

ORIGINAL

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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COMPLAINANTS' REQUEST FOR A STATUS HEARING

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, LLC ("Complainants"), by their attorneys, respectfully request that a formal status hearing be scheduled before the Presiding Judge to address several important discovery, expert, and related issues and their impact upon the scheduled deadlines in this case, including:

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- Gulf Power's October 31st "Final Report on Pole Survey" and Gulf Power's suggestion that it intends to amend the Final Report in January, 2006;
- Gulf Power's November 4th request to defer until the close of discovery the production of documents required by the Court's October 12th Order denying in part Gulf Power's Motion to Reconsider;
- Gulf Power's November 4th motion to extend expert discovery deadlines to the close of discovery;
- Gulf Power's November 4th Interrogatories and Document Requests to Complainants;
- Consideration of a proposed stipulation with regard to pole changeouts as suggested in the Court's Order of October 12th; and

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- Complainants' third Motion to Compel Gulf Power to comply with the Court's September 22nd *Second Discovery Order*.¹

Gulf Power's "Final Report," Expert Reports and Further Discovery

On October 31, 2005 Gulf Power filed a four-page "Final Report on Pole Survey." The Presiding Judge suggested this survey to allow Gulf Power an opportunity to identify those particular poles it claimed were at "full capacity." *See* Hearing Transcript (Dec. 13, 2004), p. 82. However, the Final Report utterly fails to identify any particular pole or provide an explanation, as required by applicable court precedent, as to why "each pole" is considered to be at "full capacity." *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002) (power company "must show with regard to each pole that the pole is at full capacity"). Instead Gulf Power simply concludes that more than 7000 poles in Pensacola are "full" and that by simple extrapolation more than 110,000 of all of Gulf Power's poles are "full." We are also left to guess what will change if and when Gulf Power surveys "an additional 5,000+ poles" and "amend" its "Final Report" in January 2006, a time that, notably, is after the existing December 16, 2005 deadline for the completion of all discovery.²

Gulf Power's extrapolation to make larger contentions about what percentage of its utility poles are at "full capacity" is inconsistent with the requirement in *Alabama Power* that any utility seeking compensation under a constitutional "just compensation" rubric in excess of FCC regulations must submit proof of full capacity for "each pole." *See Alabama Power*, 311 F.3d at 1370. Extrapolation is also inconsistent with the Presiding Judge's own prior rulings – that Gulf

¹ Pursuant to the Presiding Judge's Order, FCC 05M-52 (Oct. 26, 2005), Complainants will be filing a Reply to Gulf Power's Response to Complainants Third Motion to Compel this Thursday, November 10, 2005. In addition, in accordance with FCC rules, Complainants will file a response to Gulf Power's two motions for enlargement of time by November 14, 2005.

² Although the deadline was set early on to allow all of Gulf Power's poles to be surveyed, less than 7% were actually surveyed, and after an initial survey of these poles through May, not a single new pole was surveyed in June, July, August or September (when the survey was to be completed), and weather was only a problem in the Gulf Power area in Late August and September.

Power has the burdens of production and persuasion “*with respect to specific poles*” (emphasis in original) and that the pole survey “should, at a minimum, fill in gaps on *individual pole* utilization” (emphasis added).³ FCC 05M-23, Status Order (April 15, 2005), 4, 6. Indeed, when the Presiding Judge initiated the idea of a pole survey, he stated that Gulf Power would have “to get these poles pinned down *one-by-one*” and that Gulf Power “has to account for poles *on an individual basis.*” See Hearing Transcript (Dec. 13, 2004), pp. 82, 90 (emphasis added). Although the Presiding Judge subsequently suggested that Gulf Power might utilize extrapolation from a “meaningful sampling” so that the “reliability of the method” could be analyzed, there is nothing in the Final Report about sampling or method that would allow for any analysis. Moreover, even if extrapolation could be used appropriately to identify full poles, there is still another problem for Gulf: proof of “full capacity” and a concomitant “missed opportunity” must be shown as to “each pole.” *Alabama Power*, 311 F.3d at 1370. If there is only extrapolation, then there is no individualized proof of any “missed,” “lost,” or otherwise “foreclosed” “opportunity” on any particular pole. *Id.*

