

ORIGINAL

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

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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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To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**COMPLAINANTS' THIRD MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND FURTHER RESPONSES TO INTERROGATORIES FOR WHICH THE
PRESIDING JUDGE TWICE REQUIRED SUPPLEMENTAL RESPONSES OR, IN THE
ALTERNATIVE, FOR EVIDENTIARY RULINGS OR DISMISSAL**

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

MP _____ Bright House Networks, LLC ("Complainants"), by their attorneys and pursuant to
OM _____
TR _____ 47 C.F.R. §§ 1.323(c) and 1.325(a)(2) and this Court's Orders dated August 5 and September 22,
CR _____ 2005, respectfully submit this third Motion to Compel Gulf Power Company ("Gulf Power") to
CL _____ produce documents, provide further responses to interrogatories or, in the alternative, for rulings
PC _____
CA _____ limiting Gulf Power's evidentiary submissions or dismissing this proceeding.¹ Complainants
SR _____ request the opportunity to present oral argument on this Motion.

SGA _____
SEC _____
OTH _____
¹ See Complainants' Motion to Dismiss, filed August 1, 2005, at 6 ("Gulf Power has no evidence sufficient to meet the requirements of *Alabama Power*, to satisfy the constitutional standard of 'loss to the owner,' to substantiate its claims in its Description of Evidence, or to demonstrate the value of any claimed loss at the time of the alleged taking.")

DOCUMENT NUMBER-DATE

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BACKGROUND

The August 5, 2005 Discovery Order (“*Discovery Order*”)² resolving Complainants’ first Motion to Compel and the September 22, 2005 Second Discovery Order (“*Second Discovery Order*”)³ resolving Complainants’ second Motion to Compel provide the context and basis for this third Motion. First, the *Discovery Order* gave Complainants an opportunity to submit revised, narrowed document requests to Gulf Power. Complainants complied and served their Second Set of Document Requests on August 10, 2005, after first conferring with counsel for Gulf Power as to the scope of that request and by focusing the request upon the standard set forth in the Eleventh Circuit’s *Alabama Power* decision⁴ and upon the claims made by Gulf Power in its January 2004 Description of Evidence. Gulf Power filed supplemental document and interrogatory responses on August 26, 2005. As permitted by the *Discovery Order*, Complainants then filed a Second Motion to Compel on August 31, 2005 due to the inadequacy of Gulf Power’s supplemental interrogatory and document responses. Gulf Power filed an opposition to Complainants’ Second Motion on September 7, 2005.⁵ Complainants filed a brief Reply, requesting leave therefor, on September 9, 2005.

The Court granted substantially all of Complainants’ Second Motion to Compel, and in the *Second Discovery Order* directed Gulf Power to file supplemental responses to six interrogatories and ten of the eleven revised document requests. Despite the Court’s admonition with respect to the manner of producing documents and rejection of Gulf Power’s repeated objection that documents had been made available in May, Gulf repeated that same objection in its supplemental responses, produced no new documents, and provided inadequate “second supplemental” responses to the

² FCC 05M- 38 (Released August 5, 2005)

³ FCC 05M- 44 (Released September 22, 2005)

⁴ *Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, 311 F.3d 1357 (11th Cir. 2002)(“*Alabama Power*”).

⁵ See Gulf Power Company’s Response to Complainants’ Second Motion to Compel (“*Gulf Opposition*”).

interrogatories. With respect to three of the document requests, Gulf Power failed to supplement its responses and instead filed a Motion to Reconsider.⁶

Complainants respectfully submit this third Motion to Compel because Gulf Power's supplemental answers to the six document requests in Complainants' Second Set, despite this Court's explicit directions in its September 22, 2005 Order, have resulted in not a single document being produced and simply repeat an objection or profess a lack of understanding. The interrogatories have not been answered with sufficient specificity as directed by the Court in the *Second Discovery Order*.⁷ Gulf Power's "second supplemental" responses to the document requests that are the subject of this third Motion were a repeat of the objections the Court expressly rejected, stating again that the responsive documents were among those "made available for inspection" previously, without providing any identifying markers such as precise locations, offices, files, and, most importantly, specific document numbers or titles. Gulf Power's supplemental responses are simply part of a gigantic "do it yourself kit" without identifying specific documents despite the rules and the Court's explicit directive. Complainants cannot fairly be expected to search through files and offices to find the documents Gulf Power asserts are the ones it was relying upon when it filed its "Description of Evidence" and made its claims in this proceeding.⁸ Instead, it is and always has been Gulf Power's burden to identify and specify the documents upon which it relied to convince the Bureau to designate this matter for hearing and upon which Gulf Power intends to rely at the hearing in this proceeding. This is Gulf Power's proverbial "third strike" and its claims should be dismissed outright or subject to evidentiary rulings depriving it of submitting the specific evidence it has asserted exists but continually refuses to produce.

⁶ Complainants filed their Opposition to that Motion on October 6, 2005.

⁷ Complainants believe Gulf Power's second supplemental answer to Interrogatory No. 25 is still inadequate but at least there Gulf Power made an effort to specify its response, although it is interesting to note that its second supplemental answer provides detail based on the deposition Complainants took of one of Gulf Power's employees.

⁸ *See Discovery Order*, 21 n.17.

ARGUMENT

I. Gulf Power's Supplemental Responses to Complainants' Second Set of Document Requests Are Entirely Inadequate

Request No. 1:

Produce, and specify by Bates number, all documents referring to any instance, from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments.

