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FILED ELECTRONICALLY AND VIA COURIER

January 20, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
PO Box 2319, 27th Floor
Toronto, ON
M4P 1E4

Dear Ms. Walli:

RE: Application by Canadian Distributed Antenna Systems Coalition ("CANDAS");
Board File No.: EB-2011-0120

We are writing to file the responses of CANDAS to the interrogatories of Consumers Council of Canada ("**CCC**") in respect of the Reply Report of Ms Patricia Kravtin filed on behalf of CANDAS.

For ease of reference, where we have referred to answers to first round interrogatories, we have used the following protocol: *e.g.* THESL(CANDAS)Byrne-1, would be a reference to THESL's response to CANDAS' question #1 on Ms Mary Byrne's Affidavit.

Where we have provided a reference to answers to second round interrogatories on CANDAS' Reply Evidence, we have used the following protocol: *e.g.* CANDAS(OEB)Larsen REPLY-1, would be a reference to CANDAS' response to Board Staff's question #1 on Tormod Larsen's Reply Evidence.

We will file two paper copies of the responses as soon as possible.

Yours very truly,

(signed) H.T. Newland

YMS/bc

cc: All Intervenors

EB-2011-0120

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an Application by the **Canadian Distributed Antenna Systems Coalition** for certain orders under the *Ontario Energy Board Act*, 1998.

RESPONSES TO INTERROGATORIES OF

CONSUMERS COUNCIL OF CANADA

(on the Reply Report of Ms Patricia Kravtin filed on behalf of the Applicant, CANDAS)

January 20, 2012

1. On Page 17 of her Reply Report, Ms Kravtin makes the following assertion:

> For example, data on alleged "safety violations" associated with pole attachments with which I am familiar, have shown violations associated with attachments of the utility's own distribution equipment at the same rate, if not higher, than those associated with third-party attachments.

What is the "data on alleged "safety violations" that Ms Kravtin is referring to? Please provide copies of that data.

Response:

Ms Kravtin is referring to utility pole audit data provided in pole proceedings in which Ms Kravtin has participated, as identified on Attachment 1 to her Reply Report. Ms Kravtin is either (1) not personally in possession of that data, or (2) cannot provide such data due to its proprietary designation. While Ms Kravtin is not able to provide the referenced audit data (which might encompass records on thousands to upwards of tens of thousands of poles), attached are Ms Kravtin's report and corroborating public documents from the 2006 Gulf Power proceedings that specifically reference an example of utility audit data to which Ms Kravtin's statement refers.

Attachments:

1. Pre-filed Direct Testimony of Patricia Kravtin in FCC EB Docket No. 04-381, submitted on behalf of Complainants, March 31, 2006 at 50-57.

2. Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC EB Docket No. 04-381, FCC 07D-01, January 31, 2007 at 6-7.

3. Complainants' Reply Proposed Findings of Fact, EB Docket No. 04-381, dated August 16, 2006 at 5, paragraph 8; at 11-12, paragraphs 26-28; at 16, paragraph 42; and at 18-19, paragraphs 52, and 55-61.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., Complainants, v. Gulf Power Company, Respondent.	EB Docket No. 04-381

PRE-FILED DIRECT TESTIMONY OF PATRICIA D. KRAVTIN

On behalf of Complainants

March 31, 2006

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PRE-FILED DIRECT TESTIMONY OF PATRICIA D. KRAVTIN

INTRODUCTION

Q. PLEASE STATE YOUR NAME, POSITION, AND BUSINESS ADDRESS.

A. My name is Patricia D. Kravtin. I am an economist in private practice specializing in the analysis of telecommunications, cable, and energy regulation and markets. My business address is 57 Phillips Avenue, Swampscott, Massachusetts.

Experience and Qualifications

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I received a B.A. with Distinction in Economics from the George Washington University. I studied in the Ph.D. program in Economics under a National Science Foundation Fellowship at the Massachusetts Institute of Technology (M.I.T.). My fields of concentration at M.I.T. were government regulation of industry, industrial organization, and urban and regional economics.

My professional background includes a wide range of consulting experiences in regulated industries. Between 1982 and 2000, I was a consultant at the national economic research and consulting firm of Economics and Technology, Inc. (ETI) in that firm's regulatory consulting group, where I held positions of increasing responsibility, including Senior Vice President/Senior Economist.

Upon leaving ETI in September 2000, I began my own consulting practice specializing in telecommunications, cable, and energy regulation and markets. I have testified or served as an expert witness on telecommunications matters in proceedings before over thirty

state, provincial, and federal regulatory commissions, including the Federal Communications Commission ("FCC" or "Commission"), the Federal Energy Regulatory Commission ("FERC"), and the Canadian Radio-television and Telecommunications Commission ("CRTC").

In addition, I have testified as an expert witness in litigation before United States District Court. I have served as an expert on matters relating to Section 253 of the Telecommunications Act ("Removal of Barriers to Entry") before the United States District Court for the Eastern District of New York, the Northern District of New York, and the Southern District of California. I have also testified before the United States District Court for the Eastern District of Tennessee in antitrust cases relating to telecommunications competition and market power. I have also testified before a number of state legislative committees and served as advisor to a number of state regulatory agencies.

Of particular relevance to this proceeding, I have testified as an expert on pole attachment and other related matters before various municipal, state, provincial, and federal agencies, including this Commission, on numerous occasions.

Q. HAVE YOU PREPARED A DETAILED SUMMARY OF YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE?

A. Yes. A detailed resume summarizing my training, previous experience, and prior testimony and reports is provided as Attachment 1 to this testimony.

Q. WHAT HAVE YOU RELIED UPON IN PREPARING THIS TESTIMONY?

A. I have relied on my education, training, research, and experience in economic analysis, and my prior experience in the areas of telecommunications and utility regulation as outlined in Attachment 1. I have considered various data and information in forming my opinions, including publicly available documents, case pleadings, and materials produced in the discovery taken in this matter. A list of the materials I have considered in preparation of this direct testimony is presented as Attachment 2 to this testimony.

Q. UNDER WHAT TERMS ARE YOU BEING COMPENSATED FOR THIS TESTIMONY?

A. I am being compensated for the time I spend on this matter at my standard rate of $325 per hour. I will also be reimbursed for any travel and miscellaneous out-of-pocket expenses incurred in connection with this litigation. My compensation is not contingent on the outcome of this litigation or my analysis.

Assignment and Purpose of Testimony

Q.DESCRIBE YOUR ASSIGNMENT AND THE PURPOSE OF YOUR TESTIMONY?

A. I was asked by counsel for the Florida Cable Telecommunications Association ("FCTA") to review materials relating to Gulf Power Company's ("Gulf Power" or "the utility") claim for additional compensation for member attachments to Gulf Power poles. As part of my assignment, I was asked to assess the validity of Gulf Power's claims in accordance with established economic and public policy principles, and in the context of the Eleventh Circuit Court's *Alabama Power Company* ("*Alabama Power*" or "*APCo*") decision.

Summary of Testimony

Q. COULD YOU PLEASE PROVIDE A SUMMARY OF YOUR TESTIMONY.

A. On March 3, 2006, I submitted a Summary Expert Report, which as its caption indicates, provided a summary of the testimony I am presenting in this case. While I will not duplicate that detailed summary here, highlighted below are the key points presented in my testimony regarding Gulf Power's claims for "just compensation" rates in excess of marginal cost pursuant to the Eleventh Circuit Court's *Alabama Power* decision.

- Gulf Power's proposed "just compensation" rates have no relation to the fundamental economic principles of cost causation embodied in Section 224 of the Communications Act, the practical and economic realities of poles, or to the purported basis for Gulf Power's claims in this proceeding, i.e., the *APCo* criteria for seeking just compensation in excess of marginal cost (i.e., demonstration of both full capacity and lost opportunity on a pole specific basis).

- Gulf Power's proposed "just compensation" rates - which exceed rates derived from the FCC Cable Formula by a factor of eight or more - are based on a replacement cost methodology that has no relation to the actual costs of hosting a pole attachment. Gulf Power's replacement costs are essentially reincarnations of the hypothetical "replacement" costs soundly rejected by the Commission and Courts in the past. Gulf Power's calculations are more accurately described as another attempt to manipulate the existing FCC formula methodology to produce a higher rate result than as a meaningful response to the *APCo* criteria.

- By Gulf Power's own admission, its proposed replacement cost rates are designed to reflect elements of "value" to the taker (versus loss to the owner) in direct violation of the legal principle of just compensation set forth in the *APCo* decision.

- Gulf Power also appears to justify its claim for "just compensation" rates based on replacement costs on its "lost opportunity" to "exclude" attachers from poles and the associated value or "higher value use" of exclusion. As recognized in *APCo*, the power company cannot validly point to its inability to charge the government, or by extension, an attacher, a higher "full market price" as a lost opportunity. Gulf Power is being compensated for the value of exclusion by the designation of third party attachments to Gulf Power's poles as a "taking" for which Gulf Power is receiving "just compensation."

- As found in *APCo*, marginal costs (and the FCC Cable Formula rates which in combination with applicable make-ready charges "provides for much more than marginal costs") provide Gulf Power "just compensation" for use of its poles. No additional compensation is therefore necessary, or as I understand it, permitted pursuant to *APCo*, except under the limited circumstances where the utility can demonstrate both full capacity and lost opportunity on a per pole basis. If a pole is not full, no additional compensation is allowed. Similarly, if a pole is full but there is no lost opportunity, there is no additional compensation allowed.

- Even if Gulf Power had a legitimate claim for additional compensation for individual poles pursuant to *APCo* - i.e., it was able to demonstrate both full capacity and lost opportunity for those poles, that additional compensation is not properly based on the value of exclusion or any other proxy for value to the attacher. This would include, for example, the "value" associated with the hypothetical avoided cost to the attacher of stand alone pole construction or underground installation. But for the utility's monopoly ownership of poles, Gulf Power would not be in a position to extract such "value" from attachers, and the setting of just compensation to include such "value" is inconsistent with economic principles of cost causation and economic efficiency and the legal principle of takings.

- The only poles for which Gulf Power could even arguably seek a rate based on a new pole replacement cost would be poles that would not have been replaced *but for* an additional attachment and as to which costs Gulf Power had not already been reimbursed through make-ready charges or rental rates paid by the additional attacher. Even then, under the terms of the *APCo* decision, any reimbursement over and above marginal cost would need be tied to actual showing of *both* full capacity and lost opportunity on an individual pole basis, neither of which in my opinion Gulf Power has demonstrated in this case.

- A pole satisfies the condition of full capacity in the economic sense only in those limited situations where capacity on the pole is truly "rivalrous" or "zero sum," meaning that the power company actually has to displace an existing attachment or turn away a new attachment in order to accommodate another attachment or use.

- From an economics perspective, a true situation of full capacity would occur only in those instances where make-ready or pole change-outs cannot practically occur due to terrain, obstructions, or zoning restrictions. It makes no economic sense to say a pole is at full capacity if, by doing nothing other than act in accordance with normal and customary business practices including make-ready, rearrangements and pole change-outs, Gulf Power has not, or does not have to displace or turn away attachments in order to accommodate

another. Simply put, there is no rivalrous or exclusion condition in such a situation.

- That Gulf Power may deny access for reasons of "insufficient capacity" does not affect this fundamental economic reality of full capacity. Moreover, Gulf Power's ability to deny under Section 224 is not absolute; it must be agreed upon and carried out on a non-discriminatory basis. Since Gulf Power routinely performs make-ready, rearrangements, and pole change-outs for itself, its joint pole owners, and other third-party attachers, it would seem Gulf Power would not be able to refuse to perform make-ready at its own unfettered discretion and for the sole purpose of being able to charge a higher "just compensation" rate to a particular class of (cable) attachers.

- A pole satisfies the condition of lost opportunity in the economic sense only in those limited situations where the utility experiences actual foregone revenue, foreclosed opportunity, or tangible cost consequence. It makes no economic sense to say there Gulf Power has experienced a lost opportunity in a hypothetical context, if in reality, Gulf Power has experienced none of the above, or in fact, has actually received a benefit from a third party attachment through additional rental revenues or increased pole plant asset values.

- Gulf Power's pleadings and discovery responses talk only in terms of generic or hypothetical "lost opportunity" based on the fallacy that the pole is or was "full" at some point in time. To my knowledge, Gulf Power has presented no evidence of actual situations where an attacher or use was kept off any pole or that Gulf Power experienced a tangible loss or cost consequence as a result.

- Gulf Power argues, as a general proposition, that evidence of make-ready work (either prospective or performed in the past) in order to accommodate an additional attachment is itself demonstration of the conditions of full capacity and lost opportunity. Gulf Power's argument is inherently illogical and ignores the dynamic state-of-being inherent to poles, namely the ability to harness greater effective pole capacity in the present time frame. Make-ready is the vehicle by which Gulf Power has been able to accommodate an additional pole attachment. Through the normal and customary business practices of make-ready, rearrangements (which would include the correction of code violations), and pole change-out, Gulf Power has historically been able to accommodate an additional attacher. No exclusion or rivalrous condition on the pole – the condition required for demonstration of full capacity on the pole – can meaningfully exist if the additional attacher is or can be readily accommodated on the pole. Nor is there an identifiable foreclosed opportunity or foregone revenues (lost opportunity), since Gulf Power is reimbursed by the attaching party for any cost incurred in that endeavor and receives the benefit of a future stream of rental revenues. As noted above, Gulf Power's ability to deny access on grounds of "insufficient capacity" is not relevant to the underlying economics of the situation, and it would seem Gulf Power would not be able to

refuse to perform make-ready at its own unfettered discretion and for the sole purpose of being able to charge a higher "just compensation" rate to cable attachers.

- Similarly, if Gulf Power was (or is) able to accommodate another attachment or use of its own without having to perform make-ready or pole change-out work, then there is neither a rivalrous condition on the pole (full capacity), nor an identifiable foreclosed opportunity or foregone revenues (lost opportunity). Under either the make-ready or no make-ready scenarios, Gulf Power and its electric ratepayers are decidedly not worse off because of an additional attachment (the economic standard for cross-subsidization); indeed they stand to gain. In the parlance of the *APCo* decision, Gulf Power is not out any money after the "taking" of pole space and there can be no valid claim for additional compensation.

- The only situations in which Gulf Power can legitimately satisfy the dual conditions of full capacity and lost opportunity consistent with the economic reality standard inherent in *APCo* and on that basis seek additional compensation are the following limited cases where the utility can demonstrate both: (1) make-ready or pole change-out is not possible for a given pole (again due to terrain, obstructions, or zoning restrictions) based on valid engineering considerations and adherence to industry best practices of pole utilization; *and* (2) tangible lost opportunity in the form of actual foregone revenues or an actual foreclosed opportunity for that pole based on valid economic analysis, such as the kind of net present value analysis common in business case planning and the government franchise application review.

- A valid economic demonstration of lost opportunity would require quantifiable and verifiable estimation of the differential between the revenues Gulf Power would have received from the presently attached cable company (who would necessarily have to be replaced by the new attachment to satisfy the full capacity prong of the *APCo* test) including rental rates and make-ready charges as compared with the revenues Gulf Power could reasonably expect to receive over some reasonable planning period (properly discounted to a present value basis) either from the new attacher or from a higher value use of its own. To be valid, the economic analysis demonstrating lost opportunity cannot be based on hypothetical assumptions. It must be based on real world factors and considerations that realistically compare the net revenue streams Gulf Power could reasonably expect to receive from the new attacher vis-à-vis the existing cable operator. It is within the realm of possibility that an objective analysis would find the net present value of revenues Gulf Power could reasonably expect to receive from the existing cable attacher could actually exceed those from the new attacher - in which case, there would be no quantifiable lost opportunity.

- Gulf Power suggests evidentiary standards for demonstrating the dual conditions of full capacity and lost opportunity on a per pole basis, such as I've delineated, are unduly burdensome. In making such an argument, Gulf Power ignores the fact that it is already receiving from Complainants "just compensation" in excess of marginal cost in the form of the FCC Cable Formula rates (Complainants are actually paying rental rates in excess of the FCC Cable Formula rate) and applicable make-ready charges. Under *APCo*, the utility is permitted to seek alternative just compensation in excess of marginal cost only in those instances where there is a verifiable lost opportunity. For the reasons set forth in this testimony, the standards for Gulf Power's showing that I have delineated are no more than that required to ensure economically meaningful satisfaction of the *APCo* criteria.

- If the evidentiary standards to which Gulf Power is to be held are not tied to objective, verifiable, economically meaningful, and non-discriminatory standards, Gulf Power will be in a position to exploit its monopoly ownership of the poles, charge inefficiently high rates, and mismanage its pole space in order to indiscriminately extract additional "value" from the attacher. The evidentiary requirements spelled out in this testimony and in my deposition testimony are economically and practically sound, and consistent with the "economic reality" standard for poles set forth in the *APCo* decision.

- Finally, if particular pole-specific cost, lost opportunity, or other relevant data are not available or Gulf Power is not able to find or present such data, then no reasonable determination of the *APCo* criteria, i.e., the existence of both full capacity and lost opportunity, can be made. Determinations on a pole-specific basis are required to satisfy the economic reality standard inherent in the Eleventh Circuit test. Statistical extrapolations, by design, and especially as proposed by Gulf Power, are flawed and inadequate in the context of the criteria set forth in the *APCo* decision.

EFFECTIVE REGULATION IS NECESSARY TO ENSURE ACCESS TO MONOPOLY-OWNED POLE FACILITIES AT JUST AND REASONABLE RATES.

Q. WHAT IS THE ROLE OF REGULATION WITH RESPECT TO THIRD-PARTY ATTACHMENTS TO UTILTY POLES?

A. Where the utility has control over an essential or bottleneck facility, as is the case with pole attachments, the utility has both the ability and the incentive to charge third-party attachers excessive rates. If anything, the utility's incentive to do so has increased

in recent years with the growing prospect of competition among cable and electric utilities.

