complainants’ concern, the *Scheduling Order’s Addendum* had provided:

Gulf Power shall provide additional information to Complainants and the Bureau about such poles identified on January 20, and on January 27, including Gulf Power pole numbers; all documentation associated with the Osmose report that is applicable to such poles; identification of all entities attached to each pole; location above ground level of all attachments on each pole; height,

material and data of installation in the ground of each pole; copies of all make-ready (including 'change-out') documents involving each pole; copies of any accounting and/or cost records relating to such poles; and all records and/or a statement upon which Gulf Power relies to support its claim of a lost opportunity as to such poles.

Complainants represent that not all such documentary information was provided, and that the parties were unable to agree to a *Joint Order*. Complainants now requests that the Presiding Judge issue a one-sided "speaking" *Order* that would include a finding that:

Gulf Power did not provide any make-ready documents pertaining to the 40 Osmose poles or any accounting records, records of unreimbursed costs, or other records in support of its claim of lost opportunity on any pole.

Complainants seek this preclusion order which is so broad that it could block Gulf Power from offering testimony and documentary evidence on lost opportunity. Gulf Power believes that the relief sought by Complainants is "too broad," would unduly limit Gulf Power's case development and could even "invade work-product." Such concerns are not unreasonable.

Gulf Power has the burden of proof on the issue set for adjudication to determine:

Whether Gulf Power is entitled to receive compensation above marginal cost for any attachments to its poles belonging to the Cable Operators and if so, the amount of any such compensation.

Hearing Designation Order, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004 ("*HDO*"), Para. 11. Gulf Power readily admits that "both sides" are to "produce/ identify/disclose any documents upon which they intend to rely in their cases-in-chief." Those documents must be exchanged on March 31, 2006, and there is an Admission Session set for April 10, 2006. *See Status Order, supra*. Gulf Power admits an anticipated limitation in its proof, noting that "it is practically impossible to re-construct a pole (and its rearrangements or change-outs) through history." Thus, there can be no further prehearing relief granted on document discovery under the *Scheduling Order's Addendum*, and therefore, Complainants' proposed one-sided *Order*¹ will not be granted.²

¹ Complainants were not invited to seek a one-sided order, and it was clear to both parties during the telephone conference that the Presiding Judge only would entertain a *Joint Order*. Complainants assumed the risk of a summary rejection of the motion. But the question of proof is sufficiently important to be considered, and Gulf Power has responded on the merits.

² Complainants also note that it did not receive "color photographs of ten of the fifty poles that it identified, received black and white photos of five "Knology poles," and received no data or photos on the other five "Knology poles." Gulf Power should check its records and provide additional color photos and data before March 31.

Accordingly, IT IS ORDERED that *Complainants Motion* filed on March 1, 2006, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION³

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Chief Administrative Law Judge

³ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.