Original Response:

The documents which would reflect instances where Gulf Power could not accommodate an additional attacher on a pole already occupied by complainants would be Gulf Power's make-ready documents, made available for inspection and copying during the May 27-28, 2005 document review. None of these documents have been Bates labeled.

Supplemental Response:

The requested documents are the make ready work orders made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). Make-ready work orders are maintained almost exclusively at the Engineering & Construction offices within Gulf Power's service territory. Since this request seeks "all documents referring to any instance form 1998 through the present, in which Gulf Power was unable to accommodate additional attachments . . . on poles already containing Complainants' attachments," this request calls for a very large number of documents spread throughout the Engineering & Construction offices. Complainants themselves have a better understanding, geographically speaking, of where they are attached and when they attached. Thus, by way of example, if Comcast (which operates principally in the Panama City area) wished to inspect the make ready work orders which referred to instances in which Gulf Power was unable to accommodate additional attachments on poles where Comcast already was attached, Comcast should look specifically at the make-ready files (organized

chronologically by year) which are “kept in the usual course of business” in the Panama City Engineering & Construction office.

Argument:

Request No. 1 concerns a critical aspect of Gulf Power’s claims in this proceeding. The Eleventh Circuit in *Alabama Power* stated that a pole owner making a constitutional claim for compensation above marginal costs must also demonstrate:

that (2) either (a) another buyer of the space is waiting in the wings or (b) the power company [itself] is able to put the space to a *higher-valued use* with its own operations.

311 F.3d at 1370 (emphasis added). This means that, as required by the constitutional standard for “just compensation” of “loss to the owner,” Gulf Power would have to show that, either with respect to a third party’s offer or Gulf Power’s own use, it had actually “incur[red] a “lost opportunity or [some] other burden.” *Id.* at 1369. Gulf Power would have to show that its poles could not accommodate an additional attachment and an opportunity was lost. As Gulf Power’s Original and Supplemental Response makes clear, Gulf Power is claiming “lost opportunity” but is refusing to back it up with documents, essentially forcing Complainants to figure out where and when Gulf “lost” any opportunity. The *Second Discovery Order* recognized this deficiency, rejected Gulf Power’s Original response and ordered Gulf Power to:

identify the particular documents that are responsive to the request, or Gulf Power must organize and label responsive documents to correspond to each request. ***It is not sufficient to merely state that the documents were made available for inspection and copying during the May 27-28 document review.***

Second Discovery Order at 3 (emphasis added). Although the records may be produced as they are kept in the usual course of business, the Court made it clear that “Gulf Power has the continuing duty in discovery to make its business records intelligible as evidence.” *Id.*

Gulf Power utterly ignored the Court's order by simply restating that it made the documents available during the May 27-28 document review and that it is Complainants' burden to sift through them to find what documents support Gulf Power's contentions and those that were relied upon in its Description of Evidence. Other federal courts agree with the formulation under the *Second Discovery Order* and have held that a party cannot simply point to locations and say go find the documents yourself. Such an approach would make a "travesty of the discovery process." *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 462 (S.D.N.Y. 1974). Gulf Power has "in essence told [Complainants] that, if [they] wish[], [they] may hunt through all its documents and find the information for [themselves]. 'This amounts to nothing more than a gigantic 'do it yourself' kit.'" *Kozlowski v. Sears, Roebuck and Co.*, 73 F.R.D. 73, 76 (D. Mass. 1979) citing *Harlem River* 64 F.R.D. at 462 and quoting *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16 (S.D.N.Y. 1966). See also *Transportes Aereos De Angola v. Ronair, Inc.*, 104 F.R.D. 482, 500 (D. Del. 1985)(same); *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 315 (E.D. Pa. 1980)(in responding to discovery, the party "must state specifically and precisely which documents will provide the desired information"). Nothing in Gulf Power's Supplemental Response complies with any aspect of the Court's *Second Discovery Order*.

As explained previously, even if Complainants were to examine every document in every file in every location, that would not mean that any particular document is responsive to the request framed by the Complainants which seeks the specific documents pertaining to Gulf Power's contentions, not just all make-ready documents that Gulf Power may have. Clearly, not every document, make-ready or other, in Gulf Power's files, even those in chronological order and

arranged by system or location, would be responsive or supportive of its claims.⁹ Gulf Power should be precluded from introducing any evidence of lost opportunity if it will not identify its documents showing where an additional attachment has not been accommodated.

Request No. 2:

Produce, and specify by Bates number, all documents referring to the actual costs that Gulf Power has incurred annually because of Complainants' attachments (including per-pole costs and aggregate costs), as reflected in its accounting books or records of expenses, from 1998 through the present.

Gulf Power's Original Response:

Gulf Power objects to this request on the grounds that it is vague and ambiguous. Subject to and without waiving these objections, the documents which would reflect costs incurred as a result of complainants' attachments are the make-ready work orders produced during the May 27-28, 2005 document review.

Gulf Power's Supplemental Response:

This request, as Gulf Power understands it, seeks production of make ready work orders for the make ready work done at the request of complainants themselves. Gulf Power made these make ready work orders available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). Make-ready work orders are maintained almost exclusively at the Engineering & Construction offices within Gulf Power's service territory, as make ready is handled at the local level. Thus, if by way of example, Cox wanted to see make ready work orders done at its request (and did not want to look at its own files), Cox could identify by permit number a particular file in a particular year at a particular Engineering & Construction office. This does not involve looking for the proverbial "needle in a haystack."

