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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*

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E.B. Docket No. 04-381

To: Office of the Secretary

COMPLAINANTS' REPLY TO GULF POWER COMPANY'S EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

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INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. § 1.277(c), 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"), hereby file this Reply to Gulf Power Company's Exceptions to Chief Administrative Law Judge Richard L. Sippel's Initial Decision.

This case involves Gulf Power's attempt to use the statutory right of access to utility poles afforded to cable television systems and telecommunications carriers in Section 224(f) of the Communications Act, and the classification of that access as a physical "taking," to increase the annual pole attachment rate that Gulf Power charges for Complainants' long-standing cable television pole attachments by *one thousand percent*, under the guise of seeking "just compensation."[1] However, as Judge Sippel correctly found in his Initial Decision, Gulf Power's claims are entirely without merit because Gulf Power already receives "just compensation" from Complainants. Importantly, Gulf Power showed no "loss" or even one uncompensated expense associated with hosting Complainants' attachments, and thus has been made constitutionally whole by Complainants' payment to Gulf Power of annual pole rental and associated make-ready expenses under the federal formula.

The fundamental constitutional principle of takings law, uniformly recognized by the courts and the Commission, is that just compensation is determined by the actual (not theoretical) *loss* to the owner whose property is taken, and not any alleged (theoretical or actual) "*gain*," "*value*," or "*cost savings*" to the "taker." Gulf Power, having been given the opportunity it specifically requested to present evidence of actual "loss," utterly failed in its required proof,

[1] Gulf Power sought to increase the pole attachment rental that it received from Complainants under the Commission's judicially sanctioned formula (approximately $6.00 per pole, plus all make-ready charges) to $38 retroactive to the year 2000, and increasing to $65 per pole in 2006, and still collect all make-ready charges.

choosing instead to focus on its baseless claim that Complainants benefited from the attachments in some amount beyond the amounts they paid in pole rental and make-ready. After considering all the evidence, Judge Sippel found that Gulf Power had not proven any out-of-pocket losses or foregone any opportunities that would justify any entitlement to an increase in what it has been receiving from Complainants under Section 224 and the Commission's rules.

The Commission and the courts have uniformly held that pole rentals utilities receive under the Commission's formula already exceed just compensation. Only in those limited situations where a pole is at "full capacity" and, as a direct result of the presence of a cable operators' attachment, a pole owner loses a quantifiable (not hypothetical) "opportunity" to rent the same space at a higher rate on a specific pole, could a pole owner then be entitled to seek a rental rate that exceeds marginal costs on that specific pole. Gulf Power focused exclusively on the theoretical "gain" Complainants earned by not having to build duplicative pole facilities and never proved either full capacity or loss on a pole-by-pole basis as required under the law.

After losing in 2003 when it tried to charge a higher just compensation rate for every one of its poles on which Complainants had attachments, Gulf Power asked for a second chance, telling the Bureau that it had evidence of both "full capacity" and "lost opportunity" on specific poles and could thus prove entitlement to a higher rate. However, after almost two years of litigation, including discovery and a hearing, it became apparent Gulf Power has no such evidence and thus failed to satisfy its burden of proving full capacity as well as "lost opportunity." Gulf Power's Exceptions here are nothing more than a cover for its failure of proof and a continuation of its assault on binding precedent, the Commission's authority and the Pole Attachments Act itself.

ARGUMENT

A. Background

This case began as a pole attachment complaint proceeding brought against Gulf Power in 2000. Gulf Power terminated Complainants' pole attachment agreements and demanded new agreements as well as a new rental rent of $38. The prior rates had been set under the FCC's pole attachment formula (in the $6.00 range) but Gulf Power's theory was that the mandatory pole access provisions added to Section 224 by the 1996 Telecommunications Act constituted a "taking," and the FCC's maximum rate under Section 224 did not (and could not) provide Gulf Power with constitutionally required "just compensation" for allowing mandatory access.[2]

While Complainants' proceeding against Gulf Power was pending at the Bureau, Alabama Power, a Southern Company affiliate and sister company to Gulf Power, employed the same tactic – Alabama Power terminated contracts and billed Alabama cable operators a $40.00 rate per pole as constitutionally required "just compensation." After the cable association filed a complaint, the Bureau ruled against Alabama Power, was affirmed by the full Commission and then affirmed by the Eleventh Circuit.[3] Each decision included an express finding that cable operators' payments of the FCC's formula pole rental plus reimbursement of the "make-ready" costs for rearranging lines or replacing poles provided pole-owning utilities with just compensation.

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[2] The Eleventh Circuit previously found Section 224's mandatory access provisions to constitute a taking, but rejected the facial challenge to Section 224 rates by finding that the FCC's formula likely provided much more than "just compensation." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999); *Gulf Power Co v. FCC*, 208 F.3d 1263 (11th Cir. 2000). The second *Gulf Power* decision also held that the FCC lacked jurisdiction to regulate pole attachments where the cable operators also offered Internet service. That holding was reversed by the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

[3] *In the Matter of Alabama Cable Telecommunications Assoc. et al. v. Alabama Power Co.*, 15 F.C.C.R. 17346 (Enf. Bur. Sept. 8, 2000), *aff'd, Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, 16 F.C.C.R. 12209 (2001), *aff'd, Alabama Power Co. v. F.C.C.*, 311 F.3d 1357 (11th Cir. 2002), cert. denied, 124 S. Ct. 50 (2003) ("*Alabama Power*").

