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

Oct 14 FCC 05M-50
04772

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.,	)	
Complainants,	)	
v.	)	
Gulf Power Company,	)	
Respondent.	)	

ORDER

Issued: October 11, 2005 **Released:** October 12, 2005

Gulf Power objects to rulings on Complainants Request for Documents Nos. 8, 14 and 15 that were made by the Presiding Judge in *Second Discovery Order* FCC 05M-44, released September 22, 2005.

This is a ruling on Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order filed on September 30, 2005. Complainants filed its Opposition on October 7, 2005.

As a preliminary matter, Complainants object to Gulf Power's request for reconsideration of an interlocutory ruling on discovery as an unauthorized request under Commission rules. *See* 47 C.F.R. § 1.291(c)(3) (petitions requesting reconsideration of interlocutory ruling made by the Commission or the Chief Administrative Law Judge will not be entertained).[1] However, the Presiding Judge may "modify or set aside" a ruling on

[1] On October 10, 2005, Complainants filed a Third Motion to Compel. Due to the scope of the motion (26 pages), Gulf Power will be permitted additional time to respond. The parties should agree to a filing date, and a proposed *Order* with respect to the pleading cycle shall be submitted by **November 24, 2005**. Complainants may file a Reply within 5 days of Gulf Power's Response. The Presiding Judge will consider the utility of oral argument (perhaps *via* telephone) after the pleadings cycle is completed. Complainants must obtain authorization from the Presiding Judge before filing any future motion to compel discovery for supplemented answers to interrogatories, or requests for documents.

his "own motion" within 60 days of the ruling. *See* 47 C.F.R. § 1.113(c). As a matter of discretion, the Presiding Judge will consider the pleadings on reconsideration only to the extent that it will assist in this adjudication.

Document Request No. 8

> Produce and specify by Bates number, all documents referring to Gulf Power's upgrades, modernization, strengthening or replacement of poles containing Complainants' attachments from 1998 --- .

The Presiding Judge found such evidence relevant to the "issue of Gulf Power's pole capacity." *Second Discovery Order* at 4. Gulf Power considers relevance of documents to capacity to be "vague." It is difficult to accept that bare conclusion under subjects such as "upgrades, modernizations, strengthening or replacement" which would likely be factors in connection with increasing a pole's capacity to take on additional attachments. However, more to the point of trial preparation, Gulf Power considers the discovery request fully answered by its admission of an "historical willingness to accommodate attachers by performing make ready." In their Opposition, Complainants argue that taking Gulf Power's refusal to produce the Request No. 8 documents on grounds of relevancy, coupled with the "admission," means to Complainants that "none of [Gulf Power's] historically changed-out poles can be found to be, or to have been at full capacity."

The alternative to document production is Stipulation which rests with Gulf Power and Complainants.[2] If the parties can agree by Stipulation to Gulf Power's "admission," then the record is established that Gulf Power has and will always accommodate a change-out whether for its own benefit or, to accommodate the need or request of a pole space renter, or potential space renter. Agreement to that proposition would shorten the evidentiary record and save time. Based on that (or similar) Stipulation, the parties can argue their respective conclusions on "full capacity" and/or "crowded". Ultimately, the Presiding Judge will consider the Stipulation along with the parties' arguments in connection with issuing the Initial Decision in this case.

In view of benefits of time and costs to the Commission to achieve an evidentiary Stipulation in lieu of supervising a labor intensive and costly document discovery, Gulf Power and Complainants shall negotiate on Stipulation for a period of no less than ten days. The parties will prepare and file a Joint Status Report on Stipulation on **October 26, 2005**.

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[2] There is even another alternative available by Complainants inspecting the documents at a Gulf Power office which was contemplated by the Presiding Judge. *See Discovery Order* FCC 05M-38, released August 5, 2005 at 21. If Complainants agree to inspect documents, Gulf Power must use reasonable methods of specifying specific relationship of documents to specific poles alleged to be at "full capacity" and/or "crowded."

Document Request No. 14

> Produce and specify by Bates number, all documents referring to sources --- from which Gulf Power has obtained new poles, from 1998 to the present, in order to change-out poles containing Complainants' attachments.

In the Second Discovery Order the Presiding Judge had determined that a "tight supply of poles" could inflate costs. Gulf Power makes the points in its request for reconsideration that such market conditions of pole availability is not at issue in this case, and that neither party is factoring bare cost of pole for showing an inflated or deflated or otherwise wrong rate. Complainants again point out that Gulf Power, by its own admission, can increase capacity of poles. Therefore, if it is not impeded from expanding capacity by pole availability, the case for charging a rate in excess of marginal costs is not effected, and the evidence of pole availability becomes irrelevant. By removing pole costs from the equation, it appears that Complainants gain a factor and Gulf Power loses one. Furthermore, Gulf Power still has the burden of proving that if "virtually any pole can be changed out" and that it has historically done so when needed or requested, there are still poles that it can prove to be at "full capacity" and/or "crowded."