⁹ Indeed, as mentioned before, some of the make-ready documents Complainants found actually refute Gulf Power's claims and contentions. *See* Complainants' Motion to Dismiss, filed August 1, 2005, at pages 24-25. Moreover, Gulf Power only says that responsive documents are "almost exclusively" found in the offices, suggesting there are other responsive documents not ever offered for review.

To the extent complainants are seeking information about the aggregate cost of make-ready performed at their request, this information could be ascertained from the make-ready costs set forth on their permits. Complainants are given a copy of the permit, but these permits also were produced "as they are kept in the usual course of business" on the cart of documents, organized by attacher, made available in the first floor Gulf Power conference room during the May 27-28 document review.

Argument:

Complainants' Document Request No. 2 reasonably and straightforwardly sought the documents supporting the costs that Gulf Power claims to have incurred because of Complainants' attachments. For example, in the *Discovery Order* of August 5, 2005, the Presiding Judge specifically ordered Gulf Power to answer Interrogatory 20, which sought the specification of each instance where Gulf Power claimed it was not reimbursed for the costs of a change-out. But Gulf Power's recent supplemental answers to Complainants' interrogatories, filed on August 26th, did not identify even one such instance and although the Court ordered Gulf Power to further supplement Interrogatory 20 (*see infra* at pp. 18-19), no information or documents on this critical issue have been provided. Instead, Gulf Power once again dodged the question by claiming that the answer could be found in unspecified "make-ready documents" already produced and that Complainants need to go find them on their own documents. But this is not about what Complainants have or will rely on, but what Gulf Power has and will rely on. The Court agreed with Complainants that Gulf Power's Original Response was inadequate and directed Gulf Power to fully respond and not rely on the May 27-28 document inspection. Nonetheless, like its Supplemental Response to Request No. 1, Gulf Power utterly failed to comply with the Court's directive. If Gulf Power knows of the existence of any such documents, they were to be "itemized" and specifically identified. *See Second Discovery Order* at 3; *Discovery Order*, 6, 20 n.16. For its

persistent and complete refusal to comply with the *Second Discovery Order*, Gulf should be precluded from introducing any evidence related to unreimbursed costs.

Request Nos. 4, 5, 6, and 7.

4. Produce, and specify by Bates number, all documents referring to Gulf Power poles that have been changed out from 1998 to the present at Complainants' request, including documents referring to compensation received by Gulf Power from Complainants for such change-outs.

5. Produce, and specify by Bates number, all documents referring to Gulf Power poles containing Complainants' attachments that have been changed out from 1998 to the present at the request of cable television attachers other than Complainants, including documents referring to compensation received by Gulf Power from such entities for such change-outs.

6. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at Complainants' request on Gulf Power poles from 1998 to the present, including documents referring to compensation received by Gulf Power from Complainants for such make-ready work.

7. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at the request of cable television attachers other than Complainants on Gulf Power poles containing Complainants' attachments from 1998 to the present, including documents referring to compensation received by Gulf Power from such cable television attachers for such make-ready work.

Gulf Power's Response to Requests 4-7:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

Gulf Power's Supplemental Responses to Requests 4-7:

The requested documents are the make ready work orders, specifically reflecting change outs, made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of

business.” Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) (“[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests.”). The face sheet of any particular make-ready order will note whether the make-ready requests a change-out.

Argument:

These four requests asked for documents pertaining to change-outs and other make-ready done specifically at the request of Complainants, or cable television attachers other than Complainants. The requests were based directly upon contentions made in Gulf Power’s January 2004 Description of Evidence. The Court agreed with Complainants that Gulf Power’s Original Response was inadequate and directed Gulf Power to fully respond and not rely on the May 27-28 document inspection. Nonetheless, like its Supplemental Response to Requests No. 1 and 2, Gulf Power utterly failed to comply with the Court’s directive. An order precluding any evidentiary submission on these issues should be entered.

Request No. 8:

Produce, and specify by Bates number, all documents referring to Gulf Power’s upgrades, modernization, strengthening, or replacements of poles containing Complainants’ attachments from 1998 through the present, including documents referring to money Gulf Power obtained to pay for such upgrades, modernization, strengthening, or replacements.

Gulf Power’s Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, unduly burdensome, vague, and seeks information which is irrelevant to the hearing issues.

Gulf Power’s Supplemental Response:

None.

Argument:

Request No. 8 asks for documents pertaining to Gulf Power's "upgrades, modernization, strengthening, or replacements of poles containing Complainants' attachments." The Court agreed with Complainants that Gulf Power's Original Response was inadequate and directed Gulf Power to fully respond and not rely on the May 27-28 document inspection.

Notwithstanding, Gulf Power did not even supplement its response but instead moved for reconsideration of this matter (and two other rulings on document requests) in the Court's *Second Discovery Order*. Complainants opposed that motion and Gulf Power should be held accountable for its failure to supplement its response as ordered.

Request No. 12:

In light of the Presiding Judge's ruling that "this hearing is limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments" and his order excluding as irrelevant evidence "relating to non-CATV attachments," produce, and specify by Bates number, all documents which Gulf Power relied or relies upon in making its contention, in its Description of Evidence, that there is an "unregulated market for pole space," to the extent that that contention applies to CATV attachments.

Gulf Power's Original Response:

Gulf Power does not interpret the Discovery Order to mean that evidence regarding what other attachers pay for the same space occupied by complainants will be excluded as irrelevant. This would be legally incorrect, and at odds with Gulf Power's burden to demonstrate a more appropriate alternative rate. Gulf Power relied, in part, upon the attachment agreements and billing information for attachers paying more than complainants. These documents are within Bates range Gulf Power 00826-2309, and other such documents were made available at the May 27-28, 2005 document review.