Almost all pole lines are exclusively owned by telephone and electric utilities, as a result of public policies to establish widespread availability of electric and telephone service. In contrast, from its inception the cable industry never had a similar opportunity (and was certainly never encouraged) to build parallel pole plant for the delivery of its own services. Local laws, environmental restrictions and other legal, economic, and practical barriers preclude cable operators and competitive local exchange carriers from placing additional poles in areas where poles already exist.

As found by the Commission in its *Alabama Cable Telecommunications Ass'n* Order:

> "[C]able attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles."[1]

As a practical reality, attachers do not have the option of duplicating the pole networks constructed by the utility and paid for by its monopoly ratepayers. While an attacher may have the option of going underground in certain cases, that is typically at an expense much greater than the utility's actual costs of accommodating the attacher on its existing pole network.

[1] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co ("Alabama Cable Telecommunications Ass'n")*, 16 FCC Rcd 12209 (2001) at ¶69.

To allow the utility to base its rental charge on its own higher, hypothetical pole replacement cost or on the hypothetical avoided cost to the attacher of stand-alone pole construction or underground installation, would permit the utility to exploit its monopoly ownership of the poles and to extract additional "value" from the attacher well in excess of the efficient or actual cost of the pole attachment.

Q. HAS THE UTILITY'S INCENTIVE TO EXPLOIT ITS MONOPOLOY OWNERSHIP OF POLES CHANGED IN RECENT YEARS?

A. The entry of electric distributors (or their affiliates) into telecommunications markets in recent years serves to heighten this incentive. Through various affiliate transactions and relationships, there are a number of devices that can be used to achieve effective cross-subsidization of an adjacent market business activity. Even in those cases where structural separation accounting rules might be in place, implicit, if not explicit forms of cross-subsidy manage to persist which allow the utility to leverage its monopoly power and control of essential facilities into the competitive market.

The utility's ability and incentive to exploit its monopoly ownership of poles is explicitly acknowledged by the Eleventh Circuit Court as an important backdrop to its *APCo* decision. The following excerpts from the *APCO* decision all speak to this point:

> Certain firms [electric utilities, local telephone companies, oil pipelines] have historically been considered to be natural monopolies – bottleneck facilities that arise due to network effects and economies of scale….Firms in other markets frequently need access to these bottlenecks in order to compete….
>
> Power companies have something that cable companies need: pole networks. Concerned about the monopoly prices power companies could extract from the cable companies, Congress

> allowed cable companies to force their way onto utility poles at regulated rates….
>
> This change to a forced-access regime was perhaps spurred by new laws, consistent with the 1996's Act vision of competition in all sectors of the data distribution business, that gave large power companies freedom to enter the telecommunications business…Perhaps fearing that electricity companies would now have a perverse incentive to deny rivals the pole attachments they need, Congress made access mandatory. [2]

Q. NOTWITHSTANDING THE CHANGES ACCOMPANYING THE 1996 ACT, WHAT RIGHTS OF POLE OWNERSHIP DOES THE UTILITY RETAIN?

A. As owner of the pole, the utility exerts many discretionary powers, none of which changed in connection with the passage of the 1996 Act. A cable company has to apply to use each pole, and cannot install its facilities until its permits are approved. The utility can revoke the permit. In cases where rearrangements are required, or a new pole has to be installed to accommodate the cable attachment, the cable company must agree to pay all make-ready costs (as determined unilaterally by the utility) before the permit is issued. The utility decides when and where to build out its system, and the cable company must adjust its plans accordingly. In addition, the utility has the power to deny access on the basis of "insufficient capacity."[3]

Contrary to assertions by Gulf Power's expert, Roger Spain, under the terms and conditions of utility pole attachment agreements, the value of the integrated elevated corridor is not being conveyed to the attacher, it is retained by the utility as owner of the

[2] *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power*" or "*APCo*") at 1361-63.

[3] There are restrictions on the utility's ability to invoke insufficient capacity as the basis for denial of access. For example, the determination of insufficient capacity must be agreed upon by the parties and applied by the utility in non-discriminatory manner. See 47 U.S.C. 224(f), also *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002) at 1346-1349.

pole network. As articulated by the Commission in its *Alabama Cable Telecommunications Ass'n* order:

> …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, all of which affect the determination of value of the interest conveyed. A pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole...pole owners in general, are not entitled to an enhanced value or network value for pole attachments…the utility is not conveying to the attacher the right to be in the public right-of-way, which is granted by the local franchising authority for a fee, nor does the utility provide the attacher with a complete corridor of access to a network of customers.[4]

While ownership of the poles confers distinct advantages to Gulf Power, contrary to the assertion of Mr. Spain, it does not present significant risks for several reasons. First, the bulk of the poles that are the subject of Gulf Power's claim are already in service. While new replacement poles will be installed each year, as acknowledged by Gulf Power, the life of a pole is very long (approximately 30 years, although some can be as old as 80) [5] so the existing base of poles is large relative to the annual additions. Second, a significant percentage (approximately 75% according to Gulf Power)[6] of Gulf Power's poles are constructed under joint use arrangements with the telephone company, under which both build poles and grant reciprocal access to each other's poles. Third, most poles have been built by the utility under cost-of-service regulatory rules to provide its core electric utility service, which means that the poles and the obligation to maintain, repair, and

[4] *Alabama Cable Television Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209 (2001) at ¶57.

[5] Deposition of Ben Bowen, September 14-15, 2005, at 118.

[6] *Id*. at 115.

replace them into perpetuity) have been allowed into Gulf Power's rate base and subject to full cost recovery. Fourth, any costs that would not be incurred by the utility in the provision of its core electric service but for third party attachers, are directly reimbursable to the utility through the charging of make-ready.

Q. HOW DOES THE UTILITY'S OWNERSHIP OF THE POLES IMPACT THE RELATIVE BARGAINING POSITION OF THE UTILITY VIS-À-VIS THIRD-PARTY ATTACHERS?

A. By virtue of the former's ownership of the poles, electric utilities and cable companies negotiating pole rental fees are not even close to an equal bargaining position with regard to the setting of pole rates. Gulf Power's implicit suggestion that there is an equal bargaining position between itself and cable companies over rents, or alternatively, a "free market" for poles, makes little sense in terms of the practical realities of utility pole ownership and construction.

This point was explicitly recognized by the Eleventh Circuit Court in its *APCo* decision:

> As the owner of these 'essential facilities,' the power companies had superior bargaining power, which spurred Congress to intervene in 1978.[7]

Q. WHAT IS THE PRACTICAL IMPLICATION OF THE UTILITY'S OWNERSHIP OF THE POLES AND THE RESULTING ASYMETRIC BARGAINING POWER IT ENJOYS OVER THIRD PARTY ATTACHERS?

A. Unless the utility is subject to regulatory pricing standards based on well-established economic cost allocation principles, and held to operational standards consistent with industry best practices regarding pole utilization, the utility will be able to exploit its monopoly power resulting from its ownership of the poles. In particular, the

[7] *Alabama Power*, 311 F.3d at 1362.

utility will have the ability to charge excessive, economically inefficient rates that are based on value to the attacher or some other inappropriate standard rather than an economically appropriate cost.

Q. IS THERE ANY EVIDENCE OF GULF POWER'S ABILITY TO EXPLOIT ITS MONOPOLY POWER OVER POLES?

A. Yes. As indication of Gulf Power's ability to exploit its monopoly power over poles, the rates proposed by Gulf Power as "just compensation" rates exceed the FCC Cable Formula rate by a factor of eight or more. Using data for 2000, Gulf Power identified what it purports to be a "just compensation" rates of $40.60.[8] The corresponding FCC Cable Formula Rate based on 2000 data was only $4.61. Updated versions of this analysis provided by Gulf Power identify a proposed pole attachment fee as high as $54.38 based on 2004 data.[9] This latter figure exceeds the FCC Cable Formula rate of $5.96 for the comparable period by as much as 812%. The calculation of the FCC Cable Formula rates using data for the years 2000 - 2004 is presented as Attachment 3 to this testimony.

[8] Deposition of Ben Bowen, September 14-15, 2005, Exhibit 10 (02460), also reproduced in Exhibit 4, Deposition of Patricia Kravtin, March 15, 2006.

[9] Deposition of Terry Davis, November 18, 2005, Exhibit 40 (02445); also reproduced in Exhibit 4, Deposition of Patricia Kravtin, March 15, 2006.

SECTION 224 OF THE COMMUNICATIONS ACT AND THE FCC RATE FORMULA IMPLEMENTED PURSUANT TO SECTION 224 REFLECT ECONOMICALLY APPROPRIATE COST ALLOCATION PRINCIPLES.

Q. YOU MENTION ABOVE THE UTILITY'S ABILITY TO CHARGE EXCESSIVE, MONOPOLY RATES FOR POLE ATTACHMENTS AS OPPOSED TO RATES BASED ON ECONOMICALLY APPROPRIATE COSTS. CAN YOU EXPLAIN WHAT YOU MEAN BY ECONOMICALLY APPROPRIATE COSTS?

A. Under economically appropriate cost allocation principles, the recovery of the cost of the pole attachment is based upon the concept of cost causation (i.e., cost-causer pays). Such costs reflect costs that would not be borne *but for* the attacher, including a normal (reasonable) return to capital. Costs designed in this manner prevent a situation of cross-subsidy between the pole owner and the pole attacher.

The principle of cost causation is firmly established in Section 224 of the Communications Act, in Subsections (h) and (i). Section 224(h) specifically holds that it is the entity that "adds to or modifies its existing attachment" that should bear "a proportionate share of the costs incurred by the owner." Section 224(i) further specifies that an entity should "not be required to bear any of the costs of rearrangement or replacing its attachment," if that rearrangement or replacement is the result of a change "sought by any other entity (including the owner…)."

Consistent with the economic principle of cost causation, Section 224(d) links the pole attachment rental to marginal costs, by establishing a range of reasonableness that has marginal costs as a lower bound, and fully allocated cost as an upper bound. Section 224(d) "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of

the total usable space…which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole."

Q. HOW DOES THE FCC CABLE RATE FORMULA FOR POLE ATTCHMENT RENTAL RELATE TO THE UPPER AND LOWER BOUNDS ESTABLISHED IN SECTION 224(D)?

A. The actual FCC rate formula adheres to the *greater* fully allocated cost standard described in Section 224(d), which by definition, allows the utility to recover through the rental rate ongoing costs *in excess* of than marginal cost, as recognized by the Court in the *APCo* decision:

> Based on these guidelines [47 U.S.C. 224(d)(1)], the FCC promulgated regulations that focused on the upper end of this range.
>
> …the fact [is] that much more than marginal cost is paid under the Cable Rate.[10]

Q. HOW DOES THE FCC CABLE RATE FORMULA IN PRACTICE APPLY THE COST CAUSATION PRINCIPLES ENUCIATED IN SECTION 224(H) AND (I)?

A. The FCC Cable Rate Formula allows recovery of a cost-causative portion of the utilities' operating expenses and actual capital costs attributable to the entire pole, based on booked costs. The FCC Cable Rate formula can be expressed as follows: Maximum Rate = (Space Occupied by Attachment ÷ Total Usable Space) × Net Cost of Bare Pole × Carrying Charge Rate.[11]

[10] *Alabama Power*, 311 F.3d at 1363, 1369.

[11] 47 C.F.R. 1.1409.

The FCC Cable Rate Formula charges cable companies in proportion to their direct use or occupancy requirements – one foot of space on the pole – again consistent with cost causation principles. Compared with electric utility facilities, cable attachments occupy considerably less space on the pole and place much less of a cost burden on poles than do electric conductors, not only in terms of space but also in terms of weight and required height above minimum grade. Cable attachments also need less space than telecommunications attachments. For example, on a standard 40-foot joint use pole, 8.5 feet of space is allocated to Gulf Power and 3 feet is allocated to telecommunications carriers, BellSouth and Sprint, as opposed to the 1 foot of usable space allocated to cable.[12]

Electric utilities such as Gulf Power do not favor a formula that allocates cost based on the percentage of usable space occupied by cable, precisely because such a formula allocates a relatively small portion of the overall cost of the pole to cable. However, the FCC's allocation of 1 foot of space is consistent with cable's small use requirements, and the fundamental economic principle of cost causation.

In situations where marginal cost is very small, it is entirely appropriate to allocate little (or even no cost) to the user. Reasoned principles of economic cost recovery do not require the allocation of every conceivable dollar that could be attributed to a cost causer based on ability to pay or the pole owner's subjective (and self-serving) notion of fairness. All that is required—from an economics standpoint—is that the recovery be economically reasonable and appropriate in accordance with fundamental economic

[12] See Deposition of Rex Brooks, September 16, 2995, at 29, Deposition of Terry Davis, November 18, 2005, at 159.

principles of cost causation. The FCC's space factor is totally consistent with this fundamental economic concept.

Indeed, even with a relatively small portion (7.41%) of the overall cost of the pole attributed to cable under the FCC Cable Formula calculation, cable companies are paying well in excess of the marginal costs of their attachments. Moreover, cable companies are just one of many attachers occupying space on the utility's poles and paying rent to the utility. Taking into account the totality of attachments on a given pole, including telecommunications companies paying the higher Telecommunications Formula rate or an even higher joint-ownership rate, Gulf Power may well be approaching recovery of more than its pro-rata share of the pole cost given its own relative use of the pole. As noted above, Gulf Power's use is well over 8 feet, as compared to cable's 1 foot. Applying the same FCC space factor used to allocate costs to cable, Gulf Power should be allocating to itself roughly 60% of the cost for a standard 40 foot joint-use pole, yet it appears Gulf Power is allocating much less than this pro-rate share. As discussed later in this testimony, under Gulf Power's proposed replacement cost methodology which applies a much higher space factor to cable companies (in the range of 30%) as compared to the FCC (7.41%), Gulf Power's respective share of the cost would be far less.

The net cost of bare pole used in the FCC Formula is based on investment booked to FERC Account 364 ("Gross Pole Investment") less accumulated depreciation and accumulated deferred income taxes, and less 15% for cross-arms and other non-pole related items. Certain costs associated with equipment "specific to the electric utility's core business services and not related to the general cost of pole plant," such as lightning protectors and grounding installations in FERC accounts other than Account 364 are

excluded.[13] As will be discussed later in this testimony, in addition to using a more recent "replacement" cost that has no relation to the actual costs of poles to which cable companies are attached, one of the ways Gulf Power artificially inflates its purported "just compensation" rates is by including costs such as lighting protectors and grounding installations - costs which were expressly excluded by the FCC on the basis of cost causation principles - into the calculation of its proposed replacement costs.

Through application of the carrying charge factor, the Cable formula includes allocation of indirect or overhead costs such as administrative (FERC accounts 920-931, 935) and maintenance (FERC account 593) in addition to capital costs (taxes, depreciation, and rate of return) associated with total pole plant (i.e., reflecting both usable and unusable space).

As mentioned above, I have calculated the FCC Cable Rate formula for Gulf Power using data for the years 2000 – 2004, and those calculations are presented in Attachment 3 to this testimony.

Q. HOW ARE MAKE-READY CHARGES APPLIED IN CONNECTION WITH THE FCC CABLE FORMULA RATES?

A. In addition to the rental rate, the utility is allowed to charge cable operators make-ready charges, to recover any *one-time* additional costs incurred in the provision of pole attachments. These costs are designed in principle to recover costs that the utility would not have incurred, *but for* the attachment request, and thus, from the standpoint of economic cost causation principles, provide for an economically appropriate attribution of costs.

[13] See FCC Report and Order, 15 FCC Rcd. 6453 (2000), ¶38; see also 16 FCC.Rcd. 12209 at ¶61.

However, because utilities set make-ready charges generally in the absence of regulatory scrutiny, make-ready charges may in fact recover more than an economically appropriate attribution of cost. For example, a cable company may be charged make-ready fees for a change-out that the electric utility would have made in the absence of the cable attachment, or the cable company may be charged costs in excess of those actually incurred.

While Gulf Power witness Bowen asserts he is unaware of such circumstances where the cable company may have been charged make-ready in excess of the costs incurred by Gulf Power,[14] as mentioned above, Gulf Power sets make-ready costs at its sole discretion. By Bowen's admission, Gulf Power does not typically perform any sort of true up between the costs generated by the engineering cost program used by Gulf Power to generate make-ready charges and the actual costs incurred. Since the power company is in total control of the make-ready charge process, it is rational to assume that if the power company believed it was not recovering the full cost of make-ready, it would perform such a true-up and seek additional make-ready payments since it is not constrained in any manner from doing so.

[14]Deposition of Ben Bowen at 68-72.

THE COMBINATION OF FCC CABLE FORMULA RATES AND MAKE-READY CHARGES (INCLUDING PAYMENT FOR NEW POLES) PAID BY CABLE COMPANIES MORE THAN RECOVERS THE INCREMENTAL COST OF POLE ATTACHMENT, THEREBY SATISFYING ECONOMIC PRINCIPLES OF COST CAUSATION.

Q. TAKEN TOGETHER, WHAT ARE THE COST RECOVERY IMPLICATIONS OF THE FCC CABLE FORMULA RATES AND THE MAKE-READY CHARGES PAID BY CABLE COMPANIES?

A. Taken together, the *combination* of rental rates - which as described above, cover a proportionate share of the operating costs (administration, maintenance, inspections, etc) and the capital costs of the *total* pole (usable and unusable space) - and make-ready charges (which cover any non-recurring costs incurred by the utility) ensures the utility recovery of much more than the marginal cost of attachment.

Indeed, this widely "known fact" played a central role in the Court's analysis in *APCo*:

> *The known fact is that the Cable Rate requires the attaching cable company to pay for any "make-ready" costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully-embedded cost.*
>
> …This legal principle [just compensation is determined by the loss to the person whose property is taken], *together with the fact that much more than marginal cost is paid under the Cable Rate*, leads us to ask the following question: does marginal cost provide just compensation in this case?
>
> …In short, before a power company can seek compensation above marginal cost, it much 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.* [15]

[15] *Alabama Power*, 311 F.3d at 1369, 1370, *emphasis added*.

