ORIGINAL

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

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

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E.B. Docket No. 04-381

To: Office of the Secretary

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

GULF POWER'S RESPONSE TO COMPLAINANTS' MOTION TO DISMISS

Gulf Power Company ("Gulf Power"), in response to complainants' motion to dismiss, says the following:

Introduction

Complainants' motion to dismiss is based upon a flawed generality: that Gulf Power has not produced enough evidence in discovery to meet the *Alabama Power v. FCC* test. This flawed generality is embedded with numerous legal, logical and factual errors.

First, in arguing that Gulf Power has not produced sufficient evidence in discovery, complainants take the implicit position that discovery is complete. But complainants filed a 73-page motion to compel further discovery responses, served a second set of requests for production, and noticed three depositions for the first half of September 2005. Discovery, it

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appears, is not complete. Second, complainants repeatedly assert that Gulf Power does not have (or has not produced) the evidence described in the January 2004 Description of Evidence. This is wrong. To the extent not already itemized in its discovery responses and as set forth herein, Gulf Power also will be complying with the Presiding Judge's August 4, 2005 Discovery Order which requires: "so unless Gulf Power can show it already has done so, by **August 31, 2005**, Gulf Power must itemize the evidence that it contends it has already provided that is referred to in the Description of Evidence." (Discovery Order, p. 6) (emphasis in original).

Third, complainants' assertion that Gulf Power has not (or cannot) meet the *Alabama Power v. FCC* test is based upon a misinterpretation of the test. Since the beginning of this Hearing Proceeding, complainants have argued that the *Alabama Power v. FCC* test could never be met. The only difference in their argument now is that they can say, "at least we have taken some discovery before arguing that the case should be dismissed." But the arguments have not changed. To accept complainants' arguments would render *Alabama Power v. FCC* meaningless. Complainants have lost sight of the context in which the *Alabama Power v. FCC* test was created, and have similarly lost sight of the fact that this is a new test -- not settled law, with settled patterns of required proof. Fourth, the motion to dismiss completely ignores the Osmose audit, as if its results -- whatever they are -- are meaningless and irrelevant. Gulf Power sincerely hopes this is not the case since it already had invested roughly $100,000 in direct cost in the audit.

At best, complainants' motion to dismiss is premature. At worst, it is a misguided effort to create non-issues and distort simple facts. Complainants' motion to dismiss should be denied, and this case should be tried as scheduled on March 28, 2006.

Argument

I. Gulf Power Already Has Produced Evidence Sufficient To Meet The *Alabama Power v. FCC* Test, And Is Developing Further Evidence Through The Osmose Audit.

At times in this Hearing Proceeding (including complainants' motion to dismiss), it has seemed that the *Alabama Power v. FCC* opinion was nothing more than a one-sentence test, devoid of context or legal foundation. Though Gulf Power takes exception to this trend towards over-simplifying the holding of *Alabama Power v. FCC*, the argument below outlines, on an element by element basis, how Gulf Power intends to meet the test.[1]

A. Gulf Power Can Show That Its Poles Are "Crowded" Or At "Full Capacity."

Complainants have made much ado about nothing in attempting to draw a meaningful distinction between the terms "crowded" and "full capacity" -- a distinction not drawn by the Eleventh Circuit in *Alabama Power v. FCC*. In fact, the "important unknown fact" guiding the Eleventh Circuit's conclusion was that "no where in the record did APCo allege that APCo's network of poles is currently crowded." *Alabama Power v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002). Even if there was a distinction between "crowded" and "full capacity," as used in *Alabama Power v. FCC*, Gulf Power has defined "crowded" for the purposes of the Osmose audit to mean the same thing as "full capacity." (See Osmose Statement of Work).

Gulf Power intends to demonstrate that its poles are "crowded" or at "full capacity" in four principal ways: (1) the Osmose audit; (2) the major build-outs identified in the Description of Evidence; (3) statistical extrapolation from the Osmose audit (for poles in Gulf Power's system which have not been individually measured during the audit); and (4) system averages in

[1] As set forth in prior filings in this Hearing Proceeding, and in the proceeding before the Enforcement Bureau, Gulf Power believes the *Alabama Power v. FCC* "test" is bad law. By arguing here that it can satisfy this unprecedented deviation in Fifth Amendment jurisprudence, Gulf Power does not mean to waive its challenge to the test, but specifically reserves its right to challenge this test on appeal.

conjunction FCC presumptions. Whether complainants like it or not, Gulf Power will be able to prove that some number of its poles are "crowded" or at "full capacity." The issue will be whether that number is 7,500, 150,000, or somewhere in-between. This number depends, in part, on what forms of proof the Presiding Judge accepts. Depending on what forms of proof are accepted by the Presiding Judge, each side will have an evidentiary record upon which it can appeal the important issue of what is meant by "crowded" or "full capacity," and what proof is required to meet this part of the test.