Gulf Power's Supplemental Response:

Gulf Power is unclear as to what it is being ordered to do. In its original response, Gulf Power identified by Bates range the documents requested (and already

copied and produced). Gulf Power's reference to "other such documents" which "were made available at the May 27-28, 2005 document review" was a specific reference to the cart of documents made available in the first floor conference room of Gulf Power's headquarters, organized by attacher, which contained (among other things) attachment agreements, permits and billing information. To wit, this is where complainants spent approximately one-and-a-half days reviewing documents. These documents were produced "as they are kept in the usual course of business" with the exception that multiple file drawers in other places at Gulf Power's headquarters were consolidated on one cart for the convenience of the complainants.

Argument:

The *Discovery Order* ruled that the hearing would be "limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments" and that Gulf Power would be excluded from presenting evidence relating to "non-CATV attachments." See *Discovery Order*, 10, 11. Complainants understood this ruling to mean that Gulf Power is precluded from offering evidence pertaining to entities other than CATV attachers or what those non-CATV attachers pay, or are willing to pay, to attach to Gulf Power poles.¹⁰ With this context, Complainants' Request No. 12 asked Gulf Power to produce documents that there is, as Gulf Power claimed in its Description of Evidence, an "unregulated market for pole space" *for CATV attachments*.

Gulf Power did not answer this question initially. The Court agreed with Complainants that Gulf Power's Original Response was inadequate and directed Gulf Power to identify the documents that it claims it has or had produced that are responsive. Gulf Power did not do so, claiming it is "unclear as to what it is being ordered to do." Gulf Power even referenced the May document review again. Gulf still has not answered this request or identified the documents as directed and should be precluded from submitting any evidence it may have concerning an "unregulated market for pole space" for CATV attachments.

¹⁰ Otherwise, Complainants should not be precluded from requesting discovery information about non-CATV attachments.

Request No. 14:

Produce, and specify by Bates number, all documents referring to sources (i.e., Gulf Power's own inventory, the inventories of ILECs with whom Gulf Power has joint use agreements, or other, third-party suppliers) from which Gulf Power has obtained new poles, from 1998 through the present, in order to change-out poles containing Complainants' attachments.

Gulf Power's Original Response:

Gulf Power objects to this request on the grounds that it seeks information which is not relevant to the hearing issues.

Gulf Power's Supplemental Response:

None.

Argument:

Request No. 14 asked Gulf Power to produce documents pertaining to the sources from which it obtains poles to change-out poles already containing Complainants' attachments. Gulf Power originally refused to answer, claiming that the request is not relevant. Even though the Court rejected Gulf Power's objection, finding that not only do poles relate to an element of cost, but pole availability could effect "full capacity." *Second Discovery Order* at 5. Gulf Power failed to supplement its response and instead moved for reconsideration of this matter (and two other rulings on document requests) in the Court's *Second Discovery Order*. Complainants opposed that Motion and Gulf Power should be held accountable for its failure to supplement its response as ordered.

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 in February 2005, that depict the specific Gulf Power poles containing

Complainants' attachments that Gulf Power contends were or have been at "full capacity."

Gulf Power's Original Response:

Gulf Power made all such documents available during the May 27-28, 2005 document review. Certain of these documents were among those copied for complainants following the document review, at complainants' request.

Gulf Power's Supplemental Response:

Gulf Power is unclear as to what it is being ordered to produce. The only "maps, diagrams, or schematics" in Gulf Power's possession already have been produced. As Gulf Power clarified in its response to complainants' second motion to compel, the documents made available at the May 27-28 document review which are responsive to this request were the 1996 and 2001 pole count documents (boxes were specifically identified when produced). Gulf Power further clarified in its response to complainants' second motion to compel, "[i]f complainants are looking for maps which designate specific poles at 'full capacity,' there are no such maps." (Gulf Power's Response, p. 6).¹¹

Argument:

Request No. 15 sought production of the maps and diagrams, created before it hired its consultant Osmose, that actually depict the *specific* poles containing Complainants' attachments that Gulf Power contends were or are at "full capacity." Gulf Power's answer – essentially that it made "available" such documents already – was another attempt to make Complainants find the needle in the haystack. The Court agreed with Complainants that Gulf Power's Original Response was inadequate and directed Gulf Power to identify the poles it believes are maintained at full capacity and not rely on the May 27-28 document inspection. *Second Discovery Order* at 5. Gulf Power did not do so, claiming it is "unclear as to what it is being ordered to produce" and even referenced the May document review again despite being admonished not to do so. Gulf still has not answered this request or identified the documents as directed.

¹¹ Gulf Power's contemporaneously-filed motion to reconsider seeks reconsideration of the portion of the Second Discovery Order addressing Request No. 15 which requires Gulf Power to create new documents (in the form of "circled" or "color coded" maps).

Moreover, Gulf Power refers to its Motion to Reconsider concerning its claim that it should not have to create maps that show specific full capacity poles. Indeed, Gulf Power has asserted that its maps “depict” full capacity poles but somehow do not “designate” specific full capacity poles.¹² If it has no maps (as the supplemental response indicates), then it must drop its claim that it has such maps and be precluded from testifying about any maps or introducing them at the hearing.