The Presiding Judge, in suggesting the survey, clearly informed Gulf Power that any report “has to account for poles on an individual basis *and what is on those poles.*” Hearing Transcript (Dec. 13, 2004), p. 90 (emphasis added). And where is the substantiating data underlying its “audit”? Gulf Power has produced no photographs, sketches, printouts, or computer files, and indeed no records of any kind, even though the Osmose Statement of Work it submitted to the

³ Furthermore, while Gulf Power claims that it has surveyed 9,663 poles and found some 7,120 to be “crowded,” (a term that, according to Gulf Power’s own interrogatory answers is not equivalent to “full capacity”), it fails to identify a single such pole with any specific information, such as pole location and pole number. Significantly, Gulf Power has provided no explanation of why it contends that any of these poles are at “full capacity,” let alone being “crowded.” In its recent “Proffer” of pole evidence pertaining to three poles filed on October 17, 2005, Gulf Power claimed that, with regard to those three poles, they were at “full capacity” because of various wire or equipment clearance issues. Putting aside the merits of those claims, it is notable that no such explanation or contention has been provided for the poles that Gulf Power claims its consultant, Osmose, has audited “with contractors” doing the “day-to-day field work” and found to be at “full capacity” in the Final Report. There is also no discussion in the “Final Report” of the qualifications of those who participated in it although in the April 1, 2005 Order, the Presiding Judge required that the report include not just the identity of the persons who would sponsor the report but their “qualifications.”

Presiding Judge this spring contemplated the creation of such background data. Complainants are clearly entitled to the production of all records created by and related to work done by Osmose and/or relied upon by Gulf Power.

Complainants have argued that Gulf Power has not and cannot identify individual poles at full capacity (let alone “full” poles for which Gulf Power incurred a demonstrable “lost opportunity”). When the Court denied Complainants’ Motion to Dismiss, which was directed in part at that contention, the Presiding Judge noted that the preliminary Osmose report quantified full poles but that Complainants’ dispositive motion was premature as the Osmose audit was still underway but would be completed October 31, 2005. FCC 05M-49 at 4, Memorandum Opinion and Order (Oct. 12, 2005)(“*Order on Motion to Dismiss*”). Indeed the Presiding Judge envisioned that the completion of the audit and furnishing of the “Final Report” gave sufficient time for discovery “on the methodology and results of the completed Osmose audit.” *Order on Motion to Dismiss*, at ¶ 10. However, the Final Report provides nothing in any more detail compared to the earlier status reports or the September 30th Preliminary Report. To put it mildly, this obstructs Complainants’ preparation of expert reports and stalls any effort to take discovery of the Osmose audit.

Deferral of Expert Reports and Gulf Power’s Supplemental Discovery Responses

The second group of issues that warrant discussion at a hearing concern Gulf Power’s failure to produce additional discovery responses and the impact of this failure upon Complainants’ preparation of their expert reports. As noted above, Gulf Power must be required to produce, and Complainants must have a reasonable time to review, all of the documents pertaining to the Osmose survey and Final Report. But in addition, Gulf Power initially answered many of Complainants’ document requests and interrogatories by refusing to answer and instead stating that it would

supplement its answers at the conclusion of the Osmose report, *see, e.g.*, Gulf Power's answers to Interrogatories 3, 8, 10 and its answers to Document Requests 3, 25, and prior to the depositions of expert witnesses, *see, e.g.*, Gulf Power's answers to Interrogatories 39, 43, 44, and 48 and its answers to Document Requests 24, 27, and 32-34, which depositions are currently supposed to take place within the next four to six weeks. Yet, in addition to receiving not one document or set of specific information for the poles "identified" in the Final report, Complainants have not received any of the documents and other discovery responses that Gulf Power claimed it would produce when the Osmose survey was completed.