Because the combination of rental rates and make-ready charges recover much more than the incremental cost of attachment, there can be no valid claim of cross-subsidy or specific cost burden borne by the electric company or its customers as a result of the attachment. For a subsidy to occur, the pole owner must have unrecovered costs that *but for* the attacher would otherwise not exist. This is clearly not the case where the combination of rental rates (which in the case of the Complainants exceed the FCC formula rates)[16] and make-ready charges more than cover the incremental cost of attachment.

From an economics standpoint, rates covering incremental costs of attachment are economically efficient and avoid cross-subsidy. Where rates cover the incremental cost of attachment, neither the pole owner nor any of the other parties sharing the pole will bear a higher cost as a result of the attachment (than they would absent the attachment). It thus cannot be said from an economic perspective that the pole owner (and its other customers) would be better off without the attachment. In fact, as discussed below, it can be shown that the pole owner is typically made better off after the accommodation of an additional attachment has been made. Under these conditions, for the reasons described above, there can be no valid claim of economic subsidy. The legal principle in takings law for just compensation is consistent with the economic notion of cross subsidy avoidance:

> This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be

[16] See Complaint, July 10, 2000 at 7 n.4. and Ex. 16.

> put in as good a position as he was in before the wrong, but not better.[17]

THE *APCO* CRITERIA FOR ALLOWING A POWER COMPANY TO SEEK "JUST COMPENSATION" ABOVE MARGINAL COSTS (OVER AND ABOVE THAT ALREADY PROVIDED IN THE REGULATED RATE) IS TIED TO THE ECONOMIC CONCEPTS OF FULL CAPACITY AND LOST OPPORTUNITY.

Q. YOU CITE ABOVE TO THE FINDING IN *APCO* THAT "ANY IMPLEMENTATION OF THE CABLE RATE (WHICH PROVIDES FOR MUCH MORE THAN MARGINAL COST) NECESSARILY PROVIDES JUST COMPENSATION" UNLESS CERTAIN VERY SPECIFIC SHOWINGS ARE MADE BY THE POWER COMPANY. CAN YOU ELABORATE ON THE SPECIFIC SHOWINGS REQUIRED BEFORE A POWER COMPANY CAN SEEK COMPENSATION ABOVE MARGINAL COST.

A. Yes. As cited previously in this testimony, "before a power company can seek compensation above marginal cost," it must show the following "with regard to each pole:"

> (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.[18]

The presence of the latter two factors is described by the Court collectively as being associated with a condition of "lost opportunity" foreclosed by the taking and consistent with the "economic reality" of poles. In the absence of such proof of full capacity and lost opportunity, the Court determines that a power company "can charge only the

[17] *Alabama Power*, 311 F.3d at 1369.

[18] *Id.* at 1370.

regulated rate (so long as that rate is above marginal cost)" [19] – which as established above, holds true for the FCC Cable Rate.

Q. WHAT IS THE "ECONOMIC REALITY" OF POLES UPON WHICH THE ELEVENTH CIRCUIT BASES ITS REQUIRED SHOWING OF FULL CAPACITY AND LOST OPPORTUNITY BEFORE A UTILITY CAN SEEK COMPENSATION RATE IN EXCESS OF MARGINAL COST ?

A. The "economic reality" upon which the Eleventh Circuit bases its test relates to the "unique" nature of poles that makes them "for practical purposes, *nonrivalrous*." As explained by the Court:

> In such as case [ordinary property, such as land], the 'value' of the thing taken is congruent with the loss to the owner, and there is therefore little tension between the legal propositions [loss to the owner, not gain to the taker and full monetary equivalent of the property taken]. This is because most 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*. This means that use by one entity does not necessarily diminish the use and enjoyment of others.[20]

The Court rightly distinguishes this unique aspect of poles from the typical taking claim involving "ordinary property," where one entity's use of the property specifically forecloses some other entity. While the Court recognized the "possibility of crowding" on poles, and the notion that such "crowding" could, in principle, "make pole space become[] rivalrous," it was very specific in defining the economic standards that should

[19] *Id.*

[20] *Id.* at 1369, *emphasis added.*

be used in determining what would constitute "crowding" for the purposes of satisfying the "full capacity" criteria articulated by the Court.[21]

Full Capacity

Q. WHAT ARE THE ECONOMIC STANDARDS FOR DETERMINING FULL CAPACITY TO WHICH YOU REFER?

A. The Court was very specific in identifying the economic standards that would be required to demonstrate a pole was at "full capacity," by providing concrete descriptions of a "full" pole or the "full capacity situation" that are based on the concepts of the "zero sum" and "rivalrous" nature of poles. As described by the Court:

> When a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm – a missed opportunity that does not exist in the *nonrivalrous* scenario. By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself), the analogy to land becomes more appropriate. In the 'full capacity' situation, it is the *zero-sum* nature of pole space, like land, that is key." [22]

Q.DO THE TERMS "ZERO SUM"AND "RIVALROUS" HAVE SPECIFIC MEANINGS IN THE ECONOMIC LITERATURE?

A. Yes, they do. The terms "zero sum" and "nonrivalrous" have very specific meaning in the economics literature. To be a "zero sum" situation requires that for one entity to gain, another entity must lose.[23] The "pie" being share is of fixed size. For someone's piece of the pie to get bigger, someone else's piece must necessarily get smaller. Similarly, where a resource is "nonrival," one entity's use of a resource does not diminish or preclude the

[22] See *Alabama Power*, 311 F.3d at 1370, *emphasis added.*

[23] See Lester C. Thurow, *The Zero Sum Society*, Basic Books, Inc. Publishers (New York, 1980), at 11.

use by another.[24] Conversely, when a resource is "rival' in consumption, one entity's use of a resource does reduce the use by another. If a "nonrivalrous" or "non-zero sum" situation exists with respect to a pole, then that pole cannot legitimately be said to be at "full capacity." Said more simply, if the addition of another attachment on the pole does not preclude the pole owner's ability to accommodate another attachment or another use, then, by definition, there is available or effective capacity on the pole.

Accordingly, it is not enough that the pole just appear "crowded" or "full" in a vague or ordinary sense of the word, for example, as in a visual inspection of the pole or identification of a certain number of attachments. To satisfy the Eleventh Circuit test, it must be determined that a pole is at "full capacity" in the economic sense of presenting a rivalrous or zero-sum condition, such that one entity's presence on the pole will necessarily deprive another of the ability to attach to that pole.

Q. IN ITS VARIOUS PLEADINGS, GULF POWER APPEARS TO BE SUGGESTING THERE IS NO REAL DIFFERENCE BETWEEN THE APPEARANCE OF "CROWDING" ON A POLE AND A "FULL" POLE. DO YOU AGREE?

A. No, I do not. A pole, as with other facilities (e.g., airport, parking lot, office space) can be "crowded" or congested, without being at "full capacity" in the economic sense. For a facility to be at full capacity, it must be a situation where a user (be it an airplane, automobile, employee, or attachments) would actually be excluded from the facility because of a true *capacity constraint* or *scarcity* with respect to the underlying infrastructure. Such a situation is distinct from congestion or crowding, which often goes hand-in-hand with a lack of capacity, but which can have many other causes as well,

[24] See Musgrave and Musgrave, *Public Finance in Theory and Practice*, McGraw Hill (1976), at 51.

including for instance, inefficient management practices or poor design. If a facility would be able to accommodate an additional user if it made certain operational changes or performed functions more efficiently, then it is not at full capacity.

The distinction between crowding and full capacity has been described in the economic literature as follows:

> Congestion refers to the costs arising from crowding effects (too many users in the system), and *scarcity is a situation of exclusion* of some firms from the system *due to lack of capacity.* [25]

That Gulf Power chooses to define the concepts of crowded and full capacity as equivalent, practically or otherwise, for purposes of this case, does not in anyway alter the fundamental economic distinction between the two.

Similarly, that the Osmose Statement of Work defines the concepts of crowding or full capacity as one and the same ("to mean a pole that cannot host another attachment without rearrangement or changeout" [26]) only means the results of the Osmose survey are flawed, not that the two concepts are equivalent from a true economic perspective.

A bigger problem with Gulf Power 's definition of full capacity, however, is its failure to take into account the dynamic state-of-being inherent to poles.

[25] Gustavo Nombela, Gines de Rus, and Ofelia Betancor, *Competitive and Sustainable Growth Programme and Marginal Cost for Transport Efficiency, UNITE (Unification of accounts) WP7: User Costs and Benefits*, Case Study 7: Evaluation of Congestion Costs for Madrid Airport (1997-2000), Version 2.0, 30 April 2002, *emphasis added*.

[26] Gulf Power Non-Binding Proffer of "Full Capacity" Pole Evidence, October 17, 2005,at 2.

Q. PLEASE EXPLAIN WHAT YOU MEAN BY THE DYNAMIC STATE-OF-BEING INHERENT TO POLES AND GULF POWER'S FAILURE TO TAKE THAT INTO ACCOUNT IN ITS DEFINITION OF FULL CAPACITY.

A. An inherent economic characteristic of pole capacity is that, under normal operating conditions of production, it is *not* fixed in the short-run. Rather, it is dynamic in nature, and any economically meaningful definition of full capacity for poles will reflect this dynamic state-of-being inherent to poles. In the overwhelming majority of cases, by Gulf Power's own admission, additional attachments can (and are) accommodated in the course of normal and customary operating practices of pole owners, including pole rearrangements and change-outs. [27] In this very real economic sense, therefore, pole capacity is not static or finite.

Generally speaking, it is the fixed nature characteristic of most inputs that limit capacity or scale of operations. All inputs are ultimately variable in the long run, but what makes poles unique, is their inherent ability to provide for greater effective capacity in the "shortest" of short-runs. Productive capacity on poles can be harnessed generally as fast as the paperwork can be processed, and a technician can be called down to rearrange attachments or a taller pole can be transferred from inventory.

This economic attribute of poles distinguishes poles from other assets (e.g., land, marina space) for which valuation methods cited by Gulf Power have been applied, and means that an additional attachment is, as a general proposition, non-rival with respect to current and potential pole attachments.

[27] See Gulf Response to Second Request No. 8, also Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order at 1, September 30, 2005; Deposition of Thomas Forbes, November 17, 2005, 133-136.

The condition of full capacity exists in the economic sense when capacity is truly zero sum, such that one entity's presence on the pole actually deprives another of the ability to attach to that pole. For a resource to be at full capacity necessarily requires that capacity be fixed in a short run sense. To the extent Gulf Power is able through normal and customary business practices (i.e., make-ready, rearrangements and pole changeouts) to harness greater effective pole capacity in the present time frame, it makes no sense from an economics perspective to say the pole is at full capacity. Indeed, the power company's routine practice of accommodating additional attachments of poles is the antithesis of a "zero sum" situation.

Q. IN WHAT RESPECTS IS GULF POWER'S ROUTINE PRACTICE OF ACCOMMODATING ADDITIONAL ATTACHMENTS THE ANTITHESIS OF A"ZERO SUM" SITUATION?

A. After performing what is routine work on the pole (for which it is compensated by the incremental attacher through make-ready pursuant to Section 224), the power company does not have to displace an existing attachment, or turn away another attachment. In fact, the power company is typically able to accommodate even more attachments after the routine work has been performed, than it was before.

It is a totally perverse economic result under such circumstances as just described to identify such a pole as being at "full capacity," and on that basis allow the power company to charge not only the additional cable attacher but other pre-existing cable attachers a rate higher than the cable rate (which is already in excess of marginal cost). Such an outcome violates the cost-causation principles underlying Section 224, by requiring pre-existing attachers, who were not the cause agents in any principal respect, to pay more than they were paying before the pole change-out or rearrangement.

Q.WHAT IS GULF POWER'S POSITION REGARDING THE DYNAMIC APPROACH TO FULL CAPACITY YOU DESCRIBE ABOVE?

A. Gulf Power's position is that adopting a dynamic approach to full capacity would make it impossible for Gulf Power to meet its burden since, as Gulf Power acknowledges, "virtually *any* pole can be changed out."[28] This is a strawman argument, and one that is not valid for several reasons.

First, there are a number of real-world situations where it will not be possible for the power company to harness greater effective capacity on a pole. Some examples identified by the Complainants include:

> "For example, a layer of impenetrable rock may exist underneath the pole precluding a taller pole from being sunk low enough in the ground as required by applicable engineering codes; a height limit may be imposed by the Federal Aviation Administration for poles in a given geographic area; an overpass or other cables or wires (e.g., electric transmission lines, streetcar wires, etc.) might interfere with placement of a taller pole; or a 50 foot pole might have so many attachments as to render it "full," but no taller 55 pole exists in inventory." [29]

Second, while these types of situations where pole change-outs cannot practically occur due to terrain, obstructions, or zoning restrictions may be limited in nature, they are the only *true* instances where poles can be characterized as zero sum or rivalrous in nature. Hence, such instances are the only legitimate, economically valid cases where a potential finding of "full capacity" can be made, and the type of evidence Gulf Power must provide in order to meet its burden of proof in this case with respect to the first of the two *APCO* criteria. Under the two-prong test established in *APCo*, the power company would still have to prove the existence of an actual lost opportunity either in the form of a "bidding

[28] Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order, September 30, 2005, at 4.

firm" or "higher valued use" of the power company that was actually turned away or precluded.

That Gulf Power may deny access for reasons of "insufficient capacity" does not affect this fundamental economic reality of full capacity. Moreover, Gulf Power's ability to deny under Section 224 is not absolute; it must be agreed upon and carried out on a non-discriminatory basis. Since Gulf Power routinely performs make-ready, rearrangements, and pole changeouts for itself, its joint pole owners, and other third-party attachers, it would seem Gulf Power would not be able to refuse to perform make-ready at its own unfettered discretion and for the sole purpose of being able to charge a higher "just compensation" rate to a particular class of (cable) attachers.

Because Gulf Power's ability to seek additional compensation in excess of marginal cost is tied to the demonstration of full capacity (in conjunction with lost opportunity), it is obviously in Gulf Power's own interest to embrace a definition of full capacity that would encompass the largest number of poles possible. Gulf Power's position that the need for, or the previous occurrence of make-ready work to accommodate an additional pole attachment, in and of itself,"[30] demonstrates a condition of "full capacity" is consistent with such a strategy.

However, the relative frequency of "full capacity" poles has no substantive bearing on the validity of the economic concept of full capacity. If anything, since Gulf Power is already receiving just compensation for use of its poles, there should be no expectation of

[29] Complainants' Responses to Gulf Power's First Set of Interrogatories and Document Requests, April 18, 2005, at 18.

[30] See e.g., Gulf's Non-Binding Proffer of "Full Capacity" Pole Evidence, October 17,2005, at 2.

a large number of poles that would qualify for additional compensation under the *APCo* criteria.

Q. DOES GULF POWER'S POSITION THAT THE NEED FOR, OR PREVIOUS OCCURRENCE OF MAKE-READY WORK DEMONSTRATES A CONDITION OF FULL CAPACITY MAKE ECONOMIC SENSE?

A. No, it does not. Gulf Power's position with respect to make-ready is inherently illogical and ignores the dynamic state-of-being inherent to poles, namely the ability to harness greater effective pole capacity in the present time frame. Make-ready is the vehicle by which Gulf Power has been able to accommodate an additional pole attachment. Through the normal and customary business practices of make-ready, rearrangements (including the correction of code violations), and pole change-out, Gulf Power has historically been able to accommodate an additional attacher. No exclusion or rivalrous condition on the pole – the condition required for demonstration of full capacity on the pole – can be said to exist in any meaningful sense of the word if the additional attacher is or can be readily accommodated on the pole. (Nor for that matter is there an identifiable foreclosed opportunity or foregone revenues (lost opportunity), since Gulf Power is reimbursed by the attaching party for any cost incurred in that endeavor and receives the benefit of a future stream of rental revenues.)

Contrary to Gulf Power's position, the ability to perform make-ready work on a pole provides direct evidence of the *nonrivalrous* condition of the pole. The economic realities of make-ready and full capacity cannot rationally coexist. It would be logically absurd to have a pole that is able to accommodate additional attachments (through make-ready work which the lessee is willing to pay for) classified for rate purposes as being at "full capacity." As defined above, the condition of full capacity requires a situation of

exclusion. By contrast, the practice of make-ready expressly allows for the *inclusion* of additional attachments.

Moreover, it would be decidedly perverse from an economics and public policy standpoint to reward Gulf Power for refusing to permit make-ready work performed in the normal course of business operations (and for which the lessee is willing to pay) for the express purpose of justifying a higher "just compensation" rate to preexisting attachments.

Finally, whether or not Gulf Power is legally "obliged" to do make-ready work to accommodate additional attachments is irrelevant from an economic standpoint. From an economic perspective, what is relevant is that such make-ready work has been and continues to be routinely performed by Gulf Power and that through this normal and customary process, pole capacity, as a general proposition, is readily available to accommodate an additional attachment on the pole. Whether Gulf Power remains *willing* to perform make-ready work on a non-discriminatory basis in response to a changing legal and/or regulatory incentive structure has nothing to do with the underlying economics of the situation and the fact that Gulf Power is *able* to perform make-ready as a means of accessing readily available pole capacity.

Furthermore, Gulf Power's ability to deny under Section 224 is not absolute; it must be agreed upon and carried out on a non-discriminatory basis. Since Gulf Power routinely performs make-ready, rearrangements, and pole change-outs for itself, its joint pole owners, and other third-party attachers, it would seem Gulf Power would not be able to refuse to perform make-ready at its own unfettered discretion and for the sole purpose of

being able to charge a higher "just compensation" rate to a particular class of (cable) attachers.

Lost Opportunity

Q.HAVING DISCUSSED THE FIRST PRONG OF THE *APCO* TEST, I.E., FULL CAPACITY, CAN YOU DESCRIBE HOW THE SECOND PRONG OF THE TEST, I.E., THE CONCEPT OF LOST OPPORTUNITY, RELATES TO THE FIRST?