Complainants take issue with Gulf Power's response to interrogatory number 3 in which Gulf Power contended "that all poles [to which complainants are attached], at all times, since 2000, were either "crowded" or at "full capacity." (Motion To Dismiss, p. 7). But this is nothing more than an effort to cure the unalleged "fact" fatal to Alabama Power in the Eleventh Circuit:

> This leads us to the important unknown fact: nowhere in the record did APCo allege that APCo's network of poles is crowded. It therefore had no claim.
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> * * * *
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> In unique cases such as this one, marginal cost meets this test - unless, of course, the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use. APCo never alleged these facts.

311 F.3d at 1370 & 1372.

The bottom line is that Gulf Power has, and continues to develop, evidence of "crowded" or "full capacity" poles. Even if the Presiding Judge rejects statistical extrapolation and/or system averages in conjunction with FCC presumptions, there will still be unrefutable, pole-by-pole evidence of "crowding" or "full capacity" in the form of the Osmose audit and the major

build-out make-ready work orders.[2] In short, complainants "no-evidence-of-crowding" argument just does not hold water.

B. Gulf Power Can Show That The Pole Space Occupied By Complainants Can Be Put To A Higher Valued Use.

Complainants grossly distort the second prong of the *Alabama Power v. FCC* test. To be sure, the principal basis of the *Alabama Power v. FCC* holding was the absence of crowding (or even the allegation of crowding). The Eleventh Circuit focused on the "unique nature" of the property at issue in this case:

> [M]ost property is rivalrous - its possession by one party results in a gain that precisely corresponds to the loss endured by the other party. In this case, however, the property that has been taken - space on a pole - may well lack this congruence. It may be, for practical purposes, *nonrivalrous*.
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> Suppose, for example, that a power company must, for its own "core" electric distribution activities, establish a network of poles that reaches one million feet into the sky. Further suppose that there is only one cable company in any one market that desires to attach to the power company's poles. So long as the marginal cost of the attachment is paid, the power company incurs no lost opportunity or any other burden. That is, the cable company's use does not foreclose any other use. The pole space is, for practical purposes, nonrivalrous.
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> The possibility of crowding is perhaps more likely in the context of pole space [than in access to railways], however, and if crowded, the pole space becomes rivalrous.

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[2] The make-ready documents for these major build-outs were made available for inspection and copying during the May 27-28, 2005 document review. Gulf Power stands willing, with reasonable notice and coordination, to again make these documents available.

311 F.3d at 1369 & 1370. The point, here, is that the Eleventh Circuit tied together the notions of "crowded" (or rivalrous) poles and "lost opportunity." In other words, under the *Alabama Power v. FCC* analysis, crowded = lost opportunity.[3]

This is important context for evaluating complainants' other arguments. First, complainants argue "Gulf Power fails to identify a single specific instance in which it actually had another buyer for pole space 'waiting in the wings' that could not be accommodated on poles that were at 'full capacity.'" (Motion To Dismiss, p. 12). But once it is established that Gulf Power's pole space is "rivalrous," complainants' argument is akin to requiring that a landowner present evidence of an *actual* buyer of the land before the landowner could receive compensation. This is where complainants' theory breaks down on a logical and legal level (not to mention practical level). Complainants further state:

> While there has often been reference to hypothetical buyers when establishing value, here the Eleventh Circuit dispensed with hypotheticals and required that there be an actual existing buyer present. . . .

(Motion To Dismiss, p. 12). This is like saying, "while there has often been reference to due process in criminal cases, here the court dispensed with that requirement." The Eleventh Circuit did *not* dispense with the "hypothetical willing buyer" in takings analysis. Even if the Eleventh Circuit purported to do this, it was without power to do so.[4]

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[3] This is further evidenced by the "congruence" between land and pole space which the Eleventh Circuit said would exist were pole space proven to be "rivalrous." Surely the Eleventh Circuit did not hold, and complainants do not suggest, that the owner of land taken by the government must prove some identifiable, actual lost opportunity before the landowner is entitled to compensation in excess of the marginal cost required for the owner to make his land ready for the government's use.

[4] The hypothetical willing buyer is a fixture of Fifth Amendment jurisprudence. Even in cases where there is no "market" or readily ascertainable Fair Market Value, courts have turned to Fair Market Value proxies -- they have not dispensed with the hypothetical willing buyer standard and instead required proof of an actual existing buyer.

But even if Gulf Power is held to this unintended, unlawful burden, it can still demonstrate either "other buyers waiting in the wings" or a "higher valued use" with its own operations. First, a higher valued use is axiomatic. Complainants would not have a mandatory right of access otherwise. *Alabama Power v. FCC* recognizes this very point:

> This change to a forced-access regime was perhaps spurred by new laws, consistent with the 1996 Act's vision of competition in all sectors of the data distribution business, that gave large power companies freedom to enter the telecommunications business rather than remain quarantined to the electricity business. Pub.L. No. 104-104, § 103 (1996). Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. *See Southern Company v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002) ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act.").

