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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

To: Office of the Secretary

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

COMPLAINANTS' PRELIMINARY STATEMENT ON ALTERNATIVE COST METHODOLOGY

Michael A. Gross
Vice President,
Regulatory Affairs and Regulatory Counsel
FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303-6208
(850) 681-1990

Paul Glist
John D. Seiver
Geoffrey C. Cook
Brian M. Josef
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 659-9750

Counsel for

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, COX COMMUNICATIONS GULF COAST, L.L.C., COMCAST CABLEVISION OF PANAMA CITY, INC., MEDIACOM SOUTHEAST, L.L.C., and BRIGHT HOUSE NETWORKS, L.L.C.

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COMPLAINANTS' PRELIMINARY STATEMENT ON ALTERNATIVE COST METHODOLOGY

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, L.L.C. ("Complainants"), pursuant to Orders dated October 1 and 21, 2004, respectfully submit this Preliminary Statement on Alternative Cost Methodology in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

It is undisputed that the payment of marginal costs to a utility provides it "just compensation" for cable operators' and telecommunications carriers' pole attachments under 47 U.S.C. § 224. The only judicial exception is where a pole is "full," a utility may be entitled to something more than just marginal costs as "just compensation." The upcoming hearing has been designated in order to determine whether Respondent Gulf Power Company has admissible evidence sufficient to demonstrate that specific poles are "full," and then, for each proven "full" pole, what amount in excess of marginal costs Gulf Power is entitled to receive.

Gulf Power has both the burden of production of evidence and the burden of persuasion. In particular, Gulf Power's evidence must be limited to what it specifically identified in its earlier proffer; it must show that "each pole" for which it seeks additional compensation is at "full capacity" and that the other requirements set forth in the relevant precedent are met; the determination of "insufficient capacity" must be agreed upon by all parties and take account of Gulf Power's pole inventory and change-out and other make-ready practices; and Gulf Power cannot use past, voluntary pole change-outs for which it has been fully reimbursed as a basis to demand higher pole attachment rates from Complainants. The evidence submitted must be relevant to the time period covered by the complaint – July to December 2000.

Even if Gulf Power were able to present evidence as to specific poles that satisfies the applicable legal standards, there is no need to adopt any "alternative cost methodology" because Gulf Power already receives more than marginal costs or "just compensation" for Complainants' attachments. Specifically, the Federal Communications Commission's ("FCC") Cable Formula, by providing the pole owner with not only reimbursement of marginal costs (make-ready) but also annual payments throughout the life of the pole contract representing a share of all operating costs attributable to the attachment's proportion of usable space, plus a component for reasonable profit, more than satisfies the "loss to the owner" standard for "just compensation."

Accordingly, because under the Cable Formula Complainants already pay Gulf Power significantly more than marginal costs for *all* their attachments to poles that are "full" as well as those that have excess capacity, Gulf Power is not entitled to any additional compensation.

II. BACKGROUND

In early-to-mid 2000, Gulf Power sought to terminate its long-standing pole attachment contracts with Complainants and unilaterally impose new contracts with new pole rental rates of $38.06 per pole, more than 500 percent higher than the existing rates of between $5.00 and $6.20 per pole. On July 10, 2000, after fruitless attempts to negotiate with Gulf Power, Complainants filed a pole attachment Complaint and Petition for Temporary Stay with the FCC's Cable Services Bureau challenging the new rates and the potential removal of their cable facilities. The Complainants argued that the new pole rates violated 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1418, and that there was no merit to Gulf Power's argument that the "just compensation" required by the Constitution entitled Gulf Power to a higher pole attachment rate than that calculated under the FCC's Cable Formula.[1]

[1] *See* 47 C.F.R. § 1.1409(e)(1).

Gulf Power filed its Response on August 9, 2000, challenging the Cable Formula methodology for failing to provide just compensation for the taking of space on its poles. The Response claimed to derive its $38.06 rental rate from, *inter alia*: (1) use of a "depreciated replacement cost approach," (2) inclusion of Federal Energy Regulatory Commission ("FERC") accounts that had been consistently rejected by the Commission, and (3) its own unusable space and pole height figures that differed from the Commission's established presumptions.[2] The Response also proposed various approaches for determining fair market value, including the sales comparison, income capitalization, and depreciated replacement cost approaches.[3] Significantly, Gulf Power nowhere argued or alleged that any one of its poles was "full" or had insufficient capacity to accommodate Complainants' attachments – or anyone else's for that matter.

In their August 29, 2000 Reply, Complainants emphasized the governing legal principle that just compensation is measured by the "loss" to the property owner (not the benefit to the "taker") and that the market value approach to calculating just compensation does not apply because there is no "market" for attachments to utility poles. Moreover, the "income approach" to valuation could not apply to limited licenses of portions of utility poles. Complainants also argued that Gulf Power had provided no persuasive evidence proving actual loss, nor had it supported its inclusion of FERC accounts long deemed to be improper or its alternative average pole height and usable space figures.[4]

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[2] Response at 40-42, 49-50.

[3] Response, 49-51; Wise Affidavit, 18-29.

[4] In addition, on September 11, 2000, after the pleading cycle had closed, Gulf Power filed a Notice of Filing Supplemental Authority, which consisted of a Second Affidavit of Gulf Power's appraiser responding to Complainants' August 29th Reply. In response, on September 21, 2000, Complainants' filed their own Comments On Gulf Power's Notice of Filing Supplemental Authority.

In the May 13, 2003 *Bureau Order*,[5] the Bureau held that Gulf Power failed to justify its $38.06 pole attachment rate and directed Gulf Power to permit cable operators to remain attached to its poles at their existing contract rates pending negotiation of new agreements and rates pursuant to the federal Cable Formula under Section 224.

