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Federal Communications Commission
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., Complainants, v. GULF POWER COMPANY, Respondent.	E.B. Docket No. 04-381

GULF POWER COMPANY'S RESPONSE TO COMPLAINANTS' MOTION FOR AN ORDER

Gulf Power Company ("Gulf Power") responds to 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" as follows:

1. There are two main problems with Complainants' motion and proposed order: (1) they gloss-over the documents actually at issue (historical make-ready documents for the "50 poles" identified by each side); and (2) they are over-reaching in their attempt to preclude Gulf Power from offering evidence.

2. To be clear, the documents at issue are "make-ready" documents. Complainants neglect this fact throughout their motion and proposed order, instead relying on generalities in hopes of later arguing that the order means more than was intended.

3. There was not a "failure to produce" make-ready documents on Gulf Power's part. Complainants feign surprise that Gulf Power cannot search (and thus cannot produce) all

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historical make-ready documents on a pole-by-pole basis. But this is nothing new. Since the beginning of this hearing proceeding (including the December 9, 2005 teleconference giving rise to the December 14, 2005 Order), Gulf Power has been candid that it is practically impossible to re-construct a pole (and its rearrangements or change-outs) through history. If this were possible, the audit ordered by the Court would not have been necessary since Gulf Power could have re-created not only the current condition of the pole from its records, but also the historical evolution of the pole.

4. Since make-ready documents are at issue, make-ready documents should be the subject of any order entered. Complainants' proposed order (paragraph 6 to be specific) paints with too broad a brush.[1] The Court stated in the February 15, 2006 conference call that the purpose of the 50 pole data exchange was to prevent "surprise" at trial. Complainants are taking the purpose too far. Complainants propose an order that would preclude Gulf Power, in rebuttal (for example), from offering data not specifically copied for Complainants as part of either the May 2005 document review or the January/February 2006 information exchange. The result would be patently unfair, and would be a clear violation of due process.

5. Complainants' proposed order also purports to arbitrarily limit Gulf Power's case development. The proposed order, if adopted, would prevent Gulf Power from using any information collected or developed (and conceivably, by extension, rearranged or reformatted) between now and the exchange of cases-in-chief on March 31, 2006. Not only would this unacceptably limit Gulf Power's case development/preparation, but it also might inappropriately invade the work-product doctrine. The pre-hearing exchange of cases-in-chief already removes

[1] Paragraphs 6, 7 and 8 are the only substantive paragraphs of Complainants' proposed order. Paragraphs 1 through 5 of Complainants' proposed order attempt to lay the inaccurate foundation that Gulf Power "failed to produce" something.

virtually all element of surprise (other than on cross-examination), eliminating any need for Complainants' overly expansive proposed order.

6. Gulf Power understood the direction from the Court (during the February 15, 2006 teleconference) to be that both sides should produce/identify/disclose any documents upon which they intend to rely in their cases-in-chief with respect to the 50 poles identified by either side. This intent should be reflected in any order entered by the Court. If either side offers truly "undisclosed" evidence in their cases-in-chief, the other certainly retains its right to argue for its exclusion.

7. For the reasons set forth above, Gulf Power respectfully requests that the Court deny Complainants' motion for an order and instead enter the proposed order attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response to Complainants' Motion For An Order has been served upon the following by Electronic Mail (where designated) on March 8, 2006 and will be served by United States Mail on March 9, 2006:

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