311 F.3d at 1363-64.

Second, in each instance where Gulf Power changed-out a pole occupied by complainants in order to host a telecom carrier or other attacher at a market rent, there was an actual buyer *at a higher price* "waiting in the wings." As set forth in the Description of Evidence (and in more than one filing since), Gulf Power intends to present this evidence (through make-ready documents and testimony) at the March 2006 trial. To this point, complainants argue that there was no "lost opportunity" since Gulf Power was willing to change-out the pole to create more space. (Motion To Dismiss, p. 12). But Gulf Power's historical willingness to accommodate new attachers by expanding capacity cannot be held against it in a Fifth Amendment analysis.[5]

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[5] The alternative is for Gulf Power to categorically deny requests for expansion of capacity. Is this what complainants want?

Third, in addition to the axiomatic higher valued use discussed above, there is operational value in excluding the complainants. Gulf Power builds its distribution networks to serve the electricity needs of its customers. It does not build these networks for the benefit of complainants. But as complainants point out, "reservations [of space by Gulf Power] are narrowly limited by applicable judicial precedent." (Motion To Dismiss, p. 14). Thus, if Gulf Power has not, at the time an attacher gains access to Gulf Power's poles, reserved that space for core electric use pursuant to a bona fide development plan (a term undefined by the FCC or the courts), then Gulf Power is faced with having to pay for a new pole when its needs space on the pole it already paid for. There is value, here, in excluding attachers.

II. Complainants' Other Arguments, Regarding The Description Of Evidence And The Time Of The "Alleged Taking" Miss The Mark.

A. Gulf Power Has Produced The Evidence Of Pole Change-Outs Identified In The Description Of Evidence.

Complainants argue in part III of their motion to dismiss that Gulf Power's responses to interrogatory numbers 20 through 26 warrant dismissal. Complainants contend that these interrogatories were an attempt to "flush out" evidence of pole change-outs, but that Gulf Power refused "to answer discovery requests about pole change-outs." (Motion To Dismiss, p. 22). What complainants omit from their description of Gulf Power's responses is that each response to interrogatory numbers 20 through 23 stated plainly: "To the extent the information sought is discoverable, it is the subject of other interrogatory responses and *Gulf Power's responses to complainants' request for production.*" (Gulf Power's Responses To Interrogatories).[6] Gulf

[6] Interrogatory number 24 asked for instances in which Gulf Power *refused* to change-out a pole. Number 25 asked for the steps and procedures involved in a change-out. Number 26 asked for identification of the persons involved in developing Gulf Power's make-ready procedures. Even assuming these interrogatories seek discoverable information, it is not relevant to complainants' claimed purpose of "flushing out" instances of change-outs. In any event, Gulf Power has since supplemented numbers 24, 25, as well as number 20. Gulf Power also is producing a witness to testify about its change-out procedures.

Power made available during the May 27-28, 2005 document review all of its make-ready documents, which would include *all* of the pole change-outs made the basis of these interrogatories. Furthermore, while complainants now contend that these interrogatories were aimed merely at "flushing out" the Description of Evidence, this is a subterfuge for their real purpose -- to establish the irrelevant point that Gulf Power has historically worked with all attachers to accommodate capacity needs barring unusual circumstances (as part of complainants' broader argument that there is no such thing as a crowded pole). If, upon reviewing the make-ready documents, complainants have questions about specific change-outs, Gulf Power will provide further information.

B. The Relevant Time Period Is 2000 Through The Present.

Complainants' final argument is that Gulf Power's evidence of crowding and higher valued use does not bear on "the relevant times of the alleged taking." (Motion To Dismiss, part IV). First, there is nothing "alleged" about the taking. A taking has occurred. Second, complainants again attempt to constrict the relevant time period. Complainants initially argued (earlier this proceeding) that the only relevant time period was 2000-01. Complainants now seem to accept a broader time frame (and certainly their discovery requests were broad in temporal scope -- most were 1998 to the present), but still argue that the only relevant "snapshot" of proof is from the time the taking began (in summer 2000). The taking began in summer 2000 and continues to the present. Complainants have never paid the just compensation rates demanded by Gulf Power. Furthermore, complainants' backward-looking approach neglects the fact that the outcome of this proceeding should impact forward-looking rents.[7]

[7] Ideally, this proceeding would lead to a more permanent resolution on the rate issue, so as to avoid doing battle each time Gulf Power gives notice of the upcoming year's rent.

Conclusion

Gulf Power has (and has produced) evidence meet the *Alabama Power v. FCC* test. The Osmose audit report will provide further evidence meeting the test. There are genuine, novel and important questions of fact and law for the Presiding Judge to decide upon a fully-developed record at an evidentiary hearing. Gulf Power respectfully requests that complainants' motion to dismiss be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Complainants' Motion To Dismiss has been served upon the following by Electronic Mail and by United States Mail on this the 29th day of August, 2005:

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