The Bureau recognized that cable operators had met their burden of establishing a *prima facie* case, and that Gulf Power had failed to establish that it received less than its incremental costs in permitting cable operators' attachments. The Bureau relied on the full Commission's decision *Alabama Cable Telecommunications Ass'n v. Alabama Power* Co.,[6] in concluding that the Cable Formula, together with the payment of make-ready expenses,[7] affords more than just compensation regardless of whether the attachments were deemed "voluntary" or "mandatory." Consistent with the full Commission's *APCO Review Order*, the Bureau also rejected Gulf Power's replacement cost methodology and its attempts to include unrelated cost accounts and alternative pole heights in its calculation of rental rates.

After the Enforcement Bureau issued its ruling granting Complainants' complaint,[8] Gulf Power sought reconsideration[9] arguing, among other things, for the opportunity to submit additional evidence at a hearing to meet the standard set forth in the Eleventh Circuit's decision in *Alabama Power Co. v. FCC*.[10] In that case, the Eleventh Circuit agreed with the

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[5] *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 (May 13, 2003) ("***Bureau Order***").

[6] 16 FCC Rcd. 12209 (2001) ("*Alabama Power Review Order*").

[7] "Make-ready" is the term used to describe the "upfront" costs assessed by contract against attachers to cover the costs that are actually incurred by pole owners in accommodating and installing the facilities of an attaching party. *Id.* at ¶ 29.

[8] *Bureau Order* at ¶ 14.

[9] Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, P.A. No. 00-004 (filed June 23, 2003). Complainants filed their Opposition to Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing ("Opposition") on July 25, 2003.

[10] *Alabama Power v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied* 124 S. Ct. 50 (2003) ("*Alabama Power*").

Commission's application of the established legal principle that just compensation is measured by the loss to the owner and held that, because FCC regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, the pole owner received more than just compensation. The Court observed that only if a pole owner established facts showing actual lost opportunity, *i.e.*, that particular, specified poles were "full" and that the utility was in fact deprived of the opportunity to sell the space occupied by Complainants' attachments for a greater return, could it demand compensation exceeding marginal cost.[11] Specifically, the Court held:

> In short, before a power company can seek compensation above marginal cost, it must 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. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation. While this analysis may create what appears to be an anomaly – a power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation – this result is in accordance with the economic reality that there is no "lost opportunity" foreclosed by the government unless the two factors are present.[12]

On December 9, 2003, the Bureau neither granted nor denied Gulf Power's Petition, but instead ordered Gulf Power to submit a more detailed description of evidence that it would proffer to meet the test set forth in *Alabama Power v. FCC*.[13] On January 4, 2004, Gulf Power submitted its Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test, indicating that Gulf Power would attempt to introduce: (1) evidence of an unknown number of previous pole change-outs to accommodate new attachments of four

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[11] *Id.* at 1370-71. As set forth above, Gulf Power had never argued that it was deprived of selling the space occupied by Complainants for a higher return because the pole was "full." Nonetheless, Gulf Power now seeks the opportunity to submit this "evidence" anyway.

[12] *Id.* (footnote omitted).

[13] *See* Letter from Lisa B. Griffin to Messrs. Campbell, Peterson and Seiver (Dec. 9, 2003).

telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay a purportedly "unregulated rate" for pole space on some poles; (2) evidence of make-ready for twelve different cable operators (and their geographic overlap) that have paid for change-outs of unspecified poles over an unspecified period of time; (3) unspecified load studies and business plans addressing the potential impact of unforetold third-party attachments; (4) evidence depicting what crowded poles look like; and (5) unspecified "other" evidence.[14] On February 6, 2004, Complainants responded, explaining in detail how Gulf Power's purported evidence was irrelevant, overbroad and ultimately failed to satisfy the *Alabama Power v. FCC* exception.

On September 27, 2004, the Enforcement Bureau issued an order deferring resolution of Gulf Power's Petition for Reconsideration and setting a hearing to consider Gulf Power's proposed evidence.[15]

III. GULF POWER HAS THE BURDENS OF PRODUCTION AND PERSUASION, AND, WITH RESPECT TO COST METHODOLOGY, IS BOUND BY THE LEGAL STANDARDS ESTABLISHED BY THE ELEVENTH CIRCUIT, THE COMMUNICATIONS ACT, AND THE CONSTITUTION

In the upcoming hearing, Gulf Power has a number of significant burdens. As the Prehearing Order of October 1, 2004 established, it has both the burden of "production" and the burden of "proof."[16] Gulf Power's burden of production means that it has the burden of substantiating its contention that it has a factual basis, as to specific, individual poles containing attachments belonging to Complainants, for claiming entitlement to compensation above the

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[14] *See generally* Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test at 3-9 (filed Jan. 8, 2004) ("Description of Evidence").

[15] Gulf Power was intimately familiar with the proceedings in *Alabama Power*. In addition to being represented by the same counsel, Gulf Power had sought to have the Bureau order reviewed prematurely and consolidated that challenge with Alabama Power's in the Eleventh Circuit. The Court ultimately dismissed Gulf Power's challenge as premature, but accepted its filings as an *amicus*. *Alabama Power*, 311 F.3d at 1366-67 and n.17.

[16] Prehearing Order, 2 (Oct. 1, 2004).

marginal cost of each one of those attachments for the time period in 2000 covered by Complainants' complaint that was the subject of the Bureau's earlier orders.[17] Gulf Power's burden of proof means that it has the burden of demonstrating that the evidence it presents satisfies all of the applicable legal standards, including those established by the Eleventh Circuit in its decisions in *Alabama Power* and *Southern Company*,[18] section 224(i) of the Communications Act, and the principle that any entitlement to "just compensation" is measured by "loss to the owner," not any perceived gain or benefit to the "taker"[19] or any "hold up" price due to Gulf Power's monopoly control of poles.[20]

Several procedural and substantive standards govern Gulf Power's claims here. First, any evidence submitted by Gulf Power must be limited to that which it identified in the "Description" of the evidence Gulf Power proposed to submit.[21] As the Hearing Designation Order concluded, the hearing is an opportunity only for Gulf Power "to present the evidence *delineated* in its Description of Evidence during a hearing before an Administrative Law Judge ("ALJ")."[22] Thus, Gulf Power may not use the catch-all of "other evidence" to introduce matters not already specifically identified in its "Description."[23]

Second, before Gulf Power can seek compensation above marginal cost for any of Complainants' pole attachments, it must prove that "each pole" for which it seeks such compensation is at "full capacity." This requirement was explicitly set forth by the Eleventh

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[17] *See* Complaint at ¶ 29(b) and Exhibit 6.