The Eleventh Circuit specifically noted that "marginal cost provides just compensation" and that the FCC's formula for pole rental attachment, "which provides for much more than marginal cost, *necessarily provides* just compensation."[4] However, the Eleventh Circuit carved out one limited circumstance where a pole owner might be entitled to recover more than the marginal costs of hosting Complainants' attachments: If a pole owner could show that an individual pole was "full" and that as a result of hosting a cable operator's attachment the pole owner was actually prevented from collecting more rent from another attacher (an actual, not hypothetical, attacher had to be "waiting in the wings"), a pole owner could have a claim to more than reimbursement of marginal costs from the cable operator attacher.[5] In this situation, reimbursement of an amount in excess of marginal costs would be limited to the amount of any actual loss of a confirmed (again, not theoretical) opportunity to rent space to another that is actually foreclosed by the presence of a cable operator's attachment.

After the Eleventh Circuit's *Alabama Power* decision, the Bureau resolved the pending action by Complainants against Gulf Power and disallowed Gulf Power's new rates.[6] Gulf Power then sought to leverage the *Alabama Power* exception into a wholesale dismantling of pole attachment regulation claiming *all* of its poles were "full" and it lost the opportunity to sell *all* of the space at "market rates" as opposed to the rate under the federal formula. Gulf Power

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[4] *Alabama Power* at 1370-71 (emphasis supplied).

[5] To recover more than marginal costs a utility would have to show "with regard *to each pole* that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." 311 F.3d at 1370 (emphasis added). Critical to the Eleventh Circuit's holding was that constitutional "just compensation" is measured by "loss to the owner" not "gain to the taker" so the fact that attachers might be spared some of the costs of building parallel pole networks was entirely irrelevant. "The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, 'the question is, What has the owner lost? not, What has the taker gained?' This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better." 311 F.3d at 1369.

[6] *In the Matter of Florida Cable Telecommunications Assoc. et al. v. Gulf Power Co.*, 18 F.C.C.R. 9599 (2003). The Bureau granted Complainants' relief, rejecting Gulf power's contention that the cable formula did not provide "just compensation," and reinstating the rates originally calculated under the formula. *Id.* at 9607-09.

sought reconsideration of the Bureau's decision, arguing that it should be afforded a second bite at the apple and the opportunity to present evidence meeting the exception identified in the *Alabama Power* decision: to prove that its poles were full and that it lost quantifiable opportunities to rent the space occupied by the cable operators at rates higher than the cable formula. Based on Gulf Power's plea and its so-called "description of evidence," the Bureau designated the matter for hearing before the Chief ALJ.[7] After a year of discovery and pre-trial proceedings, fact and expert witnesses testified at a week-long hearing in April 2006. Proposed findings of fact and conclusions of law were filed in June, oral argument held in July, and reply findings and conclusions were filed in August. The record was closed in September.

On January 31, Judge Sippel rendered his Initial Decision. He rejected every aspect of Gulf Power's claims under the controlling precedent of *Alabama Power*:[8]

Gulf Power's Poles are not "Full." Gulf Power claimed that every one of its poles that had a safety violation, or had to be rearranged or changed out to accommodate another attacher, in the past *or* in the future, was "full." Judge Sippel rejected that claim because the evidence proved that the availability and regular use of make-ready for rearranging facilities on poles and substituting taller poles, all fully paid for by the attachers, meant that no attacher was displaced from a pole or prevented from attaching. Without any full poles, Gulf Power had no claim to recovering more rental than it already received from Complainants. Initial Decision at ¶ 26.

Gulf Power Suffered No "Lost Opportunity." Judge Sippel correctly recognized prior precedent establishing that Complainants' payment of the FCC formula pole attachment rental, along with make-ready costs, reimbursed Gulf Power more than the marginal costs of hosting

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[7] Hearing Designation Order, 19 F.C.C.R. 18718 (2004) ("*HDO*").

[8] *HDO* at ¶ 5, n. 21 (setting a hearing to consider the "facts Gulf Power intends to proffer in an effort to satisfy the [*Alabama Power*] standard . . ."). Gulf Power suggests in its exceptions that the issue for hearing was "broader" in scope, to actually "interpret" Alabama Power to allow for Gulf Power's "fair market" valuation, something rejected in *Alabama Power* and not included within the *HDO*. *Compare* 311 F.3d at 1368 *with* Exceptions at p.6.

Complainants' attachments and thus was sufficient to satisfy constitutional just compensation requirements. As long as statutory rent and make-ready were paid, and cable operators, telecommunications carriers and others (including Gulf Power itself) did and could attach, there was no "lost opportunity." Without evidence of any lost opportunity, no additional rent could be due from Complainants under the *Alabama Power* test. Initial Decision at ¶ 28.

B. Reply to Gulf Power's Exceptions

1. The Initial Decision Correctly Interprets *Alabama Power v. FCC*

Gulf Power takes exception with the finding that "where capacity is available through rearrangement or expansion of a pole's height, its capacity cannot be full."[9] Gulf Power also argues that Judge Sippel misinterpreted 47 U.S.C. § 224(f)(2), *Alabama Power Company v. FCC*,[10] and *Southern Company v. FCC*,[11] arguing that all three decisions mean that poles that had or need make-ready done to accommodate new attachments *must* be at full capacity.[12] However, Judge Sippel correctly found, based on the testimony and the documentary evidence, that the performance of make-ready through rearrangements or changeouts are examples of routine joint use pole facility management, and not something that determines poles are full because Gulf Power has offered no evidence of an instance when it was prevented from accommodating an attachment because of pre-existing cable attachments.[13]

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[9] *In the Matter of Florida Cable Television Ass'n; Comcast Cablevision of Panama City, Inc; Mediacom Southeast, LLC; and Cox Communications Gulf, LLC v. Gulf Power Co.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, EB Docket No. 04-383, ¶ 25 (rel. January 31, 2007) ("Initial Decision").

[10] *See Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 15 FCC Rcd 17346, ¶ 13 (2000), *aff'd*, 16 FCC Rcd 12209 (2001), *aff'd*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S.Ct. 50 (2003).