A. As formalized in the second part of the two-prong test articulated by the Court, in order for the power company to make a claim for just compensation in excess of marginal cost, it is not sufficient to demonstrate a pole is at "full capacity." Lost opportunity must also be demonstrated. Pursuant to the *APCo* decision, lost opportunity is demonstrated by the presence of full capacity *and* one of the following two conditions - "another buyer of the space waiting in the wings" or an instance where "the power company is able to put the space to a higher-valued use with its own operations."

As further described by the Court, in order to satisfy the second prong of the test, the pole owner would be required to identify an actual "missed opportunity" or "foreclose[d] opportunity to sell space to another bidding firm" or a specific "use by the power company itself."[31]

The Court acknowledges that its ruling creates the appearance of an "anomaly" in that "a power company whose poles are not 'full'" can charge only the regulated rate… but a power company whose poles, are, in fact, full, can seek just compensation."[32] The Court

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

[32] See *Id.*at 1370-71.

rationalizes this apparent "anomaly" by stating "this result is in accordance with the economic reality that there is no 'lost opportunity' foreclosed by the government unless the *two* factors ["full capacity" and either "another buyer waiting in the wings" or a "higher-valued use" by the power company] are present" with respect to each pole.

Q.DOES IT MAKE SENSE TO SPEAK IN TERMS OF A HYPOTHETICAL BIDDER OR USE OF THE UTILITY'S POLES IN DEMONSTRATING A LOST OPPORTUNITY?

A. No, it does not. For the anomalous condition of a just compensation rate other than the regulated rate to make economic sense, the "economic reality" of lost opportunity referred to by the Court must be real versus illusory. In this context, it makes no sense to talk in terms of a hypothetical bidder or uses of the pole. To prove "lost opportunity" in an economically meaningful way, the power company must be able to show - in a quantifiable and verifiable manner- that it has suffered an actual loss in terms of foregone revenue or cost consequence as a result of the existence of full capacity on a pole. The power company must be able to demonstrate it is *financially worse off* as a consequence of a cable attacher paying for pole space under the FCC regime (i.e., combination of FCC formula rent plus make-ready).

If all attachers or uses were in fact accommodated or capable of accommodation through normal business practices, and in accordance with the FCC rules, third party attachers pay Gulf Power for any costs it incurred to make that accommodation and rental fees on top of those make-ready costs, there simply is no tangible loss to consider. If Gulf Power can accommodate a potential or hypothetical buyer, then in effect, there is nothing tangible being lost by Gulf Power.

The economic reality of the situation is that if there is no inherent reason why Gulf Power cannot accommodate a potential buyer (i.e. there is pole capacity available or readily available), then that potential buyer is not legitimately characterized as "waiting in the wings." There would be no logical reason for that buyer to be "waiting" to rent space on a Gulf Powers pole - other than the perverse incentive that Gulf Power might have to deny a potential buyer access to available pole capacity for the express purpose of being able to charge a higher "just compensation" rate to pre-existing cable attachers. The only way to prevent Gulf Power from responding to such a perverse incentive is to a) require Gulf Power to identify an *actual* buyer that has been excluded from the pole, for each pole for which Gulf Power seeks the higher just compensation rate, and b) to define full capacity in the manner described above, i.e., based on objective benchmarks that hold the power company accountable for best practices and the efficient use of *all available* pole capacity.

Similarly, the demonstration of a higher-valued use must also be based on objective criteria and the demonstration of a bona fide higher-valued use that was precluded because there was no available pole capacity. Otherwise, it would be trivial for the utility to say it valued its own use or use by an affiliate (current or potential) higher than that of any other potential use by non-affiliated entities, since by simply declaring so would result in the utility being able to charge preexisting occupants a higher pole rental rate on virtually any pole.

In very real economic terms, there would be a tangible loss only in those instances where an actual attacher or use was precluded, and Gulf Power was thereby deprived of additional revenues it could otherwise have received had pole space been available to

accommodate another attachment. Otherwise, Gulf Power's costs are being recovered, and hence there is no specific identifiable cost burden being borne by the power company or its electric ratepayers as a result of the existence of pole attachments by cable companies. Indeed, Gulf Power cannot claim it has suffered financially under the current FCC pricing regime. According to a recent order issued by the Florida Public Service Commission, Gulf Power would have been seriously overearning relative to its authorized rate of return, but for its voluntary agreement to absorb costs relating to hurricane damage.[33]

In fact, in the typical case, the pole owner will end up decidedly "better off" after an incremental cable attachment in the following concrete ways: (1) the power company receives in excess of the marginal costs it incurs through the combination of make-ready for the pole change-out or rearrangement plus the FCC Cable Rental Rate; (2) because cable attachments place minimal space demands on the pole and poles come in standard heights, the power company ends up with greater available pole capacity as compared with pre-attachment.; (3) more space is now available on the pole for additional uses and/or users for which the utility will either be able to charge rental and/or use for its own and hence realize additional sources of revenue; and (4) Gulf Power has the benefit of a newer, stronger pole for its own operations at the cable company's expense, and can thereby realize savings (or deferred capital expenditures) to its own build-out program.

[33] See Florida Public Service Agreement, *Notice of Proposed Agency Action Order Aproving Stipulation and Settlement*, Docket No. 050093-EI, Order No. PSC 05-0250-PAA-EI, March 4, 2005.

The FCC recognized this point in its *Alabama Cable Telecommunications Ass'n* decision:

> "In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service."[34]

Q. IS GULF POWER'S APPROACH TO LOST OPPORTUNITY CONSISTENT WITH THE APPROACH YOU HAVE DESCRIBED ABOVE?

A. No, it is not. Gulf Power appears to assume away the second prong of the *APCo* test with its suggestion that demonstrating full capacity in and of itself provides evidence of a lost opportunity, [35] even though, as recognized by the Court, they are different concepts, *both* of which need to be present in order to justify a utility seeking additional compensation relative to the regulated rate.

Moreover, many of Gulf Power's arguments regarding the demonstration of lost opportunity appear connected to the notion that the utility has been precluded from extracting additional "value" from cable companies and to the additional revenues Gulf Power has foregone by not being able to charge the cable companies more money for pole space.

Gulf Power falsely asserts it has suffered a lost opportunity equal to the difference between the regulated rate for pole space (which Gulf Power witness Bowen describes as a "subsidized rate") and a "free market" rate."[36] First, the economic criteria for

[34] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12209 at ¶ 58 (2001).

[35] Gulf Power's Supplemental Filing Regarding Its Fifty Pole Identification, p. 2, ¶ 6 (Feb. 10, 2006). "The Osmose audit data and the Knology make-ready information establish a lost opportunity with respect to each pole identified therein because those poles are 'crowded' or at 'full capacity."

[36] See Deposition of Ben Bowen , at 72:

Q How is it subsidized what, do you mean?

determining existence of a subsidy is the relationship between the rate charged and the underlying economic cost. It is not, as Gulf Power witness Bowen incorrectly asserts, the difference between the regulated rate and a higher alternative rate the power company believes it could charge absent regulation. Market rates can serve as proxies to costs only when conditions of effective competition exist,[37] and market forces can be relied on to bring rates down to levels approximating marginal costs. 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.

Along these same lines, the notion that Gulf Power has been precluded from extracting additional "value" from cable companies and has foregone revenues by not being able to charge the cable companies more money for pole space appears to be precisely what counsel for Gulf Power has in mind when he suggested in deposition questioning that the exclusion of cable companies from Gulf Power's poles was a "higher valued use." Citing to "producers sometimes control[ling] short run production for the purposes of driving up demand and thus value," and to the "way they [producers]drove up prices on those things was by controlling the amount of production" [38] would suggest Gulf Power's own motivation, as monopoly owner of poles, to artificially restrict the supply of pole space in order to charge an excessively high price.

A It's not a free market rate, the attachment rates in the free market were higher in the early seventies than they are today.

[37] Competitive market conditions would include numerous buyers and sellers, no one of which is large enough to influence the price by varying the quantity of output it sells. See F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition (Boston: 1990), at 16.

[38] See Deposition of Patricia Kravtin at 180-183, 195, 208-210.

Q.IT IS APPROPRIATE FOR GULF POWER TO DEFINE LOST OPPORTUNITY BASED ON FOREGONE REVENUES ASSOCIATED WITH NOT BEING ABLE TO CHARGE CABLE COMPANIES AS HIGH A RATE AS IT COULD IN THE ABSENCE OF REGULATION, OR ALTERNATIVELY NOT BEING ABLE TO EXCLUDE CABLE FROM ITS POLES?

A. No, it is not. Lost opportunity in the economic sense is not properly defined in terms of the power company's inability to artificially restrict the supply of pole space or to charge the cable company more money, because of the monopoly power the utility enjoys with respect to pole infrastructure. To do so, would allow the power company to exploit its monopoly power.

For a host of economic and public policy reasons, the definition of lost opportunity for purposes of satisfying the *APCo* test is not appropriately based on what amounts to a monopolist's perceived inadequacy of the regulated rate in satiating its desire to charge a higher price (and one that is in excess of a competitive market rate). As recognized by the Court in *APCo*, the power company cannot validly point to the "lost sale to the cable company" as "its opportunity cost" of not being able to charge a higher "full market price" as a lost opportunity. The Court analogizes as follows:

> …if the government ran its own monopoly cable company, it would not make sense for the power companies to say, 'Even though we are not out any more money than before the taking, we are missing out on the opportunity to sell to the government at what we deem to the 'full market price' of this pole space.…('Special value to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element of market value.') It should not make a difference if the government chooses to allocate the condemned property to private [cable] companies[39]

[39] See *Alabama Power*, 311 F.3d at 1369-70.

In a truly competitive market, there would be multiple pole owners with their own infrastructure, each vying for buyers to rent space on their poles. Under these circumstances, prices would tend to be bid down to levels approximating marginal cost, which is essentially the cost of make-ready, i.e., the costs of rearranging and adding space on an owner's poles. In the absence of competitive market conditions, the FCC method of charging cable companies for pole attachments (i.e., make-ready fees designed to cover the marginal costs of the pole attachment and a rental fee calculated from an allocation of ongoing direct costs based on the cable company's use of the pole) most closely approximates a truly competitive market rate and one that is consistent with the cost causation principles codified in Section 224.

Moreover, as discussed in my deposition,[40] Gulf Power is already being compensated for any value associated with the inability to exclude third party attachments by the designation of such attachments to Gulf Power's poles as a "taking" for which Gulf Power is receiving "just compensation" in the form of the regulated rate, which as found by the Court, exceeds the marginal cost of attachment. No additional compensation for the inability to exclude third party attachments is necessary, or as I understand it, permitted pursuant to *APCo*.

[40]Deposition of Patricia Kravtin at 208-210.

Furthermore, given the regulated cable rate provides just compensation to Gulf Power, there is similarly no validity to Gulf Power's claim that the difference between the cable rate and the statutory rate charged telecommunications providers represents a lost opportunity. Indeed, this very claim was considered by the Court in *APCo* and rejected.[41] Gulf Power has not presented any evidence to suggest it has not been able to accommodate all entities seeking to attach to its poles because of the presence of a cable company,[42] so there is simply no tangible lost opportunity to Gulf Power as pole owner associated with its charging cable operators based on the Cable Rate formula versus the Telecommunications Rate formula. Moreover, as discussed in my deposition,[43] and as found by the Commission and the Court,[44] the two formulas were derived for different purposes, and the fact they are based on a different allocation methodology, and are not directly comparable, does not alter the conclusion that both provide just compensation to the utility.

TO AVOID PERVERSE INCENTIVES AND UNECONOMIC OUTCOMES, THE CONCEPTS OF FULL CAPACITY AND LOST OPPORTUNITY MUST BE DEFINED BASED ON OBJECTIVE, VERIFIABLE STANDARDS THAT REFLECT THE ECONOMIC AND PRACTICAL REALITIES OF POLES, AND ARE CONSISTENT WITH INDUSTRY BEST PRACTICES.

Q. AS DESCRIBED EARLIER, THE SCENARIO CONCEIVED BY THE COURT UNDER WHICH A POWER COMPANY COULD SEEK COMPENSATION IN EXCESS OF THE REGULATED RATE IS VERY NARROWLY DRAWN, BY BEING TIED DIRECTLY TO ECONOMIC CONCEPTS SUCH AS FULL CAPACITY, ZERO-SUM, RIVALROUS, AND LOST OPPORTUNITY. NONETHELESS, ARE THERE OPPORTUNITIES FOR THE UTILITY TO TAKE ADVANTAGE OF THE OPENING GIVEN TO IT IN *APCO* ?

[41] See *Alabama Power*, 311 F.3d at 1371.

[42] See Deposition of Michael Dunn, November 16, 2005, at 118.

[43] See Deposition of Patricia Kravtin, March 15, 2006, 136-137,

[44] See *Alabama Power*, 311 F.3d at 1371.

A. Yes, there are. For the reasons discussed above describing the utility's ownership and control over this particular essential facility, the utility has every incentive to make subjective, self-serving determinations as to the satisfaction of the various elements of the Eleventh Circuit test so as to justify charging a rate higher than the regulated rate to existing cable attachers. In this context, examination of Gulf Power's case demonstrates its attempt to seek a rate many multiple times higher than the regulated rate, and to rely on economically unsupported, subjective reasoning and extrapolations in asserting the existence of full capacity/lost opportunity on the majority of its poles.

As noted above, the Court acknowledged the appearance of an anomaly if the power company is permitted to charge a higher "just compensation" rate for "full" poles, and a lower regulated rate for all others. Of greater concern, though, are the truly anomalous results that are likely to occur unless the standards to which a power company is held in proving that the two required conditions of full capacity and lost opportunity exist as an "economic reality" are objective, well-defined, and economically valid.

In the absence of objective, economically valid standards, there is no incentive for the utility to efficiently manage pole space or to take advantage of all available pole space. Indeed, the electric company could claim it is better off financially by *not* having to efficiently managing pole space or take advantage of all available pole space in order to justify denying access to a prospective attacher that it otherwise could have accommodated. Such a result would occur, because by doing so, it could charge all existing attachers (not just the attacher triggering the condition of full capacity and lost opportunity) an alternative (and if the utility had its way, higher "just compensation" rate).

Alternatively, Gulf Power appears to be taking the position that it does not need to actually *deny* access to a prospective attacher or to suffer *actual* unreimbursed expenditures in order to charge all existing attachers a higher "just compensation" rate. Gulf Power's position appears to be that it can deny access at its own unfettered discretion in lieu of accommodating a prospective attacher through the normal and customary fully-compensated make-ready process. Under Gulf Power's logic, Gulf Power's claim for a higher "just compensation" rate would be valid even if it was economically feasible and reasonable for Gulf Power to accommodate an additional attacher or even if Gulf Power had *in fact* made such an accommodation and been reimbursed for the cost caused by that attachment, because it theoretically could have denied access.

Q. WHAT CAN BE DONE TO PREVENT SUCH PERVERSE OUTCOMES FROM OCCURRING?

A. The only way to prevent Gulf Power from responding to such perverse incentives is to require that Gulf Power's demonstration of the conditions of full capacity and lost opportunity upon which the *APCo* test relies be based on objective, verifiable, and non-discriminatory standards. Full capacity should be defined to reflect the economic and practical realities of poles and be based on objective benchmarks that hold the power company accountable for industry best practices involving pole changeouts and rearrangements and the efficient use of all available pole capacity.

For example, the power company should be precluded from benefiting financially from visually observed "full" poles caused by code violations, inefficiencies, and/or other inferior pole practices that are inherently correctable, and whose correction results in

available capacity for additional attachments. For purposes of determining whether the *APCo* test is satisfied, *all* available pole capacity, including that normally accessible through routine maintenance, rearrangements, pole change-outs, and implementation of other efficient utilization "best practices," is appropriately taken into account. Because the power company can seek reimbursement from the new cable attacher for any cost directly attributed or caused by that attachment through make-ready, there is no material cost consequence to the utility in engaging in these normal and customary pole management practices.

With respect to the demonstration of lost opportunity, Gulf Power should be required to identify an actual buyer or use that has been excluded from the pole, for each pole for which Gulf Power seeks additional compensation, and to provide the kind of valid economic analyses described below in support of its claim.

Q. GIVEN THE STANDARDS YOU HAVE IDENTIFIED ABOVE, DO YOU FORESEE SITUATIONS WHERE GULF POWER CAN LEGITIMATELY SATSIFY THE DUAL CONDITIONS OF FULL CAPACITY AND LOST OPPORTUNITY ESTABLISHED IN *APCO*?

A. Yes. There are situations, albeit limited ones, in which Gulf Power can legitimately satisfy the dual conditions of full capacity and lost opportunity consistent with the economic reality standard inherent in *APCo* and on that basis seek additional compensation. (Again, for all other situations, Gulf Power is already receiving just compensation for use of its poles by cable companies via the FCC Cable Rate Formula and applicable make-ready charges). The situations in which Gulf Power could legitimately satisfy the dual conditions of full capacity and lost opportunity are those limited cases in which the utility can demonstrate both: (1) make-ready or pole change-

out is not possible for a given pole (again due to terrain, obstructions, or zoning restrictions) based on valid engineering considerations and adherence to industry best practices of pole utilization; *and* (2) that the utility has experienced a tangible lost opportunity as a result, in the form of actual foregone revenues or actual foreclosed opportunity for that pole based on valid economic analysis.

Q. CAN YOU BE SPECIFIC AS TO THE TYPE OF VALID ECONOMIC ANALYSIS THAT WOULD BE REQUIRED TO CREDIBLY SUPPORT A UTILITY'S CLAIM OF LOST OPPORTUNITY?

A. Yes. The type of economic analysis that would be required to support a utility's claim of lost opportunity is the kind of net present value analysis common in business case planning and the government franchise application review process. The required analysis would provide quantifiable and verifiable estimation of the differential between the revenues Gulf Power would have received from the presently attached cable company (who would necessarily have to be replaced by the new attachment to satisfy the full capacity prong of the *APCo* test) including rental rates and make-ready charges as compared with the revenues Gulf Power could reasonably expect to receive over some reasonable planning period (properly discounted to a present value basis) either from the new attacher or from a higher value use of its own. To be valid, the economic analysis demonstrating lost opportunity cannot be based on hypothetical assumptions. Rather, it must be based on real world factors and considerations that realistically compare the net revenue streams Gulf Power could reasonably expect to receive from the new attacher vis-à-vis the existing cable operator.