[18] *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

[19] *Alabama Power*, 311 F.2d at 1370.

[20] *See id.* at 1362-63.

[21] Gulf Power Description of Evidence, ¶¶ 4-12.

[22] Hearing Designation Order, ¶ 5 (emphasis added).

[23] Gulf Power Description of Evidence, ¶ 12.

Circuit in *Alabama Power*.[24] Gulf Power's suggestion, in its earlier filings, that it should be entitled to utilize a presumption of "full capacity" on all of its poles is inconsistent with, and therefore barred by, the per-pole standard set in *Alabama Power*.[25] Even if Gulf Power could proffer that a particular pole was at "full capacity" before a Complainant cable operator sought access and that Gulf Power had another buyer "waiting in the wings" and willing to pay more for the same space occupied by that cable operator – something Gulf Power has yet to do – Gulf Power could not credibly claim that *all of its poles* are already at full capacity. Because the applicable constitutional standard for determining just compensation is "loss to the owner,"[26] Gulf Power may not satisfy its burden of establishing rivalrous use and actual lost opportunity on specific poles simply by claiming that all of its poles are at "full capacity."[27]

Third, Gulf Power cannot unilaterally determine when pole capacity is insufficient for new attachments. The Eleventh Circuit held that a utility cannot claim a lack of capacity unless "it is agreed [by all parties] that capacity is insufficient."[28] The court ruled that the claim "that the utilities enjoy the unfettered discretion to determine when capacity is insufficient is not supported by the [Communications] Act's text."[29] Thus, in all but the rare case where a pole may not be replaced due to valid safety and engineering concerns, Gulf Power's notion of "full

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[24] *See Alabama Power*, 311 F.3d at 1370-71 and n.13.

[25] Description of Evidence, ¶ 3 and n.2. Gulf Power argues that a pole-by-pole analysis should not be done even though that is exactly what the Alabama Power test requires and what the Bureau found. *See* Bureau Order, ¶ 15 (quoting the Eleventh Circuit's statement that: "[w]ithout such proof [of actual lost opportunity], any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation." 311 F.3d at 1370-71).

[26] *Alabama Power*, 311 F.3d at 1370.

[27] *See United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948). *See also Bauman v. Ross*, 167 U.S. 548, 574 (1897) (the constitutional measure of just compensation is the loss to the person whose property is taken). Gulf Power fails to identify the "considerable friction" it claims exists between the rebuttable presumptions and the Eleventh Circuit's per-pole standard. Description at ¶ 3. The Commission's rebuttable presumptions are just that: rebuttable. *See, e.g., Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (sustaining validity of Commission's rebuttable presumptions). Moreover, the Commission uses presumptions as a basis for calculating the Cable Rate, not for disregarding it entirely.

[28] *Southern Co. v. FCC*, 293 F.3d at 1347.

[29] *Id.* at 1348.

capacity" is essentially fiction. In this proceeding, Gulf Power's long-established practice of pole change-outs, its pole attachment agreements with Complainants, and its pole expansion practices contravene its claims that its poles are at "full capacity." As Gulf Power admits in its Description of Evidence, Gulf Power and requesting attachers have regularly agreed, consistent with industry practice, to change existing poles for taller poles,[30] thereby demonstrating that its "capacity" to accommodate additional pole attachments is not "full" in those instances. In addition, in its pole attachment agreements, Gulf Power has expressly agreed to substitute poles where an existing pole is "too short, or inadequate," provided that Complainants reimburse Gulf Power for all necessary make-ready involved.[31] Gulf Power has good reasons for performing these change-outs, as attachers' dollar-for-dollar payment of the entire cost of substituting a new, taller pole creates surplus space that can be rented to others and modernizes Gulf Power's distribution network. Gulf Power can also often accommodate additional attachments, even without a pole change-out, through the use of extension arms and boxing arrangements, with the reasonable requirement that these arrangements must comply with the National Electrical Safety Code and other applicable safety standards. Given that Gulf Power already employs these methods for its own electrical conductor attachments,[32] it "must allow other attachers to do the same," consistent with its nondiscrimination obligations under the Act.[33] Accordingly, only in the rare circumstance where make-ready, including extension arms, boxing, and pole change-

[30] Description of Evidence, ¶ 4 and n.7.

[31] *See* Complaint at ¶ 12, Exhibits 3, 4 and 5 and Supplement, Exhibit 5, ¶ 12 (Pole Attachment Agreements between Gulf Power and Complainants). The reimbursement by Complainants in the form of make-ready expenses for all costs incurred with pole change-outs ensures that Gulf Power incurs no loss and, Gulf Power actually receives a net "gain" from a change-out in the form of additional usable pole space.

[32] *See* Response of Gulf Power, Third Dunn Affidavit - Attachment A, Question (2) (listing amount of Gulf Power's investment in crossarms subtracted from gross pole investment).

[33] *Cavalier Telephone, LLC v. Virginia Elec. and Power Co.*, 15 FCC Rcd. 9563, ¶ 19 (2000) (noting that "[p]erhaps [utility's] allowance of extension arms and boxing will preclude the need for taller poles."), *vacated by settlement* 2002 FCC LEXIS 6385 (2002) (in issuing the *vacatur*, the FCC specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusion contained in" the underlying decision).

outs, cannot be used to accommodate additional attachments and all parties agree that a pole location is at "full capacity" can Gulf Power satisfy the first part of the Alabama Power standard with respect to a particular pole.