[11] *Southern Co. v. Federal Communications Comm'n*, 293 F.3d 1338, (11th Cir. 2002) ("*Southern Company*").

[12] Exceptions at p. 7 ("If capacity must be expanded to accommodate a new attachment on a given pole, then that pole is at full capacity.").

[13] Initial Decision at ¶ 23. As noted (*Id.*) Gulf witness Michael Dunn admitted that a "rearrangeable pole would not be at full capacity." Dunn Cross, April 24, 2006 Tr., pp. 726-27. Gulf witness Ben Bowen also testified that "[i]t would be impractical to distinguish between rearrangement and change-out...." Gulf Power Ex. B, p. 27.

The Initial Decision correctly found that *Alabama Power* requires a showing of full capacity (not crowding or rivalry) *and* lost opportunity for a higher valued use before may claim rates above marginal costs.[14] In its Exceptions, Gulf Power simply challenges *Alabama Power*'s holding as preventing a property owner from getting just compensation unless rivalry is present.[15] However, that challenge is without basis because *Alabama Power* clearly made an exception to the rule that pole rental and make-ready under the federal formula constitute just compensation *unless* Gulf Power's poles are rivalrous. Here, Gulf Power's poles are *non*rivalrous because of the availability and use of make-ready: the "use by one entity does not necessarily diminish the use and enjoyment of others." 311 F.3d at 1369.

Not one piece of evidence was introduced by Gulf Power to contradict Judge Sippel's conclusions that not one attachment by the Complainants deprived any potential attacher from actually attaching to any pole. Gulf Power cites none in its Exceptions.[16] Even more to the point, Judge Sippel observed, based on Gulf Power's own representations, that without a survey it could not identify any specific "full" pole in its network: Gulf Power "cannot identify specific poles it contends are 'crowded' or at 'full capacity' until [a pole] audit is completed." *Status Order*, FCC 05M-23 (April 15, 2005), 1. It is ironic that Gulf Power now claims it has proven

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[14] Initial Decision at ¶ 18-19.

[15] Exceptions at p. 4 (Alabama Power is wrongly decided because it "requires a showing of rivalry . . . before a property owner is entitled to just compensation".). Although Gulf Power professes to interpret *Alabama Power* to give it "meaning," Gulf Power simply argues that it does not need to satisfy the *Alabama Power* test so it can claim an entitlement to additional rent on all it poles without specific or individualized proof of full capacity or lost opportunity.

[16] "Full capacity," not "crowding," is the applicable standard for determining when a rate above marginal cost may be required. In its Exceptions Gulf seeks to make much of the word "crowding" as the standard, but early on in the proceeding Judge Sippel made it clear that "crowding" was not the test. *Status Order*, FCC 05M-23 (April 15, 2005) at 5. Even Gulf itself drew a very clear distinction between crowding and full capacity, saying that a "crowded" pole had "room" for "one additional communications attachment" while a "full" pole did not. Compls. Ex. 56, p. 2. Its Exceptions claiming otherwise (at pp. 5-6) are completely unfounded.

something it admitted it could not, arguing instead for a presumption that all of its poles are full and ignoring that pole-by-pole proof is required under *Alabama Power*.[17]

Also, Judge Sippel correctly quoted *Alabama Power*, and noted that where marginal costs incident to attaching are paid, and no opportunity has been lost, "pole space is, for practical purposes, *non*rivalrous."[18] Accordingly, despite Gulf Power's claims, the Initial Decision correctly interpreted and applied *Alabama Power*.

2. The Initial Decision Correctly Interpreted 47 U.S.C. § 224(f)(2)

Gulf Power argues that the phrase "insufficient capacity" in 224(f)(2) was also misinterpreted in the Initial Decision[19] although Judge Sippel noted the *Southern Company* court's interpretation of the phrase. As discussed below, any application of 224(f)(2) in the present dispute is dependent on how and whether the *Southern Company* decision is taken into account. In either case, the Initial Decision's finding that make-ready is a part of a pole's existing capacity in no way improperly contradicts the "insufficient capacity" language of 224(f)(2). Nothing in the Initial Decision imposes a duty on Gulf Power that is somehow precluded by 224(f)(2); there is no FCC rule requiring it to expand capacity.

Moreover, Gulf Power would make section 224(i) meaningless; that section provides that the last attacher in time pays for make-ready costs, if necessary, either to accommodate a new attachment or to modify an existing attachment. 47 U.S.C. § 224(i). And if capacity is truly

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[17] Gulf Power has "the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*." *HDO*, ¶ 8 (emphasis added). "At a conference conducted on December 13, 2004, it was decided in connection with showing (or failing to show) full capacity *with respect to specific poles*, that Gulf Power be authorized to conduct a pole by pole survey to show which Gulf Power poles to which Complainants have attached cable, are utilized at full capacity. *Status Order*, FCC 05M-23 (April 15, 2005), p. 4 (emphasis in original). Gulf utterly failed to prove anything with respect to specific poles. Complainants' Proposed Findings of Fact and Conclusions of Law ¶¶ 139-41, 347-52, 367, 449-50, 506; *Discovery Order*, FCC 05M-38 (Aug. 5, 2005), p. 4 (Gulf "does not rely on identifying individual 'buyers waiting in the wings'"); Compls. Ex. 56, p. 5 (Gulf fails to identify a single instance in which it had a specific "higher valued use"; and Compls. Ex. 61, pp. 5-6 (Gulf could not identify a single actual reservation of pole space).

[18] Initial Decision at ¶ 19, citing 311 F.3d 1369 (emphasis added).