With respect to Document Request No. 14, Complainants have failed to rebut the reasons given by Gulf Power for the non-relevancy of data on new pole sources. As a result, Complainants have not shown a need for discovery of sources or pole acquisition costs of new poles, and Gulf Power is now precluded from using pole availability or costs to justify charging a rate above marginal costs. Therefore, Gulf Power need not provide any further response to Document Request No. 14.

Document Request No. 15

> Produce and specify by Bates number, all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power's retention of its consultant Osmose --- that depict the specific Gulf Power poles --- at full capacity.

Gulf Power initially responded that such documents were made available at the May 27-28 document review. By supplemental response, Gulf Power has identified the specific groups of documents responsive to this request: maps within the 1996 and 2001 pole count documents. (No reason is given by Gulf Power for not having provided this descriptive information in its first response.)

Gulf Power correctly notes that the Second Discovery Order requires providing more information then was asked for by Complainants. In the interest of facilitating preparation, Gulf Power was ordered merely to identify those poles that appear on such map – type documents that Gulf Power contends are at "full capacity" and/or "crowded."[3]

Gulf Power considers making a copy of an existing document that it intends to produce, and marking poles designated thereon as "full capacity" and/or "crowded," to be the creation of new document(s) which could be oppressive. The task of identifying and proving "full capacity" and/or "crowded" poles on a pole by pole basis was assigned by the Eleventh Circuit and employed in the *HDO*. Gulf Power has failed to convince that the mere preliminary specification (by circling, underline, color code, etc.) of previously identified poles as "full capacity" and/or "crowded" without any explanation and without preparing a document (only altering a copy) is oppressive. It seems to be an appropriate require-ment in an effort to provide the Bureau and Complainants with notice, and to narrow the description of evidence that is relevant to the Eleventh Circuit standard.

The burden of presentation and proof has been assigned to Gulf Power and a discovery and hearing preparation schedule has been set. *See Order* FCC 05M-38, released August 5, 2005. *See* 47 C.F.R. § 1.234 and § 1.248. The Presiding Judge can regulate the course of hearing, including preparation. Therefore, Gulf Power will be required to reasonably respond to the Presiding Judge's procedure with respect to Document Request No. 15, but only on a non-binding basis at this time.

Accordingly, the request for reconsideration of the Second Discovery Order with respect to Document Request No. 15 is refused, with modification to accommodate Gulf Power. *Compare Order* FCC 05M-45, released September 26, 2005 requiring Gulf Power to submit and exchange three poles that are at "full capacity," in a non-binding proffer. The Presiding Judge will consider any reasonable request for additional time to comply or other conditions for complying with this ruling. Also, in connection with this *Order's* compliance, it is within the discretion of Gulf Power to design the format of its response to Document Request No. 15, so long as it is reasonably responsive.

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[3] The authority of presiding judges in Commission proceedings to require forms of evidence includes regulating the "course of the hearing," requiring "the filing of memoranda of law and the presentation of oral argument with respect to any question of law," "dispose of procedural requests or similar matter," and taking actions in conforming with APA. 47 C.F.R. § 1.243(f), (g), (i), (j). *See also* additional authority at 47 C.F.R. § 2.48 (prehearing conferences; hearing conferences).

Further Instruction

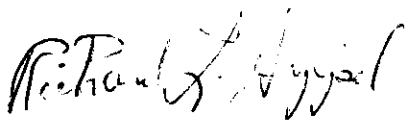
Ultimately, Gulf Power must identify each pole that it considers at "full capacity" and/or "crowded." Gulf Power will also need to offer relevant documentary proof to establish that particular poles are at "full capacity" and/or "crowded." These would include the poles occupied by Complainants' attachments for which Gulf Power seeks supra – marginal cost compensation. After identifying each such pole, Gulf Power must provide supporting documentation, or must identify specific supporting documentation that has been produced. It is not sufficient to merely refer to a block of documents that were made available at a May 27-28 offer of document inspection.

To repeat the prescribed procedure, where business documents are used to respond to interrogatories, Gulf Power "must specifically identify the documents from which the reporting party may derive and answer." *Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.D.R. 103, 105-106 (W.D. No. Carolina 1993), cited in *Second Discovery Order* at 7. The same ruling applies to responding to document requests where documents are incorporated by references.

Ruling

Accordingly, based on the foregoing, Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order is granted in part and is denied in part.

FEDERAL COMMUNICATIONS COMMISSION[4]



Richard L. Sippel
Chief Administrative Law Judge

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