Fourth, Gulf Power's proposed evidence of past, voluntary pole change-outs by more recent attachers at those attachers' expense may not be used, under the Eleventh Circuit's *Alabama Power* standard, as a basis for measuring a "lost opportunity" sufficient to require Complainants' to pay more than marginal costs for their existing attachments. Such evidence merely shows past instances in which the parties agreed that pole capacity could be expanded and did so. It does not demonstrate that Gulf Power's poles have become "rivalrous" or that, more specifically, Gulf Power has lost "an opportunity to sell space to another bidding firm."[34] Indeed, the actual pole replacement creates surplus space that can be rented to others and enhances Gulf Power's distribution network (because larger poles contain room for multiple new attachments), precluding any claim of "lost opportunity" and indeed constituting evidence of a net "gain" for Gulf Power. Thus, Gulf Power cannot use a newer attacher's willingness to pay for a pole change-out as a basis for a "just compensation" claim that Complainants, who have been attached to Gulf Power's poles for more than two decades, must pay rates higher than marginal cost, let alone rates higher than the FCC Cable Rate or the even higher contractual rates actually paid by Complainants. This sort of legal gamesmanship must not be countenanced.

Moreover, Section 224(i) prevents Gulf Power from charging existing attachers for the costs of rearrangements or the replacement of attachments if the modification at issue "is required as a result of an additional attachment or the modification of an existing attachment *sought by any other entity.*"[35] In addition, passing on additional make-ready charges or raising

[34] *Alabama Power*, 311 F.3d at 1370.

[35] 47 U.S.C. § 224(i) (emphasis added).

pole rents above the marginal costs required for any modifications or change-outs by new attachers or mandated by governmental entities would similarly violate Section 224.[36] *Alabama Power* simply does not sanction a utility's charging the costs of accommodating new attachers (particularly where they are reimbursed costs) to existing attachers and then collecting multiple higher rentals from existing attachers under the guise of obtaining "just compensation." Where there is evidence that cable operators are already on the pole rather seeking a new attachment, if the pole is "full," then the "just compensation" rate could not apply to existing attachers, but only to the new attachers.

In sum, in the hearing on whether Gulf Power is entitled to receive compensation above marginal cost for any of complainants' attachments, (1) Gulf Power's evidence must be limited to what it specifically identified in its earlier proffer and be specifically associated with the 2000 timeframe; (2) it must show that on "each pole" for which it seeks additional compensation one or more of Complainants was seeking a new attachment to a pole that was at "full capacity" and that the other requirements set forth in *Alabama Power* are met; (3) the determination of "insufficient capacity" must be agreed upon by all parties and take account of Gulf Power's pole inventory and change-out and other make-ready practices; and (4) Gulf Power cannot use past, voluntary pole change-outs for which it has been fully reimbursed as a basis to demand higher rates from Complainants. Any evidence must be thus circumscribed, as it is incontrovertible that Gulf Power never once raised the issue that its poles were at full capacity in response to the underlying complaint, let alone that such entitled it to a rate higher than marginal cost.[37]

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[36] *1999 Reconsideration Order* at ¶ 106; *Southern Co. v. Federal Communications Commission*, 293 F.3d 1338, 1352 (11th Cir. 2002).

[37] Even Alabama Power, Gulf Power's sister company, whose constitutional challenge to the Cable Formula ultimately resulted in the test being applied herein, never raised the "full capacity" issue in arguing for just compensation. "[N]owhere in the record did APCo allege that APCo's network of poles is currently crowded. It therefore had no claim. ... To be sure, the Cable Bureau and the full Commission might have been advised to

IV. EVEN IF GULF POWER COULD SATISFY THE *ALABAMA POWER* TEST, THE COMPENSATION IT ALREADY RECEIVES FROM COMPLAINANTS PROVIDES "JUST COMPENSATION," AND THEREFORE, NO FURTHER PAYMENTS UNDER AN "ALTERNATIVE COST METHODOLOGY" ARE CONSTITUTIONALLY NECESSARY

A. Even If Gulf Power Could Show That Particular Poles Are At "Full Capacity" And That It Has A Higher-Valued Use For Such Poles, Complainants Already Provide Much More Than "Marginal Costs" Through The Combination Of Make-Ready, Annual Rent Payments, And Other Benefits

Even if Gulf Power were able to satisfy the *Alabama Power* test for any particular pole, Gulf Power cannot justify raising its current contractual pole rates, because the compensation it receives from pole rents and other make-ready expenses already provides it with "just compensation." In order to meet the *Alabama Power* requirements for seeking a pole rate greater than marginal cost, Gulf Power would have to show, for each existing pole to which it claims a constitutional right to greater compensation based upon "full capacity" and a "higher valued use," *first*, that it does not have a larger pole in its inventory (for which a prospective new user, in accordance with industry practice, will pay all the expenses of changing out the existing pole); and *second*, that a prospective new attacher is willing to provide Gulf Power with more compensation than Complainants already pay for the same space occupied by Complainants' attachments. However, even if Gulf Power can make such showings for particular poles, that does not entitle it, under the rubric of obtaining constitutionally mandated "just compensation," to demand that Complainants pay Gulf Power the difference between what they are already paying and what a prospective new user is willing to pay, for two reasons.

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inquire about the level of capacity presently on APCo's poles. But we can hardly fault the Commission for ignoring an issue that APCo never raised." *Alabama Power*, 311 F.3d at 1370, 1371. Gulf Power never alleged in the record in the proceeding before the Bureau or Commission that its poles were full; indeed, Gulf Power only asserted the capacity issue after the *Alabama Power* decision was issued. *Compare Alabama* Power decision, dated Nov. 14, 2002, *with* Gulf Power's petition for reconsideration, dated June 23, 2003.

First, a prospective new user may not be aware that it qualifies for a regulated rate under FCC pole attachment regulations such as that paid by Complainants. Second, and more fundamentally, because pole attachment space is a monopoly controlled "bottleneck facility,"[38] the concept of "just compensation" does not equate to the payment of "monopoly" or "hold up" pole rental rates. Instead, Complainants will introduce evidence which demonstrates that, even when Gulf Power has met the elements of the *Alabama Power* standard, the benefits provided to Gulf Power by Complainants, which include both make-ready payments and annual rent under the FCC's Cable Formula, already provide Gulf Power with at least – and more likely in excess of – any constitutionally required "just compensation."