II. Gulf Power’s Second Supplemental Responses to Complainants’ Interrogatories Are Inadequate

The *Discovery Order* granted Complainants’ first Motion to Compel, at least in part, as to Interrogatories 8, 11, 12, 16, 17, 20, 24, 25, 34, 35, 36, 45, and 46. As to each of these Interrogatories, the *Discovery Order* required Gulf Power to revisit their answers and provide a more specific answer. However, in several instances involving Interrogatories 8, 20, 25, 34, 35, and 46, Gulf Power did not comply with the *Discovery Order* and Complainants filed their Second Motion to Compel on these six interrogatories. In the *Second Discovery Order* the Court granted the Second Motion to Compel for five of these interrogatories and entered an order with respect to the sixth (No. 35) precluding Gulf Power from offering any evidence of its use or need for any of the allegedly “reserved space” on the poles to which Complainants are attached. The Court, with respect to the five interrogatories for which supplemental responses were ordered, with the exception of No. 25, should now enter similar preclusion orders for Gulf Power’s complete failure to supplement its answers as ordered. For ease of reference, we include the entirety of the text of Gulf Power’s second supplemental answers on the Interrogatories subject to this Third Motion to Compel. To the extent Gulf Power’s second supplemental answers have their own footnotes, they

¹² See Complainants’ Opposition to Gulf Power’s Motion to Reconsider at 5.

are included as written but further indented as compared to the footnotes relating to the text of Complainants' Motion herein.

Interrogatory No. 8

This Interrogatory sought a description of how many attachments Gulf had on each pole containing Complainants' attachments that Gulf claims meet the *Alabama Power* requirements, when such attachments commenced, where they are located and the compensation received by Gulf Power from these attachers. Gulf Power's original answer was a non-answer – that it would respond to the question at a later date. The *Discovery Order* ruling on Interrogatory No. 8 required, *inter alia*, Gulf Power to “revisit” its answer “to provide information that it currently possess[es] about users, make-ready costs, and per-pole compensation, as that information is requested by this Interrogatory.” See *Discovery Order* at 5. The *Discovery Order* further required Gulf Power to “itemize” such evidence, to the extent it claimed it had already produced it. However, instead of complying, Gulf Power, consistent with its other discovery responses, simply stated that it already produced such information in documentary form, and that Complainants should go find it. That answer was not only inconsistent with its original answer, but was once again, evasive.

In the *Second Discovery Order*, the Court made it clear that Gulf Power must specifically identify the documents that are responsive to this interrogatory. But, in utter disregard of that Order, Gulf reargued its objections, discussed case law in footnotes (numbered 13, 14 and 15), and reverted to its already discredited argument that it already produced these documents so that it does not have to really explain its answer:

Gulf Power is unclear as to what additional information, if any, it is being ordered to provide. The Second Discovery Order says, “Gulf Power must identify the number of Complainants' CATV attachments on Gulf Power's poles, and provide information on when such attachments were connected, where located, and

amount of related compensation received by Gulf Power.” (Second Discovery Order, p. 6). Gulf Power already identified the number of complainants’ attachments on its poles. (See Gulf Power’s Original Response to Interrogatory No. 1). Gulf Power provided business records which identified when such attachments were made, in the form of permits organized by attacher (these were on the car of documents made available in the first floor conference room of Gulf Power’s headquarters).¹³ With respect to “where” attachments are located, the best information available to answer this question is the description of geographic scope at the end of each attachment agreement.¹⁴ The “compensation received by Gulf Power” in connection with make-ready performed upon complainants request can be found in the make ready work orders, which are organized chronologically and by permit number. By way of example, if Mediacom wanted to find out (from the documents Gulf Power has produced) what amounts it paid Gulf Power in make-ready for any particular year (other than looking at its own records), it would first look at the permit log for that year and determine which permits required make ready. Gulf Power’s permit logs (organized chronologically, by district) for years 1999 through 2002 were produced as Bates labeled documents Gulf Power 2310 - 2404). Permits that require make ready are assigned a “DSO” (Distribution Service Order), the number for which appears in the permit log. For those permits that required make ready, Mediacom could then go a to specific file drawer at a specific Engineering & Construction office and pull a specific file based on the DSO number. This file will contain the make ready work orders which reflect the cost of make ready.¹⁵ The permit themselves also identify the cost of make-ready associated with such permit.

¹³ This is the best information Gulf Power would have as to “when” a complainant attached. This assumed, of course, that complainants follow the permitting procedure, which is not always the case. Sometimes, complainants just get on the pole at their own leisure. In these instances, Gulf Power does not know they are even attached let alone when they attached.

¹⁴ The oddity of this interrogatory is that Gulf Power is being forced to tell the complainants where complainants themselves are.

¹⁵ Gulf Power does not believe the level of “how to” provided in this response is required by Fed. R. Civ. P 33(d). Gulf Power’s previous response specifically identified “make ready documents” as the documents from which the response to this interrogatory could be “derived or ascertained” with “substantially the same [burden] for the [complainants] as for [Gulf Power].” Fed. R. Civ. P. 33(d). The situation before this Court is highly distinguishable from the Allianz and Herdlein cases cited in the Second Discovery Order. In Allianz, the party responding to interrogatories said merely “information responsive to this request was previously provided as part of the Fed. R. Civ. P. 26 disclosures.” Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005). In Herdlein, the responding party “merely stated the information is available from documents that it has produced already pursuant to an unspecified document request.” Herdlein Technologies, Inc. v. Century Contractors, Inc., 147 F.R.D. 103, 105 (W.D. N.C. 1993). This is not at all what has happened here. Make ready work orders are specific documents. Both parties understand what is meant by “make ready work orders.” The fact that complainants are asking Gulf Power to identify a vast number of documents necessarily results in a seemingly vast response. But this is not a situation where Gulf Power is telling complainants to find a “needle in a haystack.” Complainants are asking for the entire haystack.