Q.CAN YOU PROVIDE EXAMPLES OF THE KIND OF REAL WORLD FACTORS AND CONSIDERATIONS THAT THE LOST OPPORTUNITY ANALYSIS WOULD PROPERLY INCORPORATE?

A. Yes. Such factors include, for example, whether the new attacher has been awarded a franchise to provide service, and if so, the length of its franchise as compared with the existing cable attacher; whether the new attacher has the technical, managerial, and financial resources to remain a viable going concern capable of paying applicable rental fees and maintaining its attachments up to code levels as compared with the existing cable attacher; and whether the new attacher would pay make-ready charges at the level of the existing cable company.

Indeed, it is within the realm of possibility, that a truly objective, realistic analysis of the net present value of revenues Gulf Power would receive from the existing cable attacher vis-à-vis those expected from the new attacher would show the former exceeding the latter - in which case, there would be no quantifiable lost opportunity. This highlights all the more reason why this type of analysis must be required.

Q.WHAT IS YOUR RESPONSE TO GULF POWER'S ASSERTIONS THAT THE EVIDENTIARY STANDARDS FOR DEMONSTRATING THE DUAL CONDITIONS OF FULL CAPACITY AND LOST OPPORTUNITY THAT ARE DELINEATED IN YOUR TESTIMONY AND IN YOUR DEPOSITION TESTIMONY ARE UNDULY BURDENSOME.

A.In making such an argument, Gulf Power ignores the fact that it is already receiving from Complainants "just compensation" in excess of marginal cost in the form of the FCC Cable Formula rates (Complainants are actually paying rental rates in excess of the FCC Cable Formula rate) and applicable make-ready charges. Under *APCo*, the utility is permitted to seek alternative just compensation in excess of marginal cost only in those instances where there is a verifiable lost opportunity. For the reasons described above,

the standards for Gulf Power's showing that I have delineated are no more than that required to ensure economically meaningful satisfaction of the *APCo* criteria.

Obviously, it is in Gulf Power's self-interest to be subject to the weakest of evidentiary standards and burden of proof requirements, and it is not surprising that the utility would take issue with the standards set forth in my testimony. However, from an objective standpoint, if the evidentiary standards to which Gulf Power is to be held are not tied to objective, verifiable, economically meaningful, and non-discriminatory standards, Gulf Power will be a position to exploit its monopoly ownership of the poles, charge inefficiently high rates, and mismanage its pole space in order to indiscriminately extract additional "value" from the attacher. The evidentiary requirements spelled out in this testimony and in my deposition testimony are economically and practically sound, and consistent with the "economic reality" standard for poles set forth in the *APCo* decision.

DETERMINATIONS ON A POLE-SPECIFIC BASIS ARE REQUIRED TO SATISFY THE ECONOMIC REALITY STANDARD INHERENT IN THE APCO TEST; STATISTICAL EXTRAPOLATIONS, BY DESIGN, AND ESPECIALLY AS PROPOSED BY GULF POWER, ARE FLAWED AND INADEQUATE.

Q. YOU DISCUSS ABOVE THE STANDARDS TO WHICH GULF POWER SHOULD BE HELD IN DEMONSTRATING FULL CAPACITY AND LOST OPPORTUNITY IN ORDER TO AVOID PERVERSE INCENTIVES AND UNECONOMIC OUTCOMES. ARE THERE OTHER STANDARDS TO WHICH GULF POWER'S DEMONSTRATION PURSUANT TO *APCO* SHOULD BE HELD?

A. Yes. As stated in the *APCo* decision, "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 either of two other conditions (i.e., another buyer waiting in the wings, or a higher-valued use by the power company) that would demonstrate an

actual lost opportunity occurred in conjunction with the first. As indicated by the italicized language in the above citation to *APCo*, the showing required by the Court is specified "*with regard to each pole.*" On a strictly empirical basis, to make such a showing will require data on individual poles be collected and examined.

Q. DOES THE *APCO* REQUIREMENT OF A POLE-BY-POLE SHOWING MAKE SENSE FROM AN ECONOMIC PERSPECTIVE?

A. Yes, it does. The crux of the *APCO* criteria lies in the "economic reality" of whether the utility has actual lost opportunity foreclosed. As discussed previously, it is hard to see how this economic reality standard could be demonstrated on the basis of hypothetical, generalized, or extrapolated data since operating conditions concerning pole capacity and foregone lost opportunity, will by their very nature, vary not only area to area, but pole to pole. Permits to attach to utility poles are applied for and granted on a pole-by-pole basis, and determinations as to the necessity and possibility of make-ready, rearrangements, and pole change-outs in order to accommodate pole attachments are made on a pole-to-pole basis.

Q. DOES GULF POWER SEEM ABLE TO PROVIDE THE INFORMATION NEEDED TO MAKE A POLE-BY-POLE DETERMINATION OF FULL CAPACITY AND LOST OPPORTUNITY AS REQUIRED UNDER *APCO*?

A. No. Gulf Power has not to date provided the kind of specific information required under *APCo* on a pole-specific basis and does not seem poised to be able to provide such information. By Gulf Power's own admission, it "does not track its future space needs on a pole by pole basis."[45] Gulf Power has not provided pole-specific information in response to Complainants' interrogatories seeking data on among other things: "the location and individual number of poles Gulf Power claims to be at 'full capacity,' as

well as the specific reason or reasons why Gulf Power so contends;" and "the number of Gulf Power poles that have been changed out to accommodate attachments of Complainants, the location of any alleged change-outs, the reasons for each change-out, and an identification of each instance in which Gulf claims it was not reimbursed for the costs of such a change-out." [46] Gulf Power has also "failed to identify a single specific instance in which it has advised an attacher, particularly Complainants, that it has actually demonstrated a bona fide need for space and then properly reserved space for its own operations."[47]

Gulf Power cannot legitimately prove there was an actual buyer waiting in the wings or higher-valued use of its own *excluded* from a pole due to lack of available space, if information on space needs and utilization is not tracked on a pole-by-pole basis. It would appear that Gulf Power is anticipating being able to rely on generalized assertions or extrapolations, neither of which in my opinion would be sufficient to satisfy the 'economic reality" standard of full capacity and lost opportunity established by the Court or to prevent Gulf Power from responding to perverse incentives.

Q. HAD GULF POWER ORIGINALLY REPRESENTED THAT IT WOULD BE PROVIDING INFORMATION ON A INDIVIDUAL POLE BASIS?

A. Yes. It is my understanding, based on information provided by Gulf Power earlier in this proceeding, that Gulf Power originally represented it would provide substantive information based on the Osmose audit for each of its 150,000 joint use poles.[48] It was

[45] See Gulf Response to Interrogatory No. 35.

[46] See Complainants Motion to Compel, dated July 11, 2005 at 11. See also Complainants Third Motion to Compel Production of Documents, Further Responses to Interrogatories, dated October 7, 2005, at 18.

[47] See also Complainants Third Motion to Compel Production of Documents, Further Responses to Interrogatories, at 20.

[48] See *Gulf Power's Final Report on Pole Survey*, October 31, 2005 at 1, which states: "Gulf Power's original goal, as set forth in the Osmose Statement of Work, was to conduct an audit of all 150,000 joint

not until Gulf Power's July 2005 Status Report on Pole Survey, did Gulf Power first mention the possibility that its survey might not encompass the entire population of joint use poles, although Gulf Power was not specific at that time. Citing generally to Hurricane Dennis, Gulf Power indicated that "the full survey may include data *with respect to less than* Gulf Power's entire service territory."[49] In the July Report, Gulf Power indicated that it had surveyed only 9,649 poles (representing only about 6% out of the total 150,000) joint use poles "on first pass," with all of those poles located in the Pensacola, Florida area. Although, the total number of poles identified to be surveyed according to the July Report was still listed as the full 150,000.[50]

In its August 29, 2005 Response to Complainant's Motion to Dismiss, Gulf Power was still maintaining its commitment to produce "unrefutable, pole-by-pole evidence of 'crowded' or 'full capacity' in the form of the Osmose Audit and the major build-out make-ready work orders."

It was not however until its Final Report on Pole Survey, dated October 31, 2005, did Gulf Power clarify the full extent to which it planned to rely on statistical extrapolations to make its case, even though, Gulf Power's decision to halt the surveying of poles was apparently made about five months prior. Gulf Power witness Tessieri revealed that the decision to halt the Osmose survey work was actually made sometime back in May, 2005, a couple of months prior to the July 10, 2005 landfall of Hurricane Dennis and the

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use poles." See also Gulf Power's Itemization of Evidence, August 31, 2005, and Gulf Power's Description of Evidence, January 8, 2004.

[49] *July Status Report*, at 2,*emphasis added.*

[50] *Id.* at 1.

issuance of the July Status Report which continued to represent the number of poles Gulf would survey as the full 150,000.[51]

In the October Report, Gulf Power indicated its plan to survey approximately 5,000+ additional poles, which would bring the total number of audited poles to 14,649, although this would appear to conflict with Gulf Power's decision the prior May to halt all survey work. In any case, the revised figure is less than 10% of the total population of 150,000 joint use poles - the number of poles that were originally supposed to be covered in the Osmose audit. Gulf Power did not identify where the additional 5,000 poles to be audited were located, only that "it may be as late as January 2006 before the work can be completed."[52] In addition, in the October Report, Gulf Power first presented a proposed methodology for extrapolating the results of its "first pass" of audits in the Pensacola area. Gulf Power simply took the percentage of poles (73.68%) purportedly found to be crowded in the "first pass" audit of 9,640 poles in Pensacola and applied that across-the-board to every joint use pole in its system.[53]

Both Gulf Power's methodology and the reasoning underlying that methodology are critically flawed.

Q. IN WHAT RESPECTS IS GULF POWER'S EXTRAPOLATION METHODOLOGY AND THE REASONING UNDERLYING THAT METHODOLOGY FLAWED?

A. First, inherent in any sampling or statistical extrapolation is the loss of precision or accuracy of results since one is necessarily relying on a subset of the population to

[51] See Deposition of David Tessieri, February 23, 2006, at 178-187, 182-184, and 270-281.

[52] *Gulf Power Final Report on Pole Survey*, October 31,2005, at 2.

represent that population. Only by performing a census of the entire population, can one avoid this type of loss of precision or accuracy. Of course, even in the case of a census, one cannot expect results to be 100% accurate due to measurement errors, but at least there is not the compounded imprecision due to sampling error.

Sampling error is the difference between the value of the sample statistic (for example, in this instance, the finding of 73.68% "crowded") and the population statistic (the true, but unknown percentage of "full capacity" poles). Sampling error exists for every sample, except in the special case where the sample is equal to the entire population. Generally speaking, the higher the level of precision needed, the larger the sample size required. Another rule of thumb is the more diverse the population, the larger the sample you will need to achieve a given level of statistical reliability. Where the population to be sampled is relatively heterogeneous (as is the case with poles), the precision of sample results can generally be improved by stratification of the sample into more uniform parts (e.g., distinct geographic or service areas). Moreover, to have a greater level of statistical "confidence" in your results, you have to be willing to accept a larger sampling error.

However, because the Eleventh Circuit test requires a showing "with regard to *each* pole," it does not appear that *any* measurable degree of statistical imprecision such as inherent to sampling would be acceptable. Statistical extrapolation, by its very design, cannot provide the "unrefutable, pole-by-pole evidence" initially promised by Gulf Power.

[53] *Id.*

The levels of imprecision and variability inherent in any given statistical extrapolation are quantifiable in statistical terms. By contrast, Gulf Power's Final Report offers only vague, qualitative language that is absolutely void of meaning from a statistical perspective:

According to Gulf Power:

> "This percentage [73.68%] is absolutely accurate for the 9,663 poles collected, highly accurate for Gulf Power's largest attacher (Cox), and reasonably accurate for the areas served by the other three Complainants (Comcast, Mediacom, and Brighthouse)."[54]

Gulf Power's assertions that the results of it limited survey are "highly accurate" and "reasonable accurate" are just that, assertions. These types of statements do not substantively address the statistical validity of Gulf Power's sampling methodology and/or the likelihood that the results of that sampling accurately represent the entire population of individual poles across Gulf Power's various serving areas and the varied population of attachers across those serving areas with a level of precision that would satisfy the *APCo* test. Gulf Power's sweeping extrapolation and generalizations fail to acknowledge the highly- localized differences in terrain, obstructions, zoning, and attaching entities across Gulf Power's various service areas.[55]

It is my understanding that the burden lies squarely with Gulf Power to provide compelling statistical evidence in support of the notion that an unstratified sampling of

[54] Gulf Power's Final Report on Pole Survey, at 2-3.

[55] See Summary Expert Report of Michael Harrelson for a discussion of the very individualized conditions extant on particular poles and in particular service areas.

some 9,600 poles in the "first pass" in the Pensacola area accurately represents, with a degree of accuracy and precision required to meet the *APCo* test showing, the conditions "with regard to each pole," for each of the roughly 140,000 unaudited poles across its various service areas. To date, no such statistical evidence has been provided.

Q.IS THERE A SECOND MAJOR PROBLEM CONCERNING GULF POWER'S STATISTICAL EXTRAPOLATIONS?

A. Yes. Perhaps even more important than the issue of the sampling imprecision of Gulf Power's statistical extrapolations is the critical flaw in the underlying design and measurement of what Gulf Power is sampling. The high percentage of "crowded" poles found by Osmose in the Pensacola area is strictly an artifact of the definition Gulf Power used for "crowded." As explained by expert witness for the Complainants Michael Harrelson, Gulf Power defines "'crowded' poles,' which it [wrongly in my opinion] equates with poles 'at full capacity,' in a very narrow and unrealistic way" by evaluating capacity "without looking at industry custom or even Gulf Power's own pole practices that govern construction and remediation of violations."[56]

As described, Gulf Power defined "crowded" or "full capacity" poles as any pole that could not accommodate an additional attachment without make-ready, or that had required make-ready to accommodate an additional attachment. Since it is common knowledge, and openly acknowledged by Gulf Power, that make-ready is routinely performed in connection with the accommodation of pole attachments, it is of no surprise that a large percentage of the sampled poles would meet this uneconomically sound definition of full capacity, if the condition of the pole's capacity was evaluated only on a

[56] See Summary Expert Report of Michael Harrelson, March 3, 2005.

static basis, at the snapshot moment just prior to the make-ready work that harnessed greater effective capacity and enabled Gulf Power to accommodate an additional attachment.

Similarly, given the nature and extent of code violations on Gulf Power's poles identified by Mr. Harrelson, it is of no surprise that a large percentage of the sampled poles would meet Gulf Power's flawed definition of full capacity if the condition of the pole's capacity was once again evaluated on a static basis, at the snapshot moment before needed corrections for code violations that would free up effective capacity were made.

Q. BASED ON THIS SECOND MAJOR FLAW, AND IGNORING FOR THE MOMENT THE OVERARCHING FLAW IN GULF POWER'S RELIANCE ON A LIMITED SAMPLE OF POLES, WHAT IS YOUR ASSESSMENT OF THE MEANING OF GULF POWER'S PURPORTED FINDING OF 73.68% CROWDED POLES?

A. By effectively counting all poles that either have had make-ready or are candidates for makeready, or that suffer from correctable code violations, Gulf Power's audit is in effect designed to identify the polar opposite of "full capacity." The 73.68% of poles identified by Gulf Power in the Pensacola area as being "crowded" are, in reality, poles for which effective capacity was made available to accommodate an additional attachment, or could be readily made available should a future request for attachment be forthcoming. By the economic reality standard established in *APCo*, the condition of these poles is inherently nonrivalrous and therefore cannot properly be classified as "full capacity" poles.

Thus, even if one accepted as an empirical matter (which I do not) the notion that statistical extrapolation of this kind provides sufficient precision and reliability to satisfy

the pole-by-pole showing required by *APCo*, because Gulf Power's extrapolation is based on a faulty definition of "full capacity," the results of the extrapolation are necessarily flawed.

In other words, even Gulf Power's extrapolation was found to be from "a meaningful sampling"[57] – which again, Gulf Power has presented is no evidence to suggest that is the case - the results of that extrapolation will not be meaningful if the underlying attribute (i.e., "full capacity") being measured is improperly defined, as is the case here.

THE REPLACEMENT COST METHODOLOGY AND RATE FORMULAS PROPOSED BY GULF POWER AS THE BASIS OF ALTERNATIVE "JUST COMPENSATION" HAVE NO RELATION TO THE FUNDAMENTAL ECONOMIC PRINCIPLES OF COST CAUSATION, THE PRACTICAL AND ECONOMIC REALITIES OF POLES, OR TO THE PURPORTED BASIS OF GULF POWER'S CLAIM IN THIS CASE, I.E., THE PER-POLE DEMONSTRATION OF FULL CAPACITY AND LOST OPPORTUNITY PURSUANT TO *APCO*.

Q. EARLIER IN THIS PROCEEDING, GULF POWER ADVANCED A NUMBER OF ALTERNATIVE VALUATION METHODS FOR CALCULATING A JUST COMPENSATION RATE. CAN YOU DESCRIBE THE METHODOLOGY GULF POWER HAS DECIDED TO ENDORSE FOR PURPOSES OF THIS PROCEEDING?

A. Yes. Earlier in this proceeding, Gulf Power identified a number of different possible valuation methods for calculating a just compensation rate, including the (1) sales comparison approach; (2) federal concessions leasing model; and (2) current replacement cost approach.[58] However, during the course of the proceeding, Gulf Power has apparently selected the replacement cost approach as its recommended methodology, and the only alternative just compensation rates provided by Gulf Power in this case are

[57] FCC, Memorandum Opinion and Order, dated October 12, 2005, at 4, note 3.