Both the Commission and the Eleventh Circuit have ruled, consistent with more than 100 years of "takings" jurisprudence, that "just compensation is determined by the loss to the person whose property is taken."[39] As the Eleventh Circuit correctly observed, "'the question is, What has the owner lost? not, What has the taker gained?'"[40] The Eleventh Circuit held that, in the absence of a showing that a pole owner is deprived of the opportunity to sell space to another bidding firm, the utility's monetary "loss" for purposes of determining the level of just compensation required by the Constitution is limited to its actual incremental, or marginal, costs, and that the pole owner receives "much more than" this amount through the combination of make-ready and annual payments pursuant to the FCC's Cable Formula.[41]

In particular, in addition to the costs of providing access for attachments (make-ready), the Cable Formula provides for an annual pole rental rate based on all the costs associated with

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[38] *Alabama Power*, 311 F.3d at 1362-63.

[39] *Alabama Power Review Order*, 16 FCC Rcd. 12,209 at ¶ 53; *Alabama Power*, 311 F.3d at 1369, citing *United States v. Causby*, 328 U.S. 256, 261 (1946).

[40] *Alabama Power*, 311 F.3d at 1369 (quoting *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961) (citation omitted)).

[41] *Id.* at 1369-70.

operating and maintaining the pole, costs of the pole itself and a reasonable profit.[42] In fact, Section 224 creates a range of compensation, the low end of which is the incremental (marginal) costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment).[43] The FCC has long interpreted Section 224 to provide that when the Commission is regulating a utility's annual rate for pole attachments, it reduces it only to the statutory maximum, the high end of the range of compensation.[44] This is constitutionally significant, because the FCC's Cable Rate, by providing the pole owner with not only reimbursement of marginal costs (make-ready) but also annual payments for as long as a licensee maintains attachments on the poles representing a share of all operating costs attributable to the attachment's proportion of usable space, plus a component for reasonable profit, satisfies the "loss to the owner" standard for "just compensation."

Accordingly, Complainants respectfully submit that any evidentiary hearing must consider the fact that Gulf Power already receives "much more" than its marginal costs of Complainants' attachments through payment of make-ready expenses and annual rents under the Cable Formula, as well as additional benefits in the form of supplemental, rentable, pole capacity in some cases involving change-outs paid for by Complainants.

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[42] "The Commission has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that *exceeds* just compensation." *Bureau Order*, ¶ 15 (citing *Alabama Power Review Order*, ¶¶ 32-61) (emphasis added).

[43] 47 U.S.C. § 224(d).

[44] *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Indeed, in Gulf Power's earlier facial challenge to the constitutional sufficiency of Section 224, the Eleventh Circuit ruled that Section 224, as amended, effected a "taking," but noted that there was nothing to indicate that the compensation it received under "voluntary" access agreements was somehow inadequate under "mandatory" access. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999) ("We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utility's] view, constitutionally inadequate under the current Act for forced access situations. *Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.*") (emphasis added).

B. No Alternative Cost Methodology, Including Those Previously Advanced By Gulf Power Such As The "Market Comparison," "Income Capitalization," And "Replacement Cost" Methods, Is Appropriate For Determining "Just Compensation" Because A Utility Pole Attachment Is A Partial Use Of A Monopoly Facility

Gulf Power contends that the Commission should adopt an "alternative cost methodology" to the Cable Formula in order to provide it with "just compensation." However, the *Alabama Power* test only contemplates a rate above marginal costs where a particular pole is full and the pole owner can demonstrate a specific, immediate higher valued use.[45] In fact, however, Gulf Power has never identified the marginal costs of Complainants' attachments. By precluding a comparison of the marginal costs of attachments to the combination of reimbursement payments for make-ready plus fully-loaded annual pole rent payments, Gulf Power makes it difficult to ascertain how much in excess of its marginal costs it already receives on each pole, including those poles Gulf Power claims are at "full capacity." This showing is critical because Gulf Power actually receives more than the minimum "just compensation" for mandatory access under the FCC's regulations through payment of make-ready expenses and annual rental rates, even on poles that are or were "full." *Alabama Power* only held that a utility meeting both prongs of its standard may "seek compensation above marginal cost," not that it may charge whatever hold-up price a new attacher is willing to pay in order to gain access to the poles.[46] While it is true that the Bureau did designate for hearing the "evidence" Gulf Power has proposed to show it is entitled to rates above marginal costs on "full" poles, there is no indication that either the *Alabama Power* court or the Bureau held that any upward adjustment of pole attachment rates pursuant to the *Alabama Power* test begins with the Cable Rate as a floor. Indeed, because reconsideration is still pending, the evidence Gulf Power proposes here may be

[45] 311 F.3d at 1370-71.

[46] *Id.*

deemed inadequate to support any claim that it is entitled to more than marginal costs, or more than marginal costs plus the rental it already receives. On that basis, the Bureau may still deny Gulf Power's Petition for Reconsideration.

Gulf Power appears to be claiming that the $40.60 rate paid by some competitive local exchange carriers ("CLECs")[47] is "just," although the Commission has already determined that such a rate is based upon flawed methodologies, improper cost accounts, and inapposite analogues,[48] and thus could not represent an "active, unsuppressed market price for the pole space at issue."[49] In fact, the Bureau previously considered and rejected evidence supporting this rate in the underlying proceeding.[50] Gulf Power has claimed that it violates just compensation principles to ignore a higher rent reached through "arm's length negotiation between a willing buyer and willing seller" for space on the same pole.[51] But the Commission has determined 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."[52]

In any event, these purported "market values" are irrelevant to any "just compensation" evaluation. For example, in *United States v. Commodities Trading Corp.*, the Supreme Court held that "fair and equitable" ceiling prices set by the government in wartime were the measure of "just compensation" for requisitioned pepper without any regard to higher peacetime "market"

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[47] Description of Evidence, ¶ 11.