In addition to these supplemental responses, Gulf Power has yet to comply with the Presiding Judge's *Second Discovery Order*, as Complainants explained in their Third Motion to Compel (currently being briefed). Instead of working to produce those documents, Gulf Power simply asks, three weeks after the October 12th Order on Reconsideration (FCC 05M-50), for more time, ostensibly due to three days of depositions that start in ten days. However, the upcoming depositions of fact witnesses grew out of the Mid-September depositions. Despite Complainants' repeated requests for dates in early October, and then Mid-October, Gulf finally agreed to early November and then said that that was "premature" and delayed the depositions until November 16th-18th. Now Gulf uses these delayed dates to further delay Complainants' ability to prepare.

Gulf has utterly failed to even partially comply with the Court's orders, produce discovery or even make its witnesses available. Although Gulf Power has filed two motions to defer discovery and delay the exchange of expert reports, these dates have been scheduled and it is not clear why depositions of their fact witnesses should delay their expert reports. If anything, Complainants are prejudiced by Gulf Power's discovery delays. Gulf should explain the problems, and at a minimum Complainants' expert reports should be held up until Gulf Power gets its house in

order. But there is no reason to defer Gulf Power's own expert reports as nothing has transpired to make compliance difficult except for its delay in agreeing to deposition dates for four weeks. These issues of discovery compliance, and their consequences upon the scheduling of this case, need to be addressed immediately.

Depositions on the Osmose Report

Finally, a third set of issues, which also concern the scheduling of this case, involve the need for additional time for depositions. In its "Final Report," Gulf Power identified several individuals who it says will testify about the Osmose pole survey, and hinted at other individuals who actually have direct, first-person knowledge of pole observations in the field. In particular, Gulf Power named "key Osmose employees" David Tessieri, David Barker, and Ken McVeary. Gulf Power also explained that Osmose itself did not perform much of the pole field work but instead relied upon "contractors" to do the "day to day field work" in assessing Gulf Power's poles. Clearly, Complainants need to be able to, first, get all Osmose-related documents involving Gulf Power, and then set up and take the depositions of both the Osmose employees and the "contractors" who actually did the field work in order to evaluate the accuracy and the conclusions that Gulf Power seeks to draw from Osmose's survey. In addition, Gulf Power has identified another person, Eddie Dixon, as a "key Gulf Power employee," and Complainants need to be able to take his deposition as well.

Other Issues

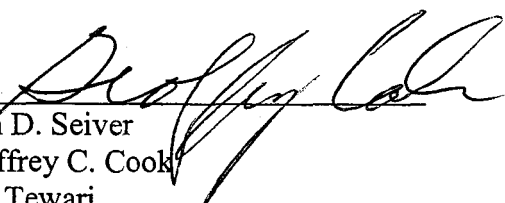
While it need not be addressed at this stage, it appears that Gulf Power is making an effort to shift its discovery obligations on to Complainants by re-asking for documents that were already produced and will likely demand that Complainants identify them again in responding to a newly served second set of interrogatories and document requests. Given that it is Gulf Power's burden of

proof on this proceeding, it is not clear what more Gulf Power can ask of Complainants that would be relevant at the hearing. Gulf Power described the evidence that it had but still has not identified what documents it has that meet that description. It is not up to Complainants to fund or otherwise do Gulf Power's discovery work.

The consequences of Gulf Power's failure to provide anything approaching a substantive report on the capacity of individual utility poles and related backup, its failure to supplement its prior discovery responses, and the need to take a substantial number of additional depositions based upon persons now identified by Gulf Power all necessitate a serious discussion before the Presiding Judge of the need to enlarge the currently scheduled dates for discovery, pre-trial filings, and, possibly, the evidentiary hearing. Accordingly, Complainants respectfully request the holding of an in-person status conference at the earliest possible opportunity.

By their attorneys,

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November 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Complainants' Request for a Status Hearing* has been served upon the following by electronic mail and U.S. Mail on this the 7th day of November 2005:

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