[19] Exceptions at p. 6.

insufficient, the electric utility could deny access, but only if such denial was non-discriminatory. The fact that Gulf Power has changed out poles and done make-ready for itself and others may force it to do the same for Complainants, but that is not a contradiction of 224(f)(2) or *Southern Company*; it is instead an application of that provision, § 224(i), and precedent.[20]

3. The Initial Decision Correctly Analyzed and Applied *Southern Company*

Gulf's argument that the *Southern Company* decision contradicts the Initial Decision misses the mark. In *Southern Company* the court ruled that "when it is agreed [by pole owner and attacher] that capacity is insufficient," a utility may not be ***required*** to provide an attacher with access to a pole. *Id.* at 1347. *Southern Company* emphasized that the term "insufficient capacity" was not defined by statute and was ambiguous, and it specifically found that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient." *Id.* at 1348.[21] By contrast, in *Alabama Power*, the issue was whether there was proof of both "full capacity" as determined by a "missed opportunity" and a consequent loss of a higher valued use. 311 F.3d at 1370-71. Although a utility may not be forced to provide third parties access to a particular pole under *Southern Company*'s rationale, the issue here is not "forcing," but deciding when capacity may genuinely be said to be full, as *Alabama Power* said, "for *practical* purposes." 311 F.3d at 1369 (emphasis added). For practical purposes, then, the question of whether capacity is full such that the pole owner suffered a missed opportunity must be answered by taking account of

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[20] Gulf Power argues that Judge Sippel's conclusion that conditions causing insufficient capacity can be easily fixed and are *de minimis* was not in the record. Exceptions at p.7. Gulf Power is wrong. *See* Complainants Reply Findings, ¶ 9; Compls. Ex. A, pp. 32, 42. Indeed, Gulf Power's own witness admitted that only in "limited cases" is there a situation where, because of "engineering practice you could not change the height of the pole." Compls. Ex. 85, Brooks Dep., pp. 45-46.

[21] Gulf Power does want to have the unilateral right to declare a pole full by refusing to perform make-ready, the other side of the same prohibited coin. Gulf Power's lament that the language on ambiguity and capacity were in a different part of the *Southern Company* opinion is of no moment. Exceptions at pp. 8-9. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993) ("language used in one portion of a statute... should be deemed to have the same meaning as the same language used elsewhere in the statute"); *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) ("Construing identical language in a single statute in pari materia is both traditional and logical").

Gulf Power's incorporation of make-ready in its permitting procedure and its undisputed "historical willingness to accommodate attachers by performing make-ready."[22] Because Complainants and other third party attachers (and the Initial Decision) would only agree that capacity is insufficient where make-ready engineering is not feasible, one may deduce from the *Southern Company* language that a pole could not be at full capacity where make-ready *could* accommodate a third party attacher. Otherwise, a unilateral refusal, or sloppy engineering on its part, would allow Gulf Power to claim all its poles are full and bootstrap a claim for more rent.[23]

In the *1999 Order* that was reviewed in *Southern Company*, the FCC notes in passing the existence of these historical make-ready attachment practices: "It is worth noting in this regard, that utilities subject to pole attachment regulation have been expected, since the beginning of pole attachment regulation to take steps to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access."[24] In its Exceptions, Gulf Power seizes on this statement and mischaracterizes it as a part of the FCC's pronouncement on capacity expansion which *Southern Company* overturned.[25] As explained above, the *Southern Company* court never indicated any intent to undo over twenty years of routine pole engineering practice. The FCC's 1999 observation about historical make-ready practices was meant only to explain how pole capacity had always been viewed by attachers and pole owners to include make-ready

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[22] Compls. Ex. 2, pp. 3-5; Initial Decision at 9. The Commission has considered make-ready to be part of determining available capacity. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 F.C.C.R. 18049, ¶ 53 (1999) ("*1999 Order*").

[23] It would be a "perverse economic result" under such circumstances to label a pole that needs make-ready as being at "full capacity" and, partly on that basis allow Gulf Power to charge not only the additional attacher but pre-existing attachers such as Complainants a rate higher than the cable rate (which is already in excess of marginal cost). "Such an outcome violates the cost-causation principles underlying [47 U.S.C.] Section 224, by requiring pre-existing attachers, who were not the cause agents in any principal respect [for the new attachment], to pay more than they were paying before the pole-change-out or rearrangement." Compls. Ex. A, Kravtin Testimony, p. 29; 47 U.S.C. § 224(i)(last attacher in time pays make-ready, if necessary, either to accommodate a new attachment or to modify an existing attachment).

[24] *1999 Order* at ¶ 53.

[25] Exceptions at p. 7.

engineering, distinguishing that practice from the actual capacity expansion requirements ultimately struck down by *Southern Company*. The Initial Decision correctly relied on Gulf Power's and other utilities' historical practice of accommodating attachers through make-ready to determine that it does not constitute an expansion of capacity. Accordingly, Judge Sippel correctly interpreted 224(f)(2) in the same way that the *Southern Company* court did, and was correct in finding that *Southern Company* has no relevance to the question of when a specific pole is at full capacity for purposes of determining whether a pole owner is entitled to more than marginal costs for hosting attachments on that particular "full" pole.[26]

4. The Availability of Make-ready is Part of Determining Pole Capacity

Gulf Power misses the point in arguing that Judge Sippel's finding on make-ready means he was looking at imaginary future poles ready to receive a new attachment instead of looking at current poles.[27] To the contrary, Gulf Power presented evidence of its existing poles, none of which had a capacity problem that would have prevented a new attachment. Had Gulf Power shown the Presiding Judge examples of poles which could *not* accommodate a new attachment due to physical barriers (overpasses, landscape hazards, etc.), those would have constituted actual and current poles at full capacity. Instead, Gulf Power chose to argue that poles fully paid for by make-ready payments and leased to multiple attachers are somehow "full" and thus subject to a higher rent, although there is absolutely no "loss" of any opportunity. Gulf Power even started an audit (and then abandoned it) because it could not otherwise make any

[26] Initial Decision at ¶ 24. Gulf Power's suggestion that Judge Sippel's reliance on *Metropolitan Transp. Auth v. ICC.*, 792 F.2d 287 (2d Cir. 1986), was "inappropriate" (Exceptions at p.9, n.5) is most curious. *Alabama Power* cited and relied on that decision when establishing the controlling rule of law on measuring "just compensation" (that value to the "taker" of any benefit obtained by the taking may not be considered; only loss to the owner is to be valued) which governs this proceeding. *Alabama Power*, 311 F.3d at 1370, *citing Metropolitan Transp. Auth v. ICC.*, 792 F.2d at 297; *HDO* at ¶ 5, n.21; Initial Decision at pp. 7-8.