[58] See Gulf December 3, 2004 filing, "Preliminary Statement on Alternative Cost Methodology.

based upon that particular methodology. Moreover, Gulf Power's expert witness, Roger Spain, in endorsing Gulf Power's choice of valuation methodology, has gone so far as to present reasons why the other possible methodologies identified earlier by Gulf Power including the sales comparison or market approach and the income approach are impractical to apply in the case of valuing poles.[59]

Q. CAN YOU DESCRIBE THE BASIS OF MR. SPAIN'S ENDORSEMENT OF THE REPLACEMENT COST APPROACH IN THIS CASE?

A. Mr. Spain's endorsement of the replacement cost approach is first and foremost based on his assumption that "the appropriate standard of value is fair market value," which he defines as "the estimated amount, expressed in terms of money, that may reasonably be expected for a property in an exchange between a willing buyer and a willing seller, with equity to both, *neither under any compulsion to buy or sell*, and both fully aware of all relevant facts."[60] In Mr. Spain's opinion, "the replacement cost of an asset is an accepted starting point for determining the fair market value of equipment."[61] Beyond the very general reasons Mr. Spain provides in support of the replacement cost approach as a means of measuring the "fair market value" of poles, Mr. Spain provides no specific support for Gulf Power's particular replacement cost methodology and calculations.

[59] Summary Report of Roger Spain, March 3, 2006, at 5.
[60] *Id.* at 3, *emphasis added*.
[61] I*d.*

Q.DO YOU AGREE WITH MR. SPAIN THAT THE REPLACEMENT COST APPROACH IS AN ACCEPTABLE VALUATION METHOD FOR PURPOSES OF THIS CASE ?

A. No, I do not. The overarching assumption underlying Mr. Spain's support for the replacement cost method in this case is its purported compatibility with determining a "free market value" for pole space. I strongly disagree with Mr. Spain's underlying assumption of a "free market value" for poles, and consequently find his strongest rationale for supporting Gulf Power's replacement cost methodology to be invalid.

As previously recognized by the Commission and others, the concept of "free market value" and accordingly a replacement cost methodology designed to reflect that concept is not applicable with respect to pole attachments. As found by the Commission in its *APCo* opinion:

> However, the Supreme Court has concluded that where a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied. Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.[62]

One of the key reasons for the "particular unsuitability" of fair market value approaches is the asymmetric bargaining power possessed by the utility, as the monopoly owner of the poles, as compared to the cable company and other third party attachers, as lessees. As discussed in earlier sections of this testimony, cable operators and utilities are not in an equal position to "bargain" over rents. Utilities are owners, whereas cable operators

[62] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12209 (2001) at ¶ 53.

are mere lessees and lack rights of ownership, planning, and control. Plain and simply, there is no "free market" for pole space. Conditions required for open or fair market valuations do not therefore exist.

Given the unequal bargaining power that the utility company can bring to bear, any claim that third party attachers have "freely negotiated" with the utility or that neither buyer or seller is "under any compulsion to buy or sell" (from the definition of free market value presented by Mr. Spain) is not valid. The Commission reached this finding in its *APCo* opinion:

> Despite Respondent's and other utilities' arguments to the contrary, there is no non-monopoly market in pole attachments. There are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments.[63]

While Gulf Power cites to higher rates paid by other attachers as evidence of a free market for pole space, such rates are not valid proxies for free market value. It is not at all unusual for firms early in their life cycles to accept high rates for access to essential facilities, even though those rates may not be sustainable in the long run, in order to gain entry and establish a foothold in a market. However, such transactions, which are consummated "under compulsion to buy" cannot be relied on as representative free market benchmarks.

Similarly, the higher rental rates embodied in various joint owner agreements between electric and telephone utilities are not representative of "free market" benchmarks either, because of the variable and non-replicable terms and conditions surrounding ownership

[63] *Id*., at ¶55.

rights, planning and control oversight, and emphasis on parity. Notwithstanding the additional benefits enjoyed by joint owners, it would appear however that the joint use agreements between Gulf Power and telecommunications carriers such as BellSouth and Sprint, actually provide for lower rates after normalization for the greater space requirements of the telecom provider than the replacement cost "just compensation" rates for cable attachers proposed by Gulf Power.[64]

Two other rationales related to the concept of fair market value are identified by Mr. Spain in support of Gulf Power's replacement cost methodology. The first is the asserted need to reflect the value of the utility's pole space as part of a larger elevated corridor or distribution system. However, as discussed earlier in this testimony in the discussion of ownership rights unilaterally enjoyed by the utility, the issue of corridor value is another utility argument that the Commission previously considered and rejected for a number of solid reasons.[65] As found by the Commission, under the terms and conditions of utility pole attachment agreements, the value of the integrated elevated corridor is not conveyed to the attacher, it is retained by the utility as owner of the pole network.

The second related rationale suggested by Mr. Spain is the asserted need to reflect the risk responsibility that falls to the owner of the pole network. The fallacy of this argument was also discussed earlier in my testimony, where the following key points in rebuttal were made: poles are very long-lived and the bulk of the poles that are the subject of Gulf Power's claim are already in service; a large percentage of the utility's poles are co-owned with the telephone company; poles and the obligation to maintain,

[64] See Deposition of Rex Brooks, September 16, 2005, at 18-22.

[65] See *Alabama Cable Television Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209 (2001) at ¶57.

repair, and replace them into perpetuity have been allowed into Gulf Power's rate base and subject to full cost recovery from the electric ratepayers for whom the pole network was built to serve; and finally, any costs that would not be incurred but for third party attachers are directly reimbursable to the utility through the charging of make-ready.

Q. IN ADDITION TO YOUR FUNDAMENTAL DISAGREEMENT WITH MR. SPAIN CONCERNING THE GENERAL APPLICABILITY OF A "FREE MARKET VALUE" TO POLES, ARE THERE OTHER REASONS WHY YOU BELIEVE GULF POWER'S PROPOSED REPLACEMENT COST METHOD IS INAPPROPRIATE AS A BASIS FOR A JUST COMPENSATION RATE.

A. Yes, as discussed at length in my deposition testimony,[66] there are many compelling reasons, given the practical and economic realities of poles, why the replacement cost approach is not appropriate as a means of valuing the use of a utility's pole space for just compensation purposes. The replacement cost method is inappropriate from the broad perspective of the utility pole network as a whole, from the more narrow perspective of the individual pole, and most decidedly, from the perspective of satisfying the economic reality standard established in *APCo*.

Q. COULD YOU FIRST ADDRESS THE INAPPROPRIATENESS OF USING A REPLACEMENT COST METHODOLOGY FROM THE BROAD PERSPECTIVE OF THE UTILITY NETWORK AS A WHOLE.

A. There are many reasons why the typical arguments advanced in support of replacement costs generally are not applicable to the pricing of a utility's pole network. As the Commission has heard these reasons on many occasions, I will highlight only a few key ones. Related to the absence of a free functioning competitive market for poles, there is no need for economic "cues" from reproduction cost-based prices to guide optimal pole investment. Poles are extremely long-lived assets with little ongoing

[66] Deposition of Patricia Kravtin at 107-116.

investment in technology. Pole investment and placement decisions are driven by the needs of the pole owner, not those leasing space on the pole, and the costs of those investment and placement decisions are recoverable through rates for the utility's core regulated electric service. Electric utilities have not been deterred from investing in the optimal amount of pole plant of the height, type and class they deem optimal for their own operational needs, and cable operators have not over-consumed pole space as they would be required to pay for any over-consumption of pole space in the form of make-ready costs.

As discussed earlier in this testimony, and as found by the Commission, from a practical perspective, pole systems cannot be reproduced due to zoning, environmental, financial, and other constraints.[67] It therefore makes little economic sense to use replacement costs as a proxy for an attacher's hypothetical stand-alone network since such a network practically cannot get built. Similarly, there is no need to use replacement costs as a proxy for the hypothetical avoided cost of an attacher going underground, which is typically much more expensive than the cost of pole attachment. Because there no competitive market for poles, there is no market process in action to drive the down costs of pole construction or any potential alternatives such as going underground to competitive levels. As mentioned earlier, allowing the utility to base its rental charge on its own higher, hypothetical pole replacement cost or on the hypothetical avoided cost to the attacher of stand-alone pole construction or underground installation, serves no purpose other than to permit the utility to exploit its monopoly ownership of the poles

[67] See *Alabama Cable Television Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209 (2001),at ¶57.

and to extract additional "value" from the attacher well in excess of the efficient or actual cost of the pole attachment.

Q. COULD YOU NEXT ADDRESS THE INAPPROPRIATENESS OF USING A REPLACEMENT COST METHODOLOGY FROM THE MORE NARROW PERSPECTIVE OF THE INDIVIDUAL POLE.

A. Yes. The use of a replacement methodology for pole rental rates does not make economic sense at the individual pole level either. As noted earlier, the majority of poles are not being replaced in any given year and enjoy long economic lives. For these poles, replacement costs are not relevant. For the relatively small percentage of poles that are replaced, for the ones that are being replaced by the electric company to serve their core electric utility service, costs are recoverable through regulated rates for those customers. For the poles that would not be replaced but for third party attachers, the costs are recoverable through make-ready charges, set unilaterally by the utility. If the third party attacher refuses to pay the make-ready as unilaterally determined by the utility, the pole is not replaced.[68] In effect, make-ready charges are replacement costs applied at the individual pole level, so there is no efficiency gain in building in replacement costs in the rental formula. There is only duplication of cost recovery and extraction of monopoly rents, in violation of the principles of cost causation embodied in Section 224.

[68]There are a variety of reasons why a potential attacher might refuse to pay makeready, including, an excessively high cost set by Gulf, or a change in the attacher's business plan. In any case, if the attacher refuses to pay make-ready, that attacher is not an actual "bidding firm" for purposes of demonstrating a tangible lost opportunity pursuant to *APCo*.

Q. FINALLY, COULD YOU ADDRESS THE INAPPROPRIATENESS OF USING A REPLACEMENT COST METHODOLOGY IIN THE CONTEXT OF THE ECONOMIC REALTITY STANDARD OF FULL CAPACITY AND LOST OPPORTUNITY ESTABLISHED IN *APCO*.

A. Yes. First, as a threshold matter, as has been made clear in the deposition testimony and expert testimony of Gulf Power witnesses, Gulf Power's use of replacement costs centers around Gulf Power's desire to extract more *value* from cable attachers. At numerous times throughout the course of this proceeding, Gulf Power and its witnesses have alluded to the value of replacement, the value of the hypothetical stand-alone construction of a pole network or the avoided cost of going underground, the value of exclusion, the value of the elevated corridor, and the "fair market value" (which where no free market exists effectively degenerates into extraction of value from the consumer). For example, according to Gulf Power witness Terry Davis:

> I see the value to the cable company to be represented by replacement cost, because that is a reflection –a representation of what it would cost the cable company to go out and put up poles themselves; so there is a value to them.[69]

By contrast, the economic reality standard established in *APCo*, has nothing to do with *value* to the taker. Indeed, it is quite the opposite. As noted previously, the legal principle guiding *APCo* is that in a taking, just compensation is based on loss to the owner, not value to the taker. In this context, Gulf Power's proposed use of replacement costs for purposes of a claim for additional just compensation is totally off the mark, since its orientation is extraction of value from cable companies as pole attachment customers, versus quantification of actual loss to Gulf Power as the pole owner.

[69] Deposition of Terry Davis , November 18, 2005, at 125.

Moreover, under the terms of *APCo*, the only time when a claim for additional compensation relative to the regulated rate can be made by a utility is in the case where it can demonstrate both full capacity and lost opportunity for a given pole. As discussed in the prior answer, Gulf Power's proposed replacement costs have no relevant economic connection to the fundamental conditions of supply present on an individual pole.

As previously stated, the only poles for which Gulf Power could even arguably seek a rate based on a new pole replacement cost pursuant to the *APCo* criteria which requires a showing of both full capacity and lost opportunity would be poles that would not have been replaced *but for* an additional attachment and as to which costs Gulf Power had not already been reimbursed through make-ready charges or rental rates paid by the additional attacher. Gulf Power's replacement cost analysis contains no calculations of this sort. Gulf's analysis contains no new elements specific to the *APCo* criteria of full capacity and lost opportunity.

Rather, Gulf Power's replacement cost analysis is essentially a reincarnation of the hypothetical "replacement" costs soundly rejected by the Commission and Courts in the past. As found by the Commission in the case of *Alabama Cable Telecommunications Ass'n*:

> "Respondent was unable to offer a reasonable proposal for implementing this methodology [replacement cost less depreciation], opting instead for a permutation of the Commission's formula, manipulating the various elements to result in a higher rate. Although Respondent argues that the replacement cost appraisal methodology will result in higher pole attachment rates, this theory is not supported by Respondent's calculations. Many of the changes in methodology that Respondent incorporates in its calculations,

> such as the amount of space occupied, the average number of attaching entities, pole height presumptions…and other increased expenses are not related to a replacement cost methodology."[70]

As described in the cited text above, Gulf Power's replacement cost calculations are more accurately described as another attempt to manipulate the existing FCC formula methodology using previously proposed adjustments to produce a higher rate result than as a meaningful response to the *APCo* criteria. Many features of Gulf Power's replacement cost methodologies presented in this case have been previously considered and rejected by the Commission in the past for being rate driven as opposed to cost-based.

These features include the use of current-year replacement pole investment cost, inclusion of investment accounts "specific to the electric utility's core business services and not related to the general cost of pole plant," and unsupported allocations of unusable space. These types of adjustments were previously discussed in the section of my testimony addressing the FCC Cable Formula rate and shown to be inconsistent with the principles of cost causation embodied in Section 224 of the Communications Act and reflected in the FCC Cable Formula for pole attachments.

[70] See *Alabama Cable Television Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209 (2001), at ¶58.

CONCLUSION

Q. DO YOU HAVE ANY BRIEF CONCLUDING REMARKS TO MAKE AT THIS TIME?

A. The FCC Cable Formula Rate, which together with make-ready charges, exceeds the marginal cost of pole attachment, and provides just compensation to Gulf Power for the use of its pole space by third party attachers. Notwithstanding this "known fact," the Eleventh Circuit court in its *APCo* decision established a two-prong criteria by which utilities, such as Gulf Power, can seek alternative just compensation relative to the regulated rate. Under the *APCo* criteria, any reimbursement over and above marginal cost must be tied to a showing of *both* full capacity and lost opportunity on an individual pole basis.

Unless Gulf Power's showing in this case is held to objective, verifiable, economically meaningful, and non-discriminatory standards as described in this testimony and in my deposition testimony, Gulf Power will be a position to exploit its monopoly ownership of the poles, charge inefficiently high rates, and mismanage its pole space in order to indiscriminately extract additional "value" from the attacher. Gulf Power's replacement cost methodology and the proposed "just compensation" rates derived using that methodology reflect Gulf Power's attempt to do the latter and should be rejected as totally inconsistent with the economic reality standard of full capacity and lost opportunity established in *APCo*.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes, it does.

Attachment 1

Patricia D. Kravtin

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Summary

Consulting economist with specialization in telecommunications, cable, and energy markets. Extensive knowledge of complex economic, policy and technical issues facing incumbents, new entrants, regulators, investors, and consumers in rapidly changing telecommunications, cable, and energy markets. Oriented toward competitive, open-market strategies that carefully balance interests of major stakeholders.

Experience

CONSULTING ECONOMIST

2000–Present Independent Consulting Swampscott, MA

- Providing expert witness services and full range of economic, policy, and technical advisory services in the telecommunications, cable, and energy fields.

SENIOR VICE PRESIDENT/SENIOR ECONOMIST

1982–2000 Economics and Technology, Inc. Boston, MA

- Active participant in regulatory proceedings in over thirty state jurisdictions, before the Federal Communications Commission, Federal Energy Regulatory Commission, and other international regulatory authorities on telecommunications, cable, and energy matters.

- Provided expert witness and technical advisory services in connection with litigation and arbitration proceedings before state and federal regulatory agencies, and before U.S. district court, on behalf of diverse set of pubic and private sector clients (see Record of Prior Testimony).

- Extensive cable television regulation expertise in connection with implementation of the Cable Act of 1992 and the Telecommunications Act of 1996 by the Federal Communications Commission and local franchising authorities.

- Led analysis of wide range of issues related to: rates and rate policies; cost methodologies and allocations; productivity; cost benchmarking; business case studies for entry into cable, telephony, and broadband markets; development of competition; electric industry restructuring; incentive or performance based regulation; universal service; access charges; deployment of advanced services and broadband technologies;

and access to pole attachments and other rights-of-way.

- Served as advisor to state regulatory agencies, assisting in negotiations with utilities, non-partial review of record evidence, deliberations and drafting of final decisions.

- Author of numerous industry reports and papers on topics including market structure and competition, alternative forms of regulation, patterns of investment, telecommunications modernization, and broadband deployment (see listing of Reports and Studies).

- Invited speaker before various national organizations, state legislative committees and participant in industry symposiums.

RESEARCH/POLICY ANALYST

1978–1980 Various Federal Agencies Washington, DC

- Prepared economic impact analyses related to allocation of frequency spectrum (Federal Communications Commission).

- Performed financial and statistical analysis of the effect of securities regulations on the acquisition of high-technology firms (Securities and Exchange Commission).

- Prepared analyses and recommendations on national economic policy issues including capital recovery. (U.S. Dept. of Commerce).

Education

1980–1982 Massachusetts Institute of Technology Boston, MA

- Graduate Study in the Ph.D. program in Economics (Abd). General Examinations passed in fields of Government Regulation of Industry, Industrial Organization, and Urban and Regional Economics.

- National Science Foundation Fellow.

1976–1980 George Washington University Washington, DC

- B.A. with Distinction in Economics.

- Phi Beta Kappa, Omicron Delta Epsilon in recognition of high scholastic achievement in field of Economics. Recipient of four-year honor scholarship.

Prof. Affiliation

American Economic Association

Reports and Studies
(authored and co-authored)

"Report on the Financial Viability of the Proposed Greenfield Overbuild in the City of Lincoln, California," prepared for Starstream Communications, August 12, 2003.