Gulf Power has never identified the documents that show how many attachments Gulf Power had or has on each pole containing Complainants' attachments, when such attachments commenced, or where they are located. Although this is "evidence" Gulf Power would use in its case, and presumably has, it just will not do what it is told. And, as discussed above in reference to Complainants' Second Request for Documents, Gulf Power's "go look through our make-ready files" answer is not a fair or reasonable response to Complainants' attempt to find out what compensation Gulf Power has been paid by attachers, at what times, on the specific poles that it claims are at full capacity.

Interrogatory No. 20

This Interrogatory asked for the number of Gulf Power poles that have been changed out to accommodate attachments of Complainants, the location of any alleged change-outs, the reasons for each change-out, and an identification of each instance in which Gulf Power claims it was not reimbursed for the costs of such a change-out. Gulf Power's initial response was to object and to refer generally, without any specifics, to other responses. The *Discovery Order* directed Gulf Power to answer, stating: "Gulf Power shall respond and provide additional information only in response to Interrogatory No. 20." But Gulf Power's next response was a non-answer. Once again, it referred generally, without any specifics, to "make-ready documents produced" already. As set forth in our discussions of all of Gulf Power's responses, this "go find it yourself answer" was not a good faith attempt to comply with the *Discovery Order*, let alone a complete or proper response to an Interrogatory that seeks to find out the number of Gulf Power poles that have been changed-out to accommodate attachments of Complainants, the location of any alleged change-outs, the reasons

for each change-out, and an identification of each instance in which Gulf Power claims it was not reimbursed for the costs of such a change-out.

In the *Second Discovery Order* the Court agreed and ordered Gulf Power to provide the number of change-outs, locations, reasons and instances of non-reimbursement. *Second Discovery Order* at 7. Nonetheless, in its second supplemental response to this interrogatory, Gulf Power once again refused to comply, restated its legal argument and suggested that the information is in files in offices for Complainants to find:

The documents from which the response to this interrogatory could be “derived or ascertained” with “substantially the same [burden] for the [complainants] as for [Gulf Power]” are the make ready work orders prepared at complainants’ request. Fed. R. Civ. P. 33(d). These specific make ready work orders can be located by cross referencing the permit log and DSO number, with the DSO numbers in the make ready files (organized chronologically by year). These documents are kept in Gulf Power’s Engineering and Construction offices. These make ready work orders provide the locations of change outs and reasons for change outs (as best as “reasons” are tracked day to day in the field). Gulf Power is not contending in this proceeding that complainants have failed to pay any specific make ready invoice. The Second Discovery Order states, “[t]he ‘make ready’ documents must be related to specific poles that are identified/indicated as being at ‘full capacity.’” (Second Discovery Order, p. 7). But this is a redundancy because Gulf Power contends (and has set forth in contention in multiple prior submissions) that all poles which required make ready before complainants could attach were at “full capacity.”

Gulf Power’s Description of Evidence is replete with contentions that it has had to “change-out” poles and that this is evidence of “full capacity” on poles containing Complainants’ attachments. *See* Description of Evidence, ¶¶ 4-6. Gulf Power’s utter failure to answer the interrogatory as ordered should be sanctioned.

Interrogatory No. 34.

This Interrogatory asked Gulf Power about whether it informs attachers when pole space is reserved for future use for its own “core electricity operation” and to identify and describe all such reservations and notifications. Gulf Power’s initial answer was “yes,” but it failed to identify a single instance in which it had provided any such notice that it was reserving space. The *Discovery Order* stated that Gulf Power “must supplement” its answer “[i]f the information is reasonably obtainable or retrievable.” But Gulf Power’s first effort at supplementing its answer merely indicated that the “spec plate” was only “written reservation/notification” that is given to “prospective attachers regarding reserved space” and that “from time to time” Gulf employees will advise “attacher field employees of potential/impending future uses.” This supplemental answer was vague *and* incomplete. Indeed the precedent in a case brought by Gulf Power’s parent company established that before a utility may reserve space for its own use, it must justify the need and specifically identify a bona fide future need for the space.¹⁶ Indeed, Gulf Power failed to identify a single specific instance in which it has advised an attacher, particularly Complainants, that it has actually demonstrated a bona fide need for space and then properly reserved space for its own operations. The Court agreed and ordered Gulf Power to identify the specific instances in which it has advised the attachers, particularly Complainants, that Gulf Power had a demonstrated need for reserving future space on the poles. *Second Discovery Order* at 7. Gulf’s second supplemental answer (with its footnote numbered 17), while again not a model of clarity, appears to concede that it never advised the attachers:

Gulf Power is unclear as to what additional information it is being ordered provide. This interrogatory asks two questions. The first is a “yes” or “no” question which Gulf Power has answered “yes.” Gulf Power assumes this is not the subject of the Second Discovery Order. The second question asks Gulf Power to “identify and describe all such reservations and notifications to attachers,

¹⁶ *Southern Company v. F.C.C.*, 293 F.3d 1338, 1348-49 (11th Cir. 2002).

including Complainants, since 1998.” Gulf Power responded to this question by referencing the “spec plates” attached to every attachment agreement, which designates the electric supply space on each pole, according to the pole height (See, in particular, plate C-11). Moreover, Gulf Power already said this is the “only written reservation/notification routinely given to prospective attachers regarding reserved space.”¹⁷ Gulf Power has no other further information to provide.