[27] Exceptions pp. 9-10.

determination as to which of its poles were full.[28] Then Gulf adopted the untenable position that every pole that had been subject to make-ready, or in the future would need make-ready, was "full." Judge Sippel wisely rejected such a construct as it would have provided Gulf with the opportunity to collect additional rent although it suffered no loss. Pole rearrangements and changeouts are *currently* a part of existing pole capacity, not a hypothetical part of future pole capacity. This is particularly true when rearrangements and changeouts have been regularly used by all pole owning utilities for the past twenty-five years.[29]

5. Prior or Current Safety Code Violations are Irrelevant to Determining Full Capacity Poles

Safety standards are important in pole engineering but irrelevant to determining whether a pole is "full" under *Alabama Power*.[30] The safety violations cited by Gulf Power are correctable in all instances through the same standard make-ready rearrangements and changeouts routinely performed to make a pole ready for a new attachment. As identified at the hearing, make-ready is field engineering work that is performed in order to ensure that attachments to utility poles comply with code and safety requirements. Compls. Ex. 87, Forbes Dep., Tr., pp. 25-26. Gulf Power's own witness, Mr. Bowen, testified that he visited a particular pole (number 318-65, Gulf Pole 2) and concluded that

> this is an example of the lengths to which some companies will go to avoid make-ready and their contractual responsibilities on crowded poles. This pole has numerous crowding and/or safety clearance violations that must be fixed by changing the pole out to a taller pole.

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[28] Gulf Power "cannot identify specific poles it contends are 'crowded' or at 'full capacity' until [a pole] audit is completed." *Status Order*, FCC 05M-23 (April 15, 2005), at 1. The audit performed by Osmose was fraught with problems and ultimately played little role in the hearing. *See* Complainants Proposed Findings of Fact and Conclusions of Law at ¶¶ 149-202; Initial Decision at pp. 16-17.

[29] Initial Decision at ¶ 24.

[30] Initial Decision at ¶ 15 ("compliance with safety has never rendered a pole at full capacity") and ¶ 19 ("merely pointing out the need for rearrangement of existing attachments and/or compliance with safety codes in order to accommodate new attachments does not meet Gulf Power's burden.").

Gulf Ex. 42, p.2; Bowen Direct Testimony, pp. 36, 16-19; Bowen Cross, April 25, 2006, Tr., p. 1067.

However, many violations are frequently caused by Gulf Power itself, making the allegation that safety violations cause poles to be at full capacity not only wrong but disingenuous.[31] It is also Gulf Power's practice to require attachers to pay make-ready costs to cure clearance and/or safety violations on existing poles, meaning safety violations impose no additional costs on Gulf Power. Compls. Ex. 87, Forbes Dep., pp. 119-20. Complainants witness Michael Harrelson explained that: "Gulf's claim that its poles are at full capacity is not reasonable, because it ignores the real-world fact that make-ready is consistently and routinely used to cure safety violations and enable additional attachments to be added to poles." Mr. Harrelson further explained:

> If Gulf Power were considered to have made a showing of 'full capacity' just by citing to temporary violations of the NESC or construction standards, and it is not required to consider correction of code violations and to remedy poor workmanship or inefficient use of pole space, Gulf would have an incentive to tolerate more lax pole practices, instead of adopting better, and safer, pole practices.

Ex. B, Volume 1, Harrelson Testimony, pp. 59, 61. In other words, "[I]t's unreasonable to not consider what the effect of correcting the violations would be and then say, 'Okay. After we put things in their proper place, is the pole now full or not full ....'" Harrelson Re-Direct, April 27, 2006 Tr., p. 1834.

[31] For example, with respect to the pole identified above (no. 318-65) Mr. Bowen testified that it was possible looking at shadings, riser shields and old bolt holes with washer indentations that *Gulf* moved its electric facilities out of the electric space and into the safety space and communications space and caused the violations complained of, and, more importantly, that it would have been Gulf's obligation to rearrange or change-out to bring it back into compliance. Bowen Cross, April 25, 2006, Tr., pp. 1069-79.

6. The Initial Decision Did Not Err By Failing to Consider Capacity Testimony

Gulf Power faults the Initial Decision for finding that "Complainant's engineering expert opined without contradiction, that a utility pole is never at full capacity if make-ready work can accommodate an additional attachment,"[32] arguing that Gulf Power's witnesses contradicted Complainants' expert. However, Gulf admitted its "historical willingness to accommodate attachers by performing make-ready." *See Order*, FCC 05M-50 (Oct. 12, 2005), p. 2. That willingness and actual work were the subject of Mr. Harrelson's testimony. And Gulf Power's witnesses all agreed that make-ready does allow poles to accommodate additional attachers.[33] Indeed, the evidence supports Judge Sippel's conclusion because Gulf has no record of any instance in which it was prevented from accommodating either a third-party attachment or its own attachments because of the presence of Complainants' cable attachments.[34]

The remainder of the verbiage at Gulf Power's Exception No. 6 merely repeats its arguments for the exclusion of make-ready from any analysis of existing capacity, all of which were considered by the trial judge and found to be unpersuasive.[35]

7. Poles Are an Essential Facility

Gulf Power argues that because cables can be laid underground in trenches as well as on overhead poles, pole networks are not essential facilities. First, the United States Congress, the

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[32] Initial Decision at ¶ 17.