[48] *Alabama Power Review Order*, 16 FCC Rcd. 12209 at ¶¶ 54-61 (2001); *Bureau Order* at ¶¶ 14-17.

[49] Description of Evidence at ¶ 11. Gulf Power erroneously implies that Adelphia Business Solutions, which is allegedly paying a $40.60 annual rental charge, is a member of the Florida Cable Telecommunications Association ("FCTA"). Description at n.9 and ¶ 11, n.16. This is incorrect. While Adelphia Cable Communications is a member of the FCTA, Adelphia Business Solutions, a separate and independent telecommunications carrier, is not. Adelphia Cable Communications is not paying a rate that exceeds the Commission's pole attachment rental formula.

[50] *See* Response at 49-51, Wise Affid. at 26; Notice of Filing Supplemental Authority, Second Wise Affid. At 5-7 (filed Sept. 11, 2000); *Bureau Order* at ¶ 14.

[51] *See* Description of Evidence at n.18.

[52] *Alabama Power Review Order*, 16 FCC Rcd. 12209 at ¶ 55; *see also Alabama Power*, 311 F.3d at 1368.

value if the requisitioned pepper could have been held and sold later to private parties.[53] In *Lord Mfg. Co. v. United States*, the Court of Claims held that the "list price" for which the plaintiff's engine mountings could have been sold was not the measure of "just compensation" for the forced sale of those mountings to the government.[54]

Moreover, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[55] the decision upon which the Eleventh Circuit and earlier courts relied for the conclusion that mandatory access under Section 224(f) constituted a taking of property,[56] the Supreme Court noted that any pre-existing indication of "market value" measured by the voluntary payment Teleprompter made to Ms. Loretto *before* the advent of the mandatory access law that was substantially in excess of the statutory presumptive payment was *not* a proper measure of what "just compensation" would be for a taking.[57] Instead, the Court left it to the New York courts to decide the issue.[58] A level of "just compensation" for mandatory access based on the amount of prior "market value" payments was never accepted by any court.[59]

Similarly, the other proposed valuation methods previously advanced by Gulf Power, the "income capitalization" method and the "reproduction cost" methods, are not appropriate for calculating "just compensation." In dismissing an attempt by Gulf Power's sister entity, Alabama Power, to proffer a value for pole attachments under the former method, the Commission found that "the income approach to valuation is inappropriate because the income

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[53] 339 U.S. 121, 123-28 (1950).

[54] 114 Ct. Cl. 199, 269 (1949), *cert. denied*, 339 U.S. 956 (1950).

[55] 458 U.S. 419 (1982).

[56] *Alabama Power*, 311 F.3d at 1364, 1365; *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999).

[57] *Loretto*, 458 U.S. at 441.

[58] *Id.*

[59] *See, e.g., Loretto v. Group W. Cable*, 135 A.D.2d 444, 448, (N.Y. App. Div. 1987) (likely award of one dollar), *appeal denied*, 522 N.E.2d 1066 (N.Y. 1988) (Table), *cert. denied*, 488 U.S. 827 (1988).

generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment."[60] Gulf Power's "reproduction cost" arguments have also been evaluated and rejected in the the FCC's Order involving Alabama Power. The Commission agreed that "the ownership interest in the space occupied by a pole attachment is a limited property interest, restricted in duration, primacy, exclusivity, and physical manner of use" and that "[b]ecause the utility's interest in the property is not completely destroyed, requiring the use of replacement costs as a measure of just compensation is inappropriate."[61]

Ultimately, Gulf Power's ability to demand and receive monopoly rents from some new attachers does not mean that it is not being made whole for any "loss" of the attachment space being used by Complainants. Like Alabama Power, Gulf Power has yet to provide any credible evidence that would show that it does not already receive just compensation for Complainants' attachments through reimbursement for make-ready and annual pole rental payments that represent a proportionate share of operating costs and a reasonable rate of return.[62]

V. THE EVIDENCE PROFFERED BY GULF POWER DOES NOT PROVIDE A BASIS FOR THE USE OF ANY COST METHODOLOGY OTHER THAN THE CABLE FORMULA

A. Evidence of Pole Change-Outs For Telecommunications Carriers And Payment Of Unregulated Rates Fails To Meet The *Alabama Power* Test

Gulf Power seeks to introduce evidence of attachment requests by four non-party telecommunications carriers for access to Gulf Power's poles.[63] Gulf Power contends that its history of performing *voluntary* pole change-outs to accommodate new attachments for Knology, KMC Telecom II, Adelphia Business Solutions and Southern Light, LLC is "indisputable

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[60] *Alabama Power Review Order,* 16 FCC Rcd. 12209 at ¶ 56.

[61] *Id.* at ¶ 56.

[62] Bureau Order, ¶¶ 14-15.

[63] Description of Evidence at ¶¶ 4-6.

evidence of 'full capacity' or 'crowding'"[64] and entitles it to a rate that exceeds marginal cost.[65] However, Gulf Power's common, uncontroversial practice of permitting change-outs does not justify higher rates to existing attachers.

Gulf Power's principal argument – that whenever it changes out a pole in response to a new attacher's request for access, the pole necessarily must already be at "full capacity," and that it is therefore entitled to raise the pole rental rates of all *existing* attachers – has no merit. First and foremost, under Gulf Power's customary procedures and industry practice, the entire cost of a pole change-out is born by the attacher for whom it is performed. Gulf Power is therefore fully reimbursed for make-ready expenses it incurs related to a pole change-out. The change-out itself usually takes the form of a larger pole, which has room not only for the new attacher's attachment(s) but also additional capacity that can be rented by Gulf Power to other, additional attachers in the future. Therefore, a change-out does not represent a "lost opportunity" or a "loss to the owner," but rather a fully compensated change that usually provides additional benefits to the pole owner.