Gulf power’s concession and failure to specify instances of advising any attacher of the need for reserved space (along with its failure to specify those instances in the field where some additional alleged notice was given) means that it should now be barred from “introducing such evidence at the hearing.” *Second Discovery Order* at 7-8. “Spec plates” are simply not the evidence that was sought by this interrogatory.

Interrogatory No. 35

This Interrogatory asked whether Gulf Power claims that it requires the use of reserved pole space currently occupied by Complainants and if so, to provide identifying information. Gulf Power initially failed to provide any answer whatsoever to this Interrogatory. The Discovery Order accordingly directed Gulf Power to respond. The response now provided by Gulf Power does not answer the question. Gulf Power says it “does not track its future space needs on a pole by pole basis,” but Gulf Power does not say whether it claims to have had the need, at any time from mid-2000 to the present, to re-take space actually occupied by Complainants. This question may not be avoided, because it goes directly the part of the *Alabama Power* test that asks whether the utility can show that it has a “higher valued use” of its own for space on particular poles occupied by Complainants. And because Gulf Power has generally claimed it has the need for the space, it must demonstrate that such need is bona fide. If Gulf Power can’t specifically identify a bona fide

¹⁷ Complainants take issue with the fact that this response “says nothing about any reservations or notifications given to existing attachers.” (Second Motion to Compel, p. 17). But the spec plates are in the attachment agreement, which covers both existing and prospective attachments.

requirement it has to re-take space for its own purposes on specific poles occupied by Complainants, then it must concede the point.¹⁸

Interrogatory No. 46

This Interrogatory asked Gulf Power to identify the pole attachment rental rates it pays to other joint user pole owners, the space it leases from such owners, and the methodologies for calculating the rates it pays. Gulf Power's original answer to No. 46 failed to identify the rates (even though it did identify rates to a different question in Interrogatory No. 45). The *Discovery Order* required Gulf Power to respond further as to Interrogatory No. 46. Gulf Power did not do so and provided no response whatsoever, either as to rates or rate methodologies, for Interrogatory No. 46. The Court agreed and ordered Gulf Power to provide a complete narrative response or specifically identify where the methodology or formula could be found. *Second Discovery Order* at 8. Gulf Power's second supplemental response was as follows:

The "pole attachment rental rates" paid by Gulf Power to other joint use pole owners are the same as the "rental rates" paid by joint users to Gulf Power (which are set forth in response to interrogatory number 45). The adjustment process (in other words, how it is determine who owes who what on an annual basis), which is based on relative pole ownership, is explained in detail in the joint use agreements. For the Sprint adjustment process, see the joint use agreement produced as Gulf Power 2113 –2131 (also marked as Exhibit 14 to the deposition of Ben Bowen), specifically Article IX at pp. 8-10 (Bates labeled pages 2122 – 2124). For the Bellsouth adjustment process, see the joint use agreement produced as Gulf Power 2089-2112 (also marked as Exhibit 8 to the deposition of Ben Bowen), specifically Article IX at pp. 12-14 (Bates labeled pages 2100-2102). For the GTC adjustment process, see the joint use agreement produced as Gulf Power 2132 – 2148), specifically Article IX at pp. 8-9 (Bates labeled pages 2141-2142).

¹⁸ Gulf Power's current answer indicates generally, without admitting that it can identify no specific need to reserve space, that, even if such a need were to arise, its policy and practice is to permit attachers to "pay the cost of [pole] modifications necessary to maintain their attachments," thereby vitiating any claim that Gulf Power is ever deprived of the opportunity to put space on its poles to a "higher valued use" of its own.

Gulf Power's second supplemental answer is somewhat helpful but at the depositions referenced the deponents could not explain the methodology and one aspect of the rate setting process for the joint users was never quantified. Complainants have requested Gulf Power to provide another witness that could explain the methodology or formula but has yet to provide a name of a witness or date for deposition (or dates for five other specified witnesses). However, if there is no specification or identification of documents that are responsive, Complainants will be forced to guess which ones are responsive and the entire examination may be consumed with guessing what those documents are or otherwise prove fruitless on the specifics of the requested documents. Gulf Power should be ordered to respond again with an identification of responsive documents (as twice ordered already) and also be directed to provide a competent witness for deposition or face sanctions.

* * *

Complainants also suggest that the Court may wish to take the opportunity in ruling on the discovery issues to review Gulf Power's Preliminary Report on Pole Survey that was filed September 30, 2005, contemporaneously with Gulf Power's supplemental discovery responses and Motion to Reconsider. The survey appears to provide no help on the underlying issues or specifying which poles are at "full capacity" that might be entitled to a rental rate that exceeds marginal costs. The number of poles actually surveyed in the last seven months is 9,663, or less than 6.5% of the total poles that were supposed to be surveyed. Gulf Power asserts that 7,120 of those are "crowded," but we are left to speculate if one or more or all of those poles are at "full capacity." Gulf Power well knows that its generic confusion of terms is potentially fatal to its claims. There is no question that the *Alabama Power* standard is "full capacity" --

nothing less. 311 F.3d at 1370. The Presiding Judge also recognized that “crowding” is not the same as “full capacity”:

The term ‘pole crowding’ is ambiguous. The Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is a ‘full capacity,’ which standard of proof was adopted by the Commission.