[33] The only instances that Gulf Power identified where it could not perform make-ready work is where a physical obstruction prevented such work, such as a bridge that kept a pole from going higher, or across waterways, or near airports. Dunn Cross, April 24, 2006, Tr. p. 754; *see also* Compls. Ex. 86, Dunn Dep. Tr., p. 59. Indeed, Mr. Dunn testified that he had no knowledge of any instances in which Gulf Power denied any party access to a utility distribution pole "because another cable operator was there." Compls. Ex. 86, Dunn. Dep., p. 129. Similarly, Mr. Rex Brooks of Gulf Power, a colleague of Mr. Dunn's, could not recall any instance of Gulf Power's ever denying a cable operator the opportunity to attach because of an inability to provide space on a pole. Compls. Ex. 85, Brooks Dep., pp. 45-46.

[34] *See* Complainants Proposed Findings of Fact and Conclusions of Law, ¶¶ 53, 54, 62, 63, 67, 90, 227-28, 230, 334, 347.

[35] *See, e.g.,* Initial Decision at ¶ 19 ("Such changes and rearrangements on poles are *normal* to accommodate new attachments") (emphasis added).

Supreme Court, federal district and circuit courts, the Department of Justice and this Commission have all recognized that poles are "essential facilities" and thus, bottlenecks to facilities-based competition in telecommunications and cable television markets.[36] Complainants agree with the Initial Decision's finding that the argument that poles do not constitute essential facilities is "long discredited" and that, even if tried independently on its merits, Gulf Power's claim would fail.

Second, Gulf Power makes another untenable claim when it urges that the Initial Decision's failure to address the essential facilities argument on the merits constitutes a denial of due process.[37] Gulf Power waived the argument that its poles were not essential facilities at any

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[36] *See, e.g.,* 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, cosponsor of the Pole Attachments Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, the cable operators are virtually dependent on the telephone and power companies. ."); *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (finding that Congress enacted the Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."). *See also Alabama Power Co. v. FCC,* 311 F.3d 1357, 1362-63 (11th Cir. 2002) (noting "'essential facilities' doctrine" and detailing Section 224's mandatory access provision to enable use of utility pole networks needed by cable operators); *Southern Co. v. FCC,* 293 F.3d 1338, 1341 (11th Cir. 2002) (cable operators have "little choice but to" attach to utility poles); *United States v. Western Electric Co.*, 673 F. Supp. 525, 564 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 238 (D.C. Cir. 1990) (stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space . . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks . . . ."); *United States v. AT&T,* No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloging of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative"); *Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 307, ¶ 23 (1970) (detailing the Justice Department's comments that the FCC must ensure just and reasonable access to poles and conduits due to the serious danger that the existing local monopoly position of the telephone companies as communications common carriers may prevent the development of an independent CATV industry); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules Governing Pole Attachments,* 13 FCC Rcd 6777, 6780, ¶ 2 (1998) (FCC observes that the purpose of Section 224 is to "ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."), *aff'd Southern Co. Services v. FCC,* 313 F.3d 574 (D.C. Cir. 2002); *Common Carrier Bureau Cautions Owners of Utility Poles*, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

[37] Exceptions at fn. 8, citing *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893).

relevant point in the underlying proceeding by failing to raise it until now;[38] an essential facilities question was not designated in the *HDO*;[39] and Gulf Power presents nothing persuasive in any event that would show any changed circumstances justifying the reversal of twenty five years of precedent. It is raised (Exceptions at p. 15) only as an untimely challenge to the *Alabama Power* decision and its "regulatory underpinnings."

8. The Initial Decision Correctly Describes the Cable Formula and Takings Law

Gulf Power takes issue with the Initial Decision's characterization of how the cable pole attachment rate compensates a utility at a rate above its marginal costs and believes that this shows that the Initial Decision is at variance with takings law.[40] To the contrary, the Initial Decision correctly observed that the cable rate fully covers a utility's costs associated with the property (space) taken and so therefore makes the utility whole. This is consistent with takings law, as summarized by the *Alabama Power* court:

> The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, 'the question is, What has the owner lost? not, What has the taker gained?' This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better.[41]

Gulf Power cites to an earlier discussion in *Alabama Power* where "fair market value" was discussed, but then omits from the citation the sentence which follows immediately: "There is not an active, unregulated market for the use of 'elevated communications corridors,' however,

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[38] *FCTA et al. v. Gulf Power Company*, PA No. 00-004, Gulf Power's Response to Complaint (filed August 9, 2000), Gulf Power's Request for Evidentiary Hearing (filed June 23, 2004), and Gulf Power's Description of Evidence for hearing (filed January 9, 2004). *See also United States v. Hutchinson*, 180 Fed. Appx. 74, 77 (11th Cir. 2006) ("An argument not made is waived.") (internal citations omitted).

[39] *See HDO* at ¶ 5 ("After carefully reviewing the parties' submissions, we conclude that Gulf Power should be afforded the opportunity to present the evidence delineated in its Description of Evidence during a hearing before an Administrative Law Judge.")

[40] Exceptions at p. 16.