In addition, evidence of previous pole change-outs is relevant only to issues of *access*; Gulf Power's reasoning would transform this rate dispute (and all future rate disputes) into an *access* dispute.[66] Gulf Power apparently believes that the moment it claims that a pole is at "full capacity" and there exists another attacher seeking access, it can charge a higher rate to all attachers. It would, therefore, have an incentive to refuse to change-out to a pole with higher capacity, thereby denying access to the potential attacher and seeking to charge existing attachers

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[64] *Id.* at ¶ 4.

[65] *Id.*

[66] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 at ¶¶ 1161-64 (Aug. 8, 1996) (hereinafter "*Local Competition Order*"); *1999 Reconsideration Order* at ¶¶ 47-53 (1999).

higher rates.[67] Utilities such as Gulf Power with affiliates deploying or preparing to deploy competitive communications services, including broadband over power lines, have an even greater incentive to claim "full capacity" on their poles to generate higher pole rentals and hinder competition. The Commission could very well find itself flooded with access complaints due to utilities' orchestrated refusals to change out their poles.

Turning to the specifics of Gulf Power's proffer of evidence on past pole change-outs, Gulf Power's Description does not detail the circumstances of the four telecommunications carriers' requests for access or whether Section 224(f)(1) was invoked by those carriers. For example, we do not know whether: (1) good faith, meaningful negotiations for access and accompanying pole attachment agreements ensued or whether rates were imposed on a take-it-or-leave-it basis, (2) these attachers were aware of their rights to regulated pole attachment rental rates, or (3) these entities filed complaints for access and lost. As was the case with numerous CLECs in the wake of the Telecommunications Act of 1996, these carriers may have made a business decision that gaining immediate access to poles at whatever monopoly rent Gulf Power was extracting outweighed the disadvantages of prolonged negotiations or potential litigation that would impede their service rollout in a highly competitive market where time-to-market was crucial. The fact that those telecommunications carriers may have chosen to pay exorbitant pole attachment rental fees (Gulf Power claims that KMC, Adelphia, and Southern Light pay $40.60 per pole)[68] to implement their own business plans does not mean that Complainants may be saddled with these charges as well under the guise of "just compensation."

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[67] Gulf Power itself appears to recognize that its practice, and the industry practice, of voluntary pole change-outs poses a challenge to its claim of "full capacity," since it argues that "[i]f voluntary expansion of capacity erases pre-existing 'crowding' or 'full capacity,' then there is a disincentive to Gulf Power to expand." Description of Evidence, ¶ 4 n.7. This "disincentive" would lead Gulf Power to refuse expansion so it could increase rates for attachers such as Complainants, who have been on Gulf Power's poles for more than two decades. *See, e.g.*, Complaint at ¶ 11, Exhibit 7 at ¶ 15 and Exhibit 8 at ¶ 5.

[68] Description of Evidence at ¶ 5 n.9.

In short, critical differences exist between requests for access by new attachers and rental rates paid by existing attachers.

In addition, Gulf Power provides no support for its assertion that individual poles must be assumed to be at "full capacity" immediately prior to pole change-outs in its attempt to recover more than marginal costs from existing attachers.[69] There are numerous reasons why poles may have to be replaced, including land use changes, local government mandates, car accidents, or requests for modifications by others. But these factors do not mean that poles are suddenly at "full capacity," "rivalrous" or otherwise such that Gulf Power may charge higher rates. This is particularly true given that pole change-outs necessitated by a new attacher are paid for in full by that attacher. The change-out creates surplus space that can be rented to others and enhances Gulf Power's distribution network with brand new distribution plant assets that will be in operation for decades. As the Commission has correctly observed: "[i]n 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."[70] Gulf Power's proffer of evidence does not indicate who requested the change-outs obtained by the telecommunications carriers, why they were needed, whether, for example, its own telecommunications affiliates occupy space on the poles to which it refers, or whether it pertains only to the 2000 time period at issue in the underlying Complaint.

Gulf Power's successful accommodation of requests for access by new attachers, where such attachers pay Gulf Power's make-ready costs (including the costs of pole change-outs) as well as monopoly-based annual pole rents, does not represent a lost opportunity under *Alabama*

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[69] Description of Evidence at ¶¶ 4-6.

[70] *Alabama Power Review Order*, 16 FCC Rcd. 12209 at ¶ 58.

Power. Gulf Power may not use these examples to impose upon existing attachers a pole rental based upon a cost methodology other than that contained in the Commission's regulations.

B. Evidence Of Pole Change-Outs For Cable Operators And Evidence Of Geographic Overlap of Non-Complainants Is Similarly Irrelevant

Gulf Power seeks to introduce similar evidence of voluntary pole change-outs that it performed on behalf of cable operators to establish that unspecified poles were at "full capacity."[71] For the reasons explained above addressing pole change-outs for telecommunications attachers, this evidence fails to show that any poles were at "full capacity" in 2000, or that Gulf Power may charge rental rates higher than marginal cost, let alone higher than the rates paid by Complainants, which are well above marginal cost. In addition, Gulf Power fails to identify the location or number of pole change-outs that were performed for particular cable operators, and the period in which these change-outs occurred. Indeed, Gulf Power seeks to submit evidence of change-outs for twelve cable operators, only four of whom have attachments at issue in this proceeding, and provides no indication that the change-outs occurred on poles at issue in the underlying Complaint proceeding.

Further, Gulf Power seeks to introduce evidence purportedly showing geographic overlap of non-party cable operator attachers, in which more than one cable operator may be attached to Gulf Power's poles, to support a showing of "full capacity."[72] But Gulf Power concedes that no such overlap exists for any of the poles to which Complainants are attached.[73] In any event, the mere existence of geographic overlap is meaningless in the absence of an affirmative showing of "insufficient capacity." It certainly provides no basis for the Commission to adopt an "alternative cost methodology."

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[71] Description of Evidence at ¶ 6.

[72] Description of Evidence at ¶ 7.

[73] Description of Evidence at n.10.