FCC 05M-23, Status Order (April 15, 2005), 5. Even Gulf Power itself, in its early answer to Complainants’ Interrogatory No. 2, recognized a distinction, contending that a “crowded” pole was “close” to being at “full capacity” but could still host another attachment, while at the same time arguing that “full capacity” means a pole that “cannot host further communications attachments.” See Motion to Dismiss, Exhibit C, 2 (emphasis added). Therefore, there is a critical defect that renders the Osrose survey utterly ineffective in trying to meet the *Alabama Power* “full capacity” requirement. And, the Presiding Judge has already noted that, apart from the Osrose survey, “Gulf Power [has] represented that it cannot identify specific poles it contends are ‘crowded’ or at ‘full capacity’” now or at any time prior to the survey. Status Order April 15, 2005), 1 (emphasis added).

Second, Gulf Power cannot rely upon its practice, which is consistent with industry custom and course of dealing, of permitting new attachers to pay the costs of make-ready and change-outs to obtain needed space for attachments in order to demonstrate that a particular pole is at “full capacity,” because that practice has *enabled* Gulf Power to obtain additional pole attachment revenue, rather than “foreclosed” it from doing so.¹⁹ The “major build-outs” that Gulf Power says it referred to in its Description of Evidence were each instances in which Gulf Power succeeded,

¹⁹ Indeed, the change-out process not only provides a utility with a new and perhaps even stronger pole, but with additional, new attachment revenue. The new attacher pays the entire cost of the larger pole and also “gives” the utility additional capacity that can be rented to others in the future, because the most recent attacher only occupies one foot of space, while poles that are changed out come in five-foot longer increments. See generally Gulf Power’s Response to Complainants’ Interrogatory 27, Exhibit D to Complainants’ Motion to Dismiss, 14-16. “In instances where attachers pay the costs of a replacement pole, the attacher actually *increases* the utility’s asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.” *In re Alabama Power*, 16 F.C.C.R. 12209, 12235 (2001)(emphasis added).

through normal and customary practices in the pole industry, in providing pole capacity to new attachers and obtaining additional revenue, rather than being deprived of, as the Eleventh Circuit put it, “an opportunity to sell space to another bidding firm.” Moreover, Gulf Power has argued that its “historical willingness to accommodate new attachers by expanding capacity cannot be held against it in a Fifth Amendment analysis,” but it is exactly this practice that ensures that Gulf is not “out . . . more money.”

Only in those situations where there is no possible extra capacity would any specific pole be subject to the “zero-sum” classification with “finite” availability such that one entity’s presence on a specific pole would actually deprive another of the opportunity to attach to that pole. “In the ‘full capacity’ situation, it is the zero-sum nature of pole space, like land, that is key.” 311 F.3d at 1370. Again by its own admission Gulf Power cannot or will not identify any situation where it has not been able to provide capacity (Document Request No. 1; pp. 4-7, *supra*). Accordingly, all new attachers have been accommodated and, therefore, there has been no instance of any “missed opportunity” and just like Alabama Power, Gulf Power simply “ha[s] no claim” for “compensation above marginal cost” for any of its poles in its service area. *Id.*, citing *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948) (“By evidence merely of bookkeeping losses, respondent did not carry its burden of proving actual damage. Just compensation is a practical conception, a matter of fact and not of fiction.”).

Third, Gulf Power cannot rely upon a “statistical extrapolation from the Osmose audit” to show poles at “full capacity,” both because, as described above, the Osmose pole survey is not designed to measure “full capacity” (as opposed to pole “crowding”), and because the *Alabama Power* decision, by requiring a showing “with regard to each pole,” 311 F.3d at 1370, precludes the reliance upon any theoretical gamesmanship such as an “extrapolation.” Gulf Power’s Preliminary

Report on Pole Survey shows that it is solely relying on such an extrapolation of 73.68%. Any such extrapolation is not justified under any statistical precedent and is wholly inconsistent with the governing legal standard, as reflected in the December 15, 2004 and the April 15, 2005 Orders, of a showing “with respect to specific poles.” See Status Order at 4. The entire purpose of allowing the survey was to achieve specificity, not extrapolate.

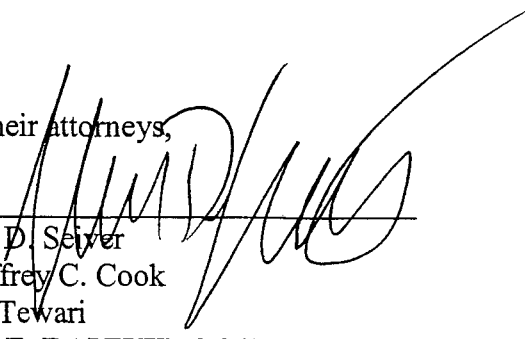
Given the incomplete responses to discovery, that the Osmose survey will not identify a single “full capacity” pole, and that Gulf Power will only extrapolate from an irrelevant number of “crowded” poles to quantify poles that were never surveyed, this proceeding should be terminated as requested in Complainants’ Motion to Dismiss.

CONCLUSION

WHEREFORE, on account of the foregoing, Complainants respectfully request that the Court enter an Order compelling Gulf Power to respond as set forth with respect to the individual discovery requests, enter evidentiary, preclusion and witness orders, or dismiss this proceeding, and award such other relief as is just.

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October 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Motion to Compel Production of Documents and Further Responses to Interrogatories for Which the Presiding Judge Twice Required Supplemental Responses or, in the Alternative, for Evidentiary Rulings or Dismissal, has been served upon the following by electronic mail and U.S. Mail on this the 7th day of October, 2005:

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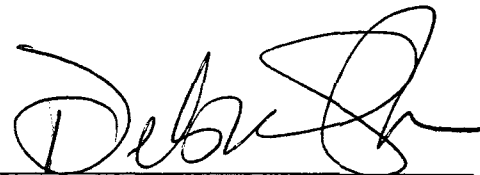
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