[41] 311 F.3d at 1369.

and *so an alternative to fair market value must be used.*" 311 F 3d at 1368 (emphasis added). The *Alabama Power* court found, consistent with relevant takings precedent, that the appropriate valuation standard here was the "loss to the owner" standard. *Id.* at 1369. Indeed, the Eleventh Circuit clearly explained that it would be a "flawed analytical step" to simply claim a lost opportunity to charge what the utility "deem[ed] the 'full market price'" of pole space without proving that it was "out any more money than [it] w[as] before the taking." *Id.* at 1369, 1370. Accordingly, an analysis couched in terms of "loss" to Gulf Power from the presence of the cable attachment is correct both as a matter of law and fact and represents no error.[42]

9. Gulf Power Failed to Prove that It Had Customers Waiting In The Wings To Buy Space On Its Poles

In designating this matter for hearing, Gulf Power was allowed to present evidence satisfying the *Alabama Power* test that it had other buyers of space on full capacity poles "waiting in the wings" to pay more than the cable attachers.[43] Complainants observe that as Gulf Power failed to submit evidence satisfying the first prong of the Alabama Power test that any of its poles were at full capacity, it would have been impossible for Gulf Power to then show it had other customers waiting to pay for attachments to such full poles. Indeed, as set forth previously, all attachers have been accommodated. Nevertheless, Gulf Power alleges that it did offer some such proof in the form of evidence showing that cable operators pay higher pole attachment rents on poles of electric cooperatives, which are exempt from the access requirements of Section 224.[44] What Complainants, or anyone else, has to pay to unregulated municipal or cooperative

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[42] Gulf Power's claim that the federal formula is an "artificially low subsidized rate based on historical costs rather than higher market rates" is circular; costs are the standard and the rate, allowing a profit is not subsidization. As the Presiding Judge suggested, if Gulf is dissatisfied with the FCC formula and wants to charge "unregulated" pole attachment rates, it should ask Congress, not the Commission, to change the law. Hearing Tr., July 6, 2006, pp. 2050-54.

[43] *HDO* at ¶ 3, 5.

[44] Exceptions at p. 17-18.

electric companies has nothing to do with Gulf Power's costs or losses, is not the kind of evidence contemplated by *Alabama Power* or the *HDO*, and is irrelevant to the standards articulated therein. Specifically, the Commission made it abundantly clear that "there is no non-monopoly market for pole attachments" and that "any rents [a utility] negotiates with other service providers not covered by the Commission's pole attachment rate formula reflect a monopoly value."[45] Because just compensation does not award a utility monopoly rates, these unregulated rates have no part in the issues in this proceeding.

Gulf Power nonetheless argues that to the extent "the Initial Decision purports to require that Gulf Power present an actual alternative user of the space (an actual "buyer waiting in the wings") before recovering fair market value for the taken pole space, that misinterprets and misapplies applicable takings law." Exceptions at p. 18. First, the *Alabama Power* court used the words "buyer waiting in the wings" and never suggested that a "hypothetical buyer" could satisfy the standard of proof; this makes sense because the only way a utility can recover a rate in excess of marginal costs is when an actual attacher is denied access. If no attacher is "waiting in the wings" then no one has been denied access. And because there is no unregulated market for pole attachment space, there is no fair market value.[46]

To the extent Gulf Power argues that *Alabama Power* is an incorrect application of takings law, this argument was made in a petition for certiorari to the United States Supreme Court that was denied, so the holding that only buyers "waiting in the wings" (or a higher valued

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[45] *Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, 16 F.C.C.R. 12209, ¶ 55; *see also Alabama Power*, 311 F.3d at 1368.

[46] *Alabama Power*, 311 F.3d at 1368 ("[t]here is not an active, unregulated market for the use of 'elevated communications corridors' . . . an *alternative* to fair market value must be used." *Alabama Power*, 311 F.3d at 1368 (emphasis added). "Where competitive market conditions do not exist (as is the case with pole space), there will be no such competitive pressures. Under such conditions, the 'free market' rate degenerates into an unregulated monopoly rate and will tend to incorporate supra-normal monopoly profit." Compls. Ex. A, Kravtin Testimony, pp. 38-39. *Alabama Power* made this point clear finding that it would be a "flawed analytical step" to claim that a monopoly owner of an essential facility had a "lost opportunity" merely by being unable to charge "market" rates. 311 F.3d at 1370 n.22.

utility use) could establish entitlement to rental above marginal costs is a final rule binding upon the Commission, just as Gulf Power previously admitted.[47]

10. Judge Sippel Adopted Correct and Well Supported Findings of Law And Fact

At Exception No. 10, Gulf Power argues broadly that the Initial Decision was mostly in error for ruling in favor of Complainants and against Gulf Power. Exceptions at p. 19. Gulf Power argues that its own interpretation of full capacity would have provided a "workable and meaningful" approach to the *Alabama Power* test, namely that whenever make-ready needs to be performed a pole is full. *Id.* While this interpretation of pole capacity would have been more meaningful to Gulf Power's desire to extract more revenue from its pole plant, the opposite interpretation – that make-ready performance is a part of existing pole capacity – is the interpretation supported by takings and just compensation law and the facts in this case.

11. Judge Sippel Correctly Refused to Strike the Pre-Filed Direct Testimony of Complainants' Economic Expert

Gulf Power argues that the Kravtin testimony, some of which the Initial Decision cites, should have been stricken from the record for offering legal opinions outside the bounds of expert testimony. First, as an economist Ms. Kravtin is uniquely qualified to opine on the economic analysis required by the *Alabama Power* decision concerning the costs used to compensate Gulf Power for its pole space, and that is what her testimony was offered and property admitted for.[48]

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[47] *HDO* at fn. 17 (In requesting a hearing, Gulf Power argued that "the *Alabama Power Decision*'s standard has no basis in just compensation jurisprudence. Gulf Power subsequently acknowledged, however, that "[o]nce the rule in [the *Alabama Power Decision*] becomes final, either through denial of certiorari review or an ultimate ruling on the merits by the Supreme Court, it will be binding upon the FCC – it will set the standard." As noted above, after Gulf Power filed the Petition, the United States Supreme Court denied certiorari in *Alabama Power*, and the Eleventh Circuit's decision became final.") (internal citations omitted).