"Assessing SBC/Pacific's Progress in Eliminating Barriers to Entry, The Local Market in California is Not Yet 'Fully and Irreversibly Open," prepared for the California Association of Competitive Telecommunications Companies (CALTEL), August 2000.

"Final Report on the Qualifications of Wide Open West-Texas, LLC For a Cable Television Franchise in the City of Dallas," prepared for the City of Dallas, July 31, 2000.

"Final Report on the Qualifications of Western Integrated Networks of Texas Operating L.P. For a Cable Television Franchise in the City of Dallas," prepared for the City of Dallas, July 31, 2000.

"Price Cap Plan for USWC: Establishing Appropriate Price and Service Quality Incentives in Utah" prepared for The Division of Public Utilities, March, 2000.

"Building a Broadband America: The Competitive Keys to the Future of the Internet," prepared for The Competitive Broadband Coalition, May 1999.

"Broken Promises: A Review of Bell Atlantic-Pennsylvania's Performance Under Chapter 30," prepared for AT&T and MCI Telecommunications, June 1998.

"Analysis of Opportunities for Cross Subsidies Between GTA and GTA Cellular," prepared for Guam Cellular and Paging, submitted to the Guam Public Utilities Commission, July 11, 1997.

"Reply to Incumbent LEC Claims to Special Revenue Recovery Mechanisms," submitted in the Matter of Access Charge Reform in CC Docket 96-262, February 14, 1997.

"Assessing Incumbent LEC Claims to Special Revenue Recovery Mechanisms: Revenue opportunities, market assessments, and further empirical analysis of the 'Gap' between embedded and forward-looking costs," submitted in CC Docket 96-262, January 29, 1997.

"Analysis of Incumbent LEC Embedded Investment: An Empirical Perspective on the 'Gap' between Historical Costs and Forward-looking TSLRIC," Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, submitted in FCC CC Docket 96-98, May 30, 1996.

"Reply to X-Factor Proposals for the FCC Long-Term LEC Price Cap Plan," prepared for the Ad Hoc Telecommunications User Committee, submitted in FCC CC Docket 94-1, March 1, 1996.

"Establishing the X-Factor for the FCC Long-Terms LEC Price Cap Plan," prepared for the Ad Hoc Telecommunications User Committee, submitted in FCC CC Docket 94-1, December 1995.

"The Economic Viability of Stentor's 'Beacon Initiative,' exploring the extent of its financial dependency upon revenues from services in the Utility Segment," prepared for Unitel, submitted as evidence before the Canadian Radio-television and Telecommunications Commission, March 1995.

"Fostering a Competitive Local Exchange Market in New Jersey: Blueprint for Development of a Fair Playing Field," prepared for the New Jersey Cable Television Association, January 1995.

"The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers," February 1994.

"A Note on Facilitating Local Exchange Competition," prepared for E.P.G., November 1991.

"Testing for Effective Competition in the Local Exchange," prepared for the E.P.G., October 1991.

"A Public Good/Private Good Framework for Identifying Pots Objectives for the Public Switched Network" prepared for the National Regulatory Research Institute, October 1991.

"Report on the Status of Telecommunications Regulation, Legislation, and modernization in the states of Arkansas, Kansas, Missouri, Nebraska, Oklahoma and Texas," prepared for the Mid-America Cable-TV Association, December 13, 1990.

"The U S Telecommunications Infrastructure and Economic Development," presented at the 18th Annual Telecommunications Policy Research Conference, Airlie, Virginia, October 1990.

"An Analysis of Outside Plant Provisioning and Utilization Practices of US West Communications in the State of Washington," prepared for the Washington Utilities and Transportation Commission, March 1990.

"Sustainability of Competition in Light of New Technologies," presented at the Twentieth Annual Williamsburg Conference of the Institute of Public Utilities, Williamsburg, Virginia, December 1988.

"Telecommunications Modernization: Who Pays?," prepared for the National Regulatory Research Institute, September 1988.

"Industry Structure and Competition in Telecommunications Markets: An Empirical Analysis," presented at the Seventh International Conference of the International Telecommunications Society at MIT, July 1988.

"Market Structure and Competition in the Michigan Telecommunications Industry," prepared for the Michigan Divestiture Research Fund Board, April 1988.

"Impact of Interstate Switched Access Charges on Information Service Providers - Analysis of Initial Comments," submitted in FCC CC Docket No. 87-215, October 26, 1987.

"An Economic Analysis of the Impact of Interstate Switched Access Charge Treatment on Information Service Providers," submitted in FCC CC Docket No. 87-215, September 24, 1987.

"Regulation and Technological Change: Assessment of the Nature and Extent of Competition From A Natural Industry Structure Perspective and Implications for Regulatory Policy Options," prepared for the State of New York in collaboration with the City of New York, February 1987.

"BOC Market Power and MFJ Restrictions: A Critical Analysis of the 'Competitive Market' Assumption," submitted to the Department of Justice, July 1986.

"Long-Run Regulation of AT&T: A Key Element of a Competitive Telecommunications Policy," *Telematics*, August 1984.

"Economic and Policy Considerations Supporting Continued Regulation of AT&T," submitted in FCC CC Docket No. 83-1147, June 1984.

Record of Prior Testimony

2005

Before the United States District Court for the Eastern District of New York, *Coastal Communication Service, Inc. and Telebeam Telecommunications Corporation, Plaintiffs - against –The City of New York and New York City Department of Information Technology and Telecommunications*, 02 Civ. 2300 (RJD) (SMG), Expert Report, filed February 4, 2005; Rebuttal Expert Report, filed August 29, 2005, Deposition December 1, 2005.

2004

In the Matter of the Ontario Energy Board Act 1998, S.O.1998, c.15, (Schedule B); and *In the Matter of an Application pursuant to section 74 of the Ontario Energy Board Act,* 1998 by the Canadian Cable Television Association for an Order or Orders to amend the licenses of electricity distributors, RP-2003-024, Reply Evidence, filed September 27, 2004 (jointly with Paul Glist), Cross-examination October 26-27, 2004.

2003

Before the **United States District Court for the Southern District of California,** *Level 3 Communications, LLC v. City of Santee,* Civil Action No. 02-CV-1193, Rebuttal Expert Report, filed July 18, 2003.

2002

Before the **New York State Public Service Commission**, *In the Matter of the Cable Television & Telecommunications Association of New York, Inc., Petitioner, v. Verizon New York, Inc., Respondent,* Affidavit filed December 19, 2002.

Before the **West Virginia Public Service Commission**, Community Antenna Service, Inc. v. Charter Communications, Case No. 01-0646-CTV-C, Live Direct Testimony and Cross-examination, June 12, 2002.

Before the **Public Service Commission of the District of Columbia,** Comcast Cablevision of the District, L.L.C., Complainant, v. Verizon Communications Inc. – Washington, D.C., Respondent, Formal Case No. 1006, Direct Testimony filed June 11, 2002; Rebuttal Testimony filed June 24, 2002.

Before the **Federal Communications Commission,** in *Cavalier Telephone, LLC, Complainant, v. Virginia Electric & Power Co., D/b/a Dominion Virginia Power, Respondent*, Case No. EB-02-MD-005, Declaration filed May 21, 2002.

Before the **Puerto Rico Telecommunications Regulatory Board**, in *Re: Petition of Centennial Puerto Rico License Corp. for arbitration pursuant to Sections 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Puerto Rico Telephone Company*, on behalf of Centennial Puerto Rico License Corp., Direct Testimony filed April 16, 2002; Deposition May 7, 2002, May 14, 2002; Reply Testimony filed May 20, 2002, Cross-examination May 22, 2002.

Before the **Federal Energy Regulatory Commission**, *in Re: In the Matter of* ***Transcontinental Gas Pipe Line Corporation***, Docket No. RP01-245, on behalf of the University of Maryland-College Park, Johns Hopkins University and Johns Hopkins University Health System, and the North Carolina Utilities Commission, Cross-answering Testimony filed January 23, 2002; Rebuttal Testimony filed May 31, 2002, Cross-examination July 31, 2002.

2001

Before the **United States District Court for the Northern District of New York**, *TC Systems, Inc. and Teleport Communications-New York vs. Town of Colonie, New York*, Civil Action No. 00-CV-1972, Expert Report, filed November 16, 2001; Rebuttal Expert Report, filed December 20, 2001.

Before the **Federal Energy Regulatory Commission**, *in Re: In the Matter of* ***Transcontinental Gas Pipe Line Corporation***, Docket No. RP01-245, on behalf of the University of Maryland-College Park, Johns Hopkins University and Johns Hopkins University Health System, and the North Carolina Utilities Commission, filed November 15, 2001.

Before the **Public Service Commission of the District of Columbia,** Comcast Cable Communications, Inc. d/b/a/Comcast Cable of Washington, D.C., Complainant, v. Verizon Communications Inc. – Washington, D.C., Respondent, filed September 21, 2001.

Before the **Public Utility Commission of Texas**, State Office of Administrative Hearings, SOAH Docket No. 473-00-1014, PUC Docket No. 22349, *Application of Texas-New Mexico Power Company for Approval of Unbundled Cost of Service Rate Pursuant to PURA § 39.201and Public Utility Commission Substantive Rule §25.344*, on behalf of Cities Served by Texas-New Mexico Power, filed January 25, 2001.

2000

Before the **Puerto Rico Telecommunications Regulatory Board**, in *AT&T of Puerto Rico, Inc. et al v. Puerto Rico Telephone Company, Inc.,Re: Dialing Parity,* Docket Nos. 97-Q-0008, 98-Q-0002, on behalf of Lambda Communications Inc., cross-examination October 19-20, 2000.

Before the **Department of Telecommunications and Energy of the Commonwealth of Massachusetts**, Docket No. DTE 98-57 – Phase III, *Re: Bell Atlantic- Massachusetts Tariff No. 17 Digital Subscriber Line Compliance Filing and Line Sharing Filing,* (Panel Testimony with Joseph Riolo, Robert Williams, and Michael Clancy) on behalf of Rhythms Links Inc. and Covad Communications Company, filed July 10, 2000.

Before the **New York State Public Service Commission** in *Re: Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements* on behalf of the Cable Television & Telecommunications Association of New York, Inc., Direct Testimony filed June 26, 2000, Supplemental Testimony filed November 29, 2000.

Before the **Maryland Public Service Commission**, on behalf of Rhythms Links Inc. and Covad Communications Company, filed jointly with Terry L. Murray and Richard Cabe, May 5, 2000.

Before the **Public Utility Commission of Texas**, in *Re: Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996,* CC Docket No. 21982, on behalf of AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc., filed March 31, 2000.

Before the **Federal Communications Commission**, in *Re: In the Matter of Price Caps Performance Review for Local Exchange Carriers, Access Charge Reform*, CC Dockets 94-1, 96-262, on behalf of Ad Hoc Telecommunications Users Committee, filed January 24, 2000.

Before the **Federal Energy Regulatory Commission**, in *Re: In the Matter of Northern Border Pipeline Company*, on behalf of the Canadian Association of Petroleum Producers and the Alberta Department of Resource Development, filed January 20, 2000.

1999

Before the **Connecticut Department of Public Utilities**, in *Re: Evaluation and Application to Modify Franchise Agreement by SBC Communications Inc., Southern New England telecommunications Corporation and SNET Personal Vision, Inc.*, Docket No. 99-04-02, on behalf of the Office of Consumer Counsel, filed June 22, 1999; cross- examination July 8, 1999

Before the **Illinois Commerce Commission**, in *Re: Illinois Commerce Commission on its own Motion v. Illinois Bell Telephone Company; et al: Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of the Incumbent Local Exchange Carriers in Illinois, Illinois Commerce Commission on its own Motion Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future, Illinois Commerce Commission on its own motion Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company*, Docket No. 97-00601, 97-0602, 97-0516, Consolidated, on behalf of City of Chicago, filed January 4, 1999; rebuttal February 17, 1999.

Before the **Puerto Rico Telecommunications Regulatory Board**, in *Re: In the Matter of Arbitration of Interconnection Rates, Terms and Conditions between Centennial Wireless PCS Operations Corp., Lambda Communications Inc., and the Puerto Rico Telephone Company*, behalf of Centennial Wireless PCS Operations Corp. and Lambda Communications Inc., cross-examination February 16, 1999.

1998

Before the **California Public Utilities Commission**, in *Re: In the Matter of the Application of Pacific Bell (U 1001 C), a Corporation, for Authority for Pricing Flexibility and to Increase Prices of Certain Operator Services, to Reduce the Number of Monthly Assistance Call Allowances, and Adjust Prices for Four Centrex Optional Features*, Application No. 98-05-038, on behalf of County of Los Angeles, filed November 17, 1998, cross-examination, December 9, 1998.

Before the **Puerto Rico Telecommunications Regulatory Board**, in *Re: In the Matter of PRTC's Tariff K-2 (Intra-island access charges)*, Docket no. 97-Q-0001, 97-Q-0003, on behalf of Lambda Communications, Inc., filed October 9, 1998, cross-examination October 9, 1998.

Before the **Connecticut Department of Public Utility Control**, in *Re: Application of the Southern New England Telephone Company*, Docket no. 98-04-03, on behalf of the Connecticut Office of Consumer Counsel, filed August 17, 1998, cross-examination February 18, 1999.

Before the **California Public Utilities Commission**, in *Re: Pacific Gas & Electric General Rate Case*, A.97-12-020, on behalf of Office of Rate Payers Advocates CA PUC, filed June 8, 1998.

1997

Before the **South Carolina Public Service Commission**, in *Re: Proceeding to Review BellSouth Telecommunications, Inc.□□ Cost for Unbundled Network Elements*, Docket no. 97-374-C, on behalf of the South Carolina Cable Television Association, filed November 17, 1997.

Before the **State Corporation Commission of Kansas**, in *Re: In the Matter of and Investigation to Determine whether the Exemption from Interconnection Granted by 47 U.S.C. 251(f) should be Terminated in the Dighton, Ellis, Wakeeney, and Hill City Exchanges*, Docket No. 98-GIMT-162-MIS, on behalf of classic Telephone, Inc., filed October 23, 1997.

Before the **Georgia Public Services Commission,** in *Re: Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Docket No. 7061-U, on behalf of the Cable Television Association of Georgia, filed August 29, 1997, cross-examination September 19, 1997.

Before the **Federal Communications Commission**, in *Re: In the Matter of Price Caps Performance Review for Local Exchange Carriers, Access Charge Reform*, CC Dockets 94-1, 96-262, on behalf of Ad Hoc Telecommunications Users Committee, filed July 11, 1997.

Before the **Federal Communications Commission**, in *Re: In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket 97-98, on behalf of NCTA, filed June 27, 1997.

Before the **Public Utilities Commission of the State of California**, in *Re: Rulemaking on the Commission□□ Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R.93-04-003, I.93-04-002AT&T, filed March 19, 1997, reply April 7, 1997.

Before the **Puerto Rico Telecommunications Regulatory Board**, in *Re: In the Matter of Centennial Petition for Arbitration with PRTC*, on behalf of Centennial Cellular Corporation, filed February 14, 1997, supplemental March 10, 1997.

Before the **Federal Communications Commission**, in *Re: In the Matter of Access Charge Reform*, CC Docket 96-262, on behalf of AT&T, filed January 29, 1997, reply February 14, 1997.

1996

Before the **New Jersey Board of Public Utilities**, in *Re: In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, TX95120631, on behalf of New Jersey Cable Television Association, filed on August 30, 1996, reply September 9, 1997, October 20, 1997, cross-examination September 12, 1996, December 20, 1996.

Before the **State Corporation Commission of the State of Kansas**, in *Re: In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*, 190, 492-U 94-GIMT-478-GIT, on behalf of Kansas Cable Telecommunications Association, Inc., filed July 15, 1996, cross-examination August 14, 1996.

Before the **Federal Communications Commission**, in *Re: Price Caps Performance Review for Local Exchange Carriers*, CC Docket 94-1, on behalf of Ad Hoc Telecommunications Users Committee, filed July 12, 1996.

Before the **State Corporation Commission of the State of Kansas**, in *Re: In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*, 190, 492-U 94-GIMT-478-GIT, on behalf of Kansas Cable Telecommunications Association, Inc., filed June 14, 1996, cross-examination August 14, 1996.

Before the **Federal Communications Commission**, in *Re: In the Matter of Implementation of the Local Competition Provisions of Telecommunications Act of 1996*, CC Docket 96-98, filed May 1996.

Before the **Federal Communications Commission**, in *Re: Puerto Rico Telephone Company (Tariff FCC No, 1)*, Transmittal No. 1, on behalf of Centennial Cellular Corp., filed April 29, 1996.

Before the **United States District Court for the Eastern District of Tennessee at Greeneville**, in *Re: Richard R. Land, Individually and d/b/a The Outer Shell, and on behalf of all others similarly situated, Plaintiffs, vs. United Telephone-Southeast, Inc., Defendant*, CIV 2-93-55, filed December 7, 1996.

1995

Before the **Federal Communications Commission**, in *Re: Bentleyville Telephone Company Petition and Waiver of Sections 63.54 and 63.55 of the Commission□s Rules and Application for Authority to Construct and Operate, Cable Television Facilities in its Telephone Service Area*, W-P-C-6817, on behalf of the Helicon Group, L.P. d/b/a Helicon Cablevision, filed November 2, 1995.

Before the **US District Court of Tennessee**, in *Re: Richard R. Land, Individually and d/b/a The Outer Shell, and on behalf of all others similarly situated, Plaintiffs, vs. United Telephone-Southeast, Inc., Defendant*, 2-93-55, Class Action, filed June 12, 1995.

Before the **Connecticut Department of Public Utility Control**, in *Re: Application of SNET Company for approval to trial video dial tone transport and switching*, 95-03-10, on behalf of New England Cable TV Association, filed May 8, 1995, cross-examination May 12, 1995.