C. Gulf Power's Speculative Load And Planning Evidence Of Unforetold Third-Party Attachments Is Irrelevant

Gulf Power claims that it wants to introduce load study reports and testimony "regarding the planning/economic impact of *unforetold* third-party attachments."[74] The dates and relevance of this speculative "evidence" concerning Gulf Power's potential, future need for additional pole space are not given; rather, this evidence boils down to a conclusory reservation of capacity at some unspecified point in time in an effort to meet the "full capacity" and "higher-valued use" standards for Complainants' attachments as of nearly four years ago.[75] Even if such speculative planning could be relevant and applied retroactively, this evidence would be unavailing because the Commission has ruled that Gulf Power may only reserve space pursuant to a bona fide development plan,[76] which Gulf Power does not identify in its Description of Evidence. Even then, attachers may utilize the space until such time as the utility actually needs it and at a just and reasonable rate under Section 224.[77]

Gulf Power also argues that principles of just compensation should allow it to decide whether reserving pole space for a potential, future use has a higher value than hosting a communications attacher.[78] Under this approach, any and all poles would be deemed "at full capacity" due to Gulf Power's unfettered reservation of pole space for its future use, subjecting the poles to a utility-mandated "higher-valued use."[79] To meet the requirements of *Alabama Power*, however, Gulf Power would have to demonstrate that it is currently "able to put the space to a higher-valued use with its own operations," not simply a reservation of space for *possible*

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[74] Description of Evidence at ¶ 8 (emphasis added).

[75] *See Alabama Power*, 311 F.3d at 1370.

[76] *See Southern Co. v. FCC*, 293 F.3d at 1348.

[77] *Id.* at 1349.

[78] Description of Evidence at ¶ 8.

[79] *Alabama Power*, 311 F.3d at 1370.

future use.[80] Gulf Power may not speculatively reserve additional pole space in order to prove a pole is "full," particularly given that it already reserves 10.5 feet of the presumed 13.5 feet of total usable space for itself and the incumbent local exchange carrier ("ILEC") joint user.[81] Providing any utility such unchecked authority would eviscerate Section 224[82] and would be inconsistent with *Alabama Power*.[83]

D. Gulf Power's "Evidence" That Only Generally Depicts Attachment Arrangements Or "Crowding" Is Irrelevant And Does Not Support The Adoption of Any Alternative Cost Methodology

Gulf Power's proferred evidence generally showing attachment arrangements or generally depicting alleged "crowding" is irrelevant to whether it has a constitutional claim for more than marginal costs for specific pole attachments and does not support the adoption of any alternative cost methodology. First, unless the attachment arrangements to be profferred demonstrate "full capacity" on specific poles containing Complainants' attachments and are accompanied by evidence of a prospective higher valued use, such evidence would be irrelevant under *Alabama Power*. But Gulf Power does not offer any indication that the photographic and engineering evidence it seeks to proffer even corresponds to poles on which Complainants are attached. Second, general depictions of "crowding" are also irrelevant, since, as Gulf Power acknowledges, make-ready arrangements, including pole change-outs, are often used to accommodate new attachers on such poles. Under *Alabama Power*, Gulf Power cannot rely

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[80] *Id.* at 1370.

[81] *See* Gulf Power Company's Reply to Complainants' Opposition to Petition for Reconsideration at 6-7.

[82] Description of Evidence at ¶ 8. Gulf Power's request to introduce evidence concerning past pole change-outs at its own expense for its core utility purposes, allegedly due to lack of capacity, is also irrelevant. *Id.* The Commission and Eleventh Circuit have held that a utility may reasonably recover reserved space in which it has permitted communications entities to attach. *See 1999 Reconsideration Order* at ¶¶ 68 ("in the instance of a utility's recapture of reserve space occupied by an attaching entity, the utility is not required to share in the modification costs the attaching entity may incur as a result of the need to modify the facilities ..."); *Southern Co v. FCC*, 293 F.3d at 1349.

[83] This is not mere speculation. In an interesting twist, another of Gulf Power's affiliates, Georgia Power, has proposed a pole attachment agreement where all of the space on the pole is purportedly "reserved" and every cable operator's existing and future attachments are deemed to be in the reserved space.

upon general pictures of poles or apparent crowding to satisfy the standards of "full capacity" and "higher valued use" for "each pole" on which they claim a constitutional right to receive more than their marginal costs of attachment.

VI. CONCLUSION

WHEREFORE, the issues to be considered and determined at the hearing should conform to the statements and methodology set forth herein.

Respectfully submitted,

By: _____
Paul Gist
John D. Seiver
Geoffrey C. Cook
Brian M. Josef
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 659-9750

Counsel for

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, COX COMMUNICATIONS GULF COAST, L.L.C., COMCAST CABLEVISION OF PANAMA CITY, INC., MEDIACOM SOUTHEAST, L.L.C., and BRIGHT HOUSE NETWORKS, L.L.C.

Michael A. Gross
Vice President,
Regulatory Affairs and Regulatory Counsel
FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303-6208
(850) 681-1990

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainants' Preliminary Statement on Alternative Cost Methodology has been served upon the following by telecopier and U.S. Mail on this the 3rd day of December, 2004:

J. Russell Campbell
Eric B. Langley
Jennifer M. Buettner
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2015
Via Fax: (205) 226-8798

Lisa Griffin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via Fax: (202) 418-0435

Ralph A. Peterson
BEGGS & LANE, LLP
501 Commendencia Street
Pensacola, Florida 32591
Via Fax: (850) 469-3330

Shiela Parker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via Fax: (202) 418-0195

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via Fax: (202) 418-0435

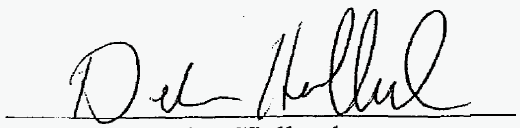
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

James Shook
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via Fax: (202) 418-0435

David H. Solomon
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Director, Division of Record and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Federal Energy Regulatory Commission
Docket Room 1A-209
888 First Street, NE
Washington, DC 20426



Debra Holland