[48] *See* Fed. Rules Evid. R. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion...").

Second, the federal rules of evidence afford a trial judge broad discretion to admit testimony which will be helpful in determining the ultimate merits of a case.[49] This is particularly true in a bench trial like the one before Judge Sippel, where there was no reason to be concerned that allowing Ms. Kravtin's expert testimony might sway a jury by leading them to believe that special weight had been afforded her opinions.[50]

Finally, the Initial Decision only cites to the Kravtin testimony once on the subject of full capacity poles, an issue on which both sides had a full and fair opportunity to present extensive evidence. The presiding Judge could have selected from any one of a number of similar statements made by experts and witnesses for both Gulf Power and Complainants. In light of this, the claim that the admission of Ms. Kravtin's testimony was error is without merit.

12. The American Public Power Association is Not An Industry Standard Setting Organization, Its Publication Was Properly Excluded, and Its Publication is Irrelevant

Judge Sippel correctly excluded a publication of the American Public Power Association which was offered in support of the proposition that cable operators pay more for attachments to poles owned by cooperative utilities exempt from the access requirements of Section 224. First the American Public Power Association exists to "advance the public policy interests of its

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[49] *See*, e.g., Fed. Rules Evid. R. 401; *See United States v. Smith*, 459 F.3d 1276, 1294 (11th Cir. 2006) ("The district court possesses broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue.") (internal citations omitted).

[50] *See*, e.g., Fed. Rules Evid. R. 703 ("Facts or data that are otherwise inadmissible shall not be disclosed *to the jury* by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their *prejudicial effect.*") (emphasis added). Indeed, Gulf Power's own witnesses opined on the *Alabama Power* standards. *Complainants' Response To Respondent Gulf Power's Motion To Strike Pre-Filed Direct Testimony Of Patricia D. Kravtin* (filed Apr. 25, 2006) ("*Opposition*") at 2-3. Complainants also explained that Gulf Power's reliance on *TC Systems v. Colonie*, 213 F. Supp. 2d 171 (N.D.N.Y. 2002) was misplaced. Ms. Kravtin was accepted as an expert and the only provision of her report stricken was a recitation of the legislative and jurisprudential history of a federal statute and its progress through the courts and FCC that the court believed had no nexus to the facts; the remainder of her opinion was admitted. *Opposition* at 3-5.

members"[51] and does not purport to provide objective inter-industry information concerning joint use poles of the kind that would be relevant to the underlying hearing. A publication by a policy advocacy group may not be offered into evidence under the guise of a trade industry publication for the sake of establishing industry standards.[52] Furthermore, even if the material had been admitted it would have been in support of an argument which was irrelevant to the proceedings. As discussed above at Heading 9, evidence of higher pole rates paid to unregulated utilities such as cooperatives does not satisfy the *Alabama Power* test (or the *HDO*) that require evidence of an actual buyer of Gulf Power's pole space "waiting in the wings." Gulf Power was therefore not prejudiced by the exclusion of inadmissible evidence in support of an irrelevant argument.

13. There Was No Harm In Allowing Only Deposition Excerpts for Certain Witnesses

Finally, Gulf Power takes exception to the fact it never had the opportunity to cross-examine four of Complainants' witnesses at the hearing even though they each had been subject to deposition earlier. Exceptions at 21-22. Gulf Power and Complainants both designated parts of the deposition transcripts, but Complainants withdrew their designations and instead made them counter-designations to Gulf Power's designations.[53] Gulf Power still insisted on each one appearing, and at the direction of Judge Sippel Complainants made Mr. O'Ceallaigh available. However, Judge Sippel changed that after "reviewing Gulf Power's 'Pre-Trial Brief,' and the excerpts of deposition testimony and exhibits, [because] it now appears there is no need to cross-examine Mr. O'Ceallaigh or any of the other representatives of Complainants in the parties'

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[51] *See* American Public Power Association website at http://www.appanet.org/aboutappa/index.cfm?ItemNumber=9487

[52] *See, e.g.*, Fed. Rules Evid. R. 702; *See also Garay v. Missouri Pacific Railroad*, 60 F. Supp. 2d 1168, 1171 (D Kan. 1999) (An expert's lack of familiarity with relevant industry standards led to partial exclusion of testimony. "Under Daubert and Kumho Tire, district courts must ensure that proffered expert testimony is not only relevant, but *reliable*.") (emphasis added).

[53] *See Order*, FCC 06M-17 (June 9, 2006).

cases-in-chief." Order FCC 06M-11 (Apr. 21, 2006). Far from arbitrary, Judge Sippel reviewed the areas of cross-examination proposed by Gulf Power for these witnesses and found that such examination would be "fly-specking in the extreme." *Id.* Accordingly, Gulf Power suffered no harm and, in any event, none of the deposition excerpts were cited in the Initial Decision. Moreover, Gulf Power made no effort to show what it needed any of these witnesses fro live that it could not use by way of deposition transcript. This exception by Gulf Power more readily shows the weaknesses in Gulf Power's case in that it would prefer to rely on Complainants' employees' testimony to try and satisfy its burden of proof.

CONCLUSION

The Initial Decision correctly found that twenty five years of historical make-ready practice establish that the existing capacity of poles at any given moment incorporates the routine performance of rearrangements and changeouts. Because Gulf Power did not demonstrate that any of its poles were at full capacity, or that it lost any opportunity to rent space to others or use it itself as the result of the presence of any of Complainants' attachments, the Commission should affirm the Initial Decision and make it a final order.

Respectfully submitted,

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March 12, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Complainants' Reply To Gulf Power Company's Exceptions To The Initial Decision* has been served upon the following by E-Mail and U.S. Mail this 12th day of March, 2007:

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