Before **Canadian Radio-Television and Telecommunications Commission**, in *Re: CRTC Order in Council 1994-1689*, Public Notice CRTC 1994-130 (Information Highway), filed March 10, 1995.

Before the **Federal Communications Commission**, in *Re: GTE Hawaii□s Section 214 Application to provide Video Dialtone in Honolulu, Hawaii*, W-P-C- 6958, on behalf of Hawaii Cable TV Association, filed January 17, 1995 (Reply to Amended Applications).

Before the **Federal Communications Commission**, in *Re: GTE Hawaii□□ Section 214 Application to provide Video Dialtone in Ventura County*, W-P-C 6957, on behalf of the California Cable TV Association, filed January 17, 1995 (Reply to Amended Applications).

Before the **Federal Communications Commission**, in *Re: GTE Florida□□ Section 214 Application to Provide Video Dialtone in the Pinellas County and Pasco County, Florida areas*, W-P-C 6956, on behalf of Florida Cable TV Association, filed January 17, 1995 (Reply to Amended Applications).

Before the **Federal Communications Commission**, in *Re: GTE Virginia□□ Section 214 Application to provide Video Dialtone in the Manassas, Virginia area*, W-P-C 6956, on behalf of Virginia Cable TV Association, filed January 17, 1995 (Reply to Amended Applications).

1994

Before the **Federal Communications Commission**, in *Re: NET□□ Section 214 Application to provide Video Dialtone in Rhode Island and Massachusetts*, W-P-C 6982, W-P-C 6983, on behalf of New England Cable TV Association, filed December 22, 1994 (Reply to Supp. Responses).

Before the **State Corporation Commission of the State of Kansas**, in *Re: General Investigation into Competition*, 190, 492-U 94-GIMT-478-GIT, on behalf of Kansas CATV Association, filed November 14, 1994, cross-examination December 1, 1994.

Before the **Federal Communication Commission**, in *Re: Carolina Telephone□□ Section 214 Application to provide Video Dialtone in areas of North Carolina*, W-P-C 6999, on behalf of North Carolina Cable TV Association, filed October 20, 1994, reply November 8, 1994.

Before the **Federal Communication Commission**, in *Re: NET□□ Section 214 Application to provide Video Dialtone in Rhode Island and Massachusetts*, W-P-C 6982, W-P-C 6983, on behalf of New England Cable TV Association, filed September 8, 1994, reply October 3, 1994.

Before the **California Public Utilities Commission**, in *Re: Petition of GTE-California to Eliminate the Preapproval Requirement for Fiber Beyond the Feeder*, I.87-11-033, on behalf of California Bankers Clearing House, County of LA, filed August 24, 1994.

Before the **Federal Communications Commission**, in *Re: BellSouth Telecommunications Inc., Section 214 Application to provide Video Dialtone in Chamblee, GA and Dekalb County, GA*, W-P-C 6977, on behalf of Georgia Cable TV Association, filed August 5, 1994.

Before the **Federal Communications Commission**, in *Re: Bell Atlantic Telephone Companies Section 214 Application to provide Video Dialtone within their Telephone Services Areas*, W-P-C 6966, on behalf of Mid Atlantic Cable Coalition, filed July 28, 1994, reply August 22, 1994.

Before the **Federal Communication Commission**, in *Re: GTE Hawaii□□ 214 Application to provide Video Dialtone in Honolulu, Hawaii*, W-P-C 6958, on behalf of Hawaii Cable TV Association, filed July 1, 1994, and July 29, 1994.

Before the **Federal Communication Commission**, in *Re: GTE California□□ Section 214 Application to provide Video Dialtone in Ventura County*, W-P-C 6957, on behalf of California Cable TV Association, filed July 1, 1994, and July 29, 1994.

Before the **Federal Communication Commission**, in *Re: GTE Florida□□ 214 Application to provide Video Dialtone in the Pinellas and Pasco County, Florida areas*, W-P-C 6956, on behalf of Florida Cable TV Association, filed July 1, 1994, and July 29, 1994.

Before the **Federal Communication Commission**, in *Re: GTE Virginia□□ 214 Application to provide Video Dialtone in the Manassas, Virginia area*, W-P-C 6955, on behalf of the Virginia Cable TV Association, filed July 1, 1994, and July 29, 1994.

Before the **Federal Communications Commission**, in *Re: US WEST□□ Section 214 Application to provide Video Dialtone in Boise, Idaho and Salt Lake City, Utah*, W-P-C 6944-45, before the Idaho and Utah Cable TV Association, filed May 31, 1994.

Before the **Federal Communication Commission**, in *Re: US WEST□□ Section 214 Application to provide Video Dialtone in Portland, OR; Minneapolis, St. Paul, MN; and Denver, CO*, W-P-C 6919-22, on behalf of Minnesota & Oregon Cable TV Association, filed March 28, 1994.

Before the **Federal Communications Commission**, in *Re: Ameritech□□ Section 214 Application to provide Video Dialtone within areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin*, W-P-C-6926-30, on behalf of Great Lakes Cable Coalition, filed March 10, 1994, reply April 4, 1994.

Before the **Federal Communications Commission**, in *Re: Pacific Bell□□ Section 214 Application to provide Video Dialtone in Los Angeles, Orange County, San Diego, and Southern San Francisco Bay areas*, W-P-C-6913-16, on behalf of Comcast/Cablevision Inc., filed February 11, 1994, reply March 11, 1994.

Before the **Federal Communications Commission**, in *Re: SNET□□ Section 214 Application to provide Video Dialtone in Connecticut*, W-P-C 6858, on behalf of New England Cable TV Association, filed January 20, 1994, reply February 23, 1994.

1993

Before the **Arkansas Public Service Commission**, in *Re: Earnings Review of Southwestern Bell Telephone Company*, 92-260-U, on behalf of Arkansas Press Association, filed September 2, 1993.

Before the **United States District Court for the Eastern District of Tennessee at Greenville**, in *Re: Cleo Stinnett, et al. Vs. BellSouth Telecommunications, Inc. d/b/a/ South Central Bell Telephone Company, Defendant*, Civil Action No 2-92-207, Class Action, cross-examination May 10, 1993, and February 10, 1994.

Before the **Federal Communications Commission**, in *Re: NJ Bell□□ Section 214 Application to provide Video Dialtone service within Dover Township, and Ocean County, New Jersey*, W-P-C-6840, on behalf of New Jersey Cable TV Association, filed January 21, 1993.

1992

Before the **New Jersey Board of Regulatory Commissioners**, in *Re: NJ Bell Alternative Regulation*, T092030358, on behalf of NJ Cable TV Association, filed September 21, 1992.

Before the **New Hampshire Public Utilities Commission**, in *Re: Generic competition docket*, DR 90-002, on behalf of Office of the Consumer Advocate, filed May 1, 1992, reply July 10, 1992, Surrebuttal August 21, 1992.

Before the **New Jersey General assembly Transportation, Telecommunications, and Technology Committee**, *Concerning A-5063*, on behalf of NJ Cable TV Association, filed January 6, 1992.

1991

Before the **New Jersey Senate Transportation and Public Utilities Committee**, in *Re: Concerning Senate Bill S-3617*, on behalf of New Jersey Cable Television Association, filed December 10, 1991.

Before the **119th Ohio General Assembly Senate Select Committee on Telecommunications Infrastructure and Technology**, in *Re: Issues Surrounding Telecommunications Network Modernization*, on behalf of the Ohio Cable TV Association, filed March 7, 1991.

Before the **Tennessee Public Service Commission**, in *Re: Master Plan Development and TN Regulatory Reform Plan*, on behalf of TN Cable TV Association, filed February 20, 1991.

1990

Before the **Tennessee Public Service Commission**, in *Re: Earnings Investigation of South Central Bell*, 90-05953, on behalf of the TN Cable Television Association, filed September 28, 1990.

Before the **New York Public Service Commission**, in *Re: NYT Rates, 90-C-0191, on behalf of User Parties NY Clearing House Association*, filed July 13, 1990, Surrebuttal July 30, 1990.

Before the **Louisiana Public Service Commission,** in *Re: South Central Bell Bidirectional Usage Rate Service*, U-18656, on behalf of Answerphone of New Orleans, Inc., Executive Services, Inc., King Telephone Answering Service, et al, filed January 11, 1990.

1989

Before the **Georgia Public Service Commission**, in *Re: Southern Bell Tariff Revision and Bidirectional Usage Rate Service*, 3896-U, on behalf of Atlanta Journal Const./Voice Information Services Company, Inc., GA Association of Telemessaging Services, Prodigy Services, Company, Telnet Communications, Corp., filed November 28, 1989.

Before the **New York State Public Service Commission**, in *Re: NYT Co. - Rate Moratorium Extension - Fifth Stage Filing*, 28961 Fifth Stage, on behalf of User Parties NY Clearing House Association Committee of Corporate Telecommunication Users, filed October 16, 1989.

Before the **Delaware Public Service Commission**, in *Re: Diamond State Telephone Co. Rate Case*, 86-20, on behalf of DE PSC, filed June 16, 1989.

Before the **Arizona Corporation Committee**, in *Re: General Rate Case*, 86-20, on behalf of Arizona Corporation Committee, filed March 6, 1989.

1988

Before **New York State Public Service Commission**, in *Re: NYT Rate Moratorium Extension*, 28961, on behalf of Capital Cities/ ABC, Inc., AMEX Co., CBS, Inc., NBC, Inc., filed December 23, 1988.

1989

Before **Rhode Island Public Utilities Commission**, in *Re: New England Telephone*, 1475, on behalf of RI Bankers Association, filed August 11, 1987, cross-examination August 21, 1987.

Before the **New York State Public Service Commission**, in *Re: General Rate Case Subject to Competition*, 29469, on behalf of AMEX Co., Capital Cities/ ABNC, Inc., NBC, Inc., filed April 17, 1987, cross-examination May 20, 1987.

Before the **Minnesota Public Utilities Commission**, in *Re: Northwestern Bell*, P-421/ M-86-508, on behalf of MN Bus. Utilities Users Counsel, filed February 10, 1987, cross-examination March 5, 1987.

1986

Before the **Kansas Public Utilities Commission**, in *Re: Southwestern Bell*, 127, 140-U, on behalf of Boeing Military, et al., filed August 15, 1986.

1985

Before the **Washington Utilities and Transportation Commission**, in *Re: Cost of Service Issues bearing on the Regulation of Telecommunications Company*, on behalf of US Department of Energy, filed November 18, 1985 (Reply Comments).

1984

Before the **Maine Public Utilities Commission**, in *Re: New England Telephone*, 83-213, on behalf of Staff, ME PUC, filed February 7, 1984, cross-examination March 16, 1984.

Before the **Minnesota Public Service Commission**, in *Re: South Central Bell*, U-4415, on behalf of MS PSC, filed January 24, 1984, cross-examination February 1984.

1983

Before the **Kentucky Public Service Commission**, in *Re: South Central Bell*, 8847, on behalf of KY PSC, filed November 28, 1983, cross-examination December 1983.

Before the **Florida Public Service Commission**, in *Re: Southern Bell Rate Case*, 820294-TP, on behalf of Florida Department of General Services, FL Ad Hoc Telecommunications Users, filed March 21, 1983, cross-examination May 5, 1983.

1982

Before the **Maine Public Utilities Commission**, in *Re: New England Telephone*, 82-142, on behalf of Staff, ME PUC, filed November 15, 1982, cross-examination December 9, 1982.

Before the **Kentucky Public Service Commission**, in *Re: South Central Bell*, 8467, on behalf of the Commonwealth of Kentucky, cross-examination August 26, 1982.

Attachment 2

List of Documents Reviewed in Preparation of Summary Report of Patricia D. Kravtin

Deposition Transcripts

Terry Davis, November 18, 2005 (including Accompanying Exhibits)
Michael Dunn, November 16, 2005
Thomas Forbes, November 17, 2005
Ben Bowen, September 14-15, 2005
Rex Brooks, September 16, 2005
David Tessieri, February 23, 2006

Other Transcripts

Status Conference Pursuant to Order FCC 05M-54

Case Filings

Gulf Power

Gulf Power's Fifty Pole Identification, January 20, 2006, and Supplemental Filing, February 10, 2006.
Gulf Power Non-Binding Proffer of "Full Capacity" Pole Evidence, October 17, 2005
Gulf Power Response to Complainant's Motion to Dismiss, August 29, 2005
Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order
Gulf Power Final Report on Pole Survey
Gulf Power July Status Report
Gulf Power's Preliminary Report on Pole Survey
Gulf Power's Response to Complainants' Second Set of Request for Production of Documents
Gulf Power's Supplemental and Second Supplemental Responses to Complainant's First Set of Interrogatories and Request for Production of Documents
Gulf Power Preliminary Statement of Alternative Cost Methodology, December 3, 2004
Gulf Power's Itemization of Evidence, August 31, 2005
Gulf Power's Description of Evidence, January 8, 2004
Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing, June 23, 2003
Various Other Filings

FCTA

Complainants' Responses to Gulf Power's Second Set of Interrogatories and Requests for Production of Documents
Complainants' Identification of Utility Poles
Complainants' Third Motion to Compel Production of Documents, Further Responses to Interrogatories
Complainant and Respondent's Joint Status Report, January 14, 2005
Complainants' Third Motion To Compel Production Of Documents, Further Responses To Interrogatories As To Which The Presiding Judge Twice Previously Required Supplemental Responses Or, In The Alternative, For Evidentiary Rulings Or Dismissal, October 7, 2005
Complainants' Opposition To Gulf Power Company's Motion To Reconsider ,October 6, 2005
Complainants' Reply To Gulf Power's Response To Complainants' Third Motion To Compel, .November 10, 2005
Complainants' Reply To Gulf Power's Response To Complainants' Motion To Dismiss, September 6, 2005
Complainants Response To Description Of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit's Test, February 6, 2004
Complainants' Motion To Dismiss and Complainants Reply To Gulf Power's Response, dated July , 2005, and September 6,2005, respectively.
Complainants' Proposed Agenda Items for the January 31, 2005 Prehearing Conference, January 25, 2005
Complaint dated July 10, 2000
Various Other Filings

Joint
Joint Status Report on Document Production and Exchange, January 14, 2005
Various Other Filings

Orders
FCC Instant Proceeding
Memorandum Opinion and Order, October 12, 2005
Scheduling Order December 14, 2005
Second Discovery Order, September 22, 2005
Status Order April 15, 2005
Order dated November 21,2005
Hearing Designation Order September 24, 2004
Various Other Procedural Orders

Other FCC
Report and Order, CS Docket 97-98, FCC 00-116, April 3, 2000, and Consolidated Partial Order on Reconsideration, May 25, 2001, FCC 01-170.
Alabama Cable Television Association v. Alabama Power Company,16 FCC Rcd (2001)

State PSC
Public Service Commission of Florida, Docket No. 0500 93-El, Order No. PSC 05-0250, PAA-El, March 4, 2005

Court Decisions
Eleventh Circuit Alabama Power Company v. FCC , November 14, 2002
Eleventh Circuit Georgia Power v. Teleport *et al*, September 29, 2003
Eleventh Circuit Southern Company v. FCC, June 13, 2002
Eleventh Circuit, Gulf Power v. US, September 9, 1999

Laws and Regulations
47 USCS @ 224
47 C.F.R. 1.1400-1.1418

Other
Petition of the US Telecom Association for a Ratemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, October 11, 2005.
BellSouth Corporation Comments in Support of USTelecom Petition for Rulemaking, RM No. 11293, December 2, 2005

Economic Literature
Musgrave and Musgrave, *Public Finance in Theory and Practice*, McGraw Hill (1976).
Lester C.Thurow, The Zero Sum Society, Basic Books, Inc., Publishers (New York, 1980).
Gustavo Nombela, Gines de Rus, and Ofelia Betancor, Competitive and Sustainable Growth Programme and Marginal Cost for Transport Efficiency, UNITE (Unification of accounts) WP7: User Costs and Benefits, Case Study 7: Evaluation of Congestion Costs for Madrid Airport (1997-2000), April 2002.

Data and Calculations
Excerpts FERC Form 1's, 2000-2004
FCC Cable Formula Rate Calculations, 2000-2004

Attachment 3

FCC Cable Rate Formula Calculations Based On Data For 2000-2004

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	**EB Docket No. 04-381**
	)	
Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
Gulf Power Company,	)	
	)	
Respondent.	)	
	)	

Appearances

*John D. Seiver, Esquire and Geoffrey C. Cook, Esquire***,** on behalf of Florida Cable Telecommunications Association, Inc., et al.; *Eric B. Langley, Esquire, J. Russ Campbell, Esquire, Ralph Peterson, Esquire and Allen M. Estes, Esquire* on behalf of Gulf Power Company; *Lisa Griffin, Esquire, Rhonda Lien, Esquire and James W. Shook*, *Esquire,* on behalf of the Enforcement Bureau

INITIAL DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: January 30, 2007 **Released:** January 31, 2007

Preliminary Statement

1. By delegation, the Chief, Enforcement Bureau initiated this formal hearing[1] to determine whether the respondent Gulf Power Company ("Gulf Power") is entitled to receive compensation above marginal costs for attachments to its utility poles of cable companies Comcast Cablevision of Panama City, Inc., Medicom Southeast, L.L.C., and Cox

[1] *See* 47 C.F.R §0.111(a)(12) (Enforcement Bureau may resolve complaints regarding pole attachments); and §0.111(a)(14) (Enforcement Bureau may issue --- designation orders).

Communications Gulf Coast, L.L.C., the cable companies represented by Florida Cable Telecommunications Association, Inc., (Complainants"). *Hearing Designation* Or*der*, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004, 19 FCC Rcd 18718 (2004) *("HDO").* Gulf Power was assigned the burden of proof on the designated issue:

> Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators and, if so, the amount of any such compensation.

HDO at Para. 11.

Background

2. Complainants filed a complaint against Gulf Power on July 10, 2000, alleging that Gulf Power violated Section 224 of the Communications Act ("Act") [47 U.S.C. § 224] and the Commission's pole attachments rules (47 C.F.R. §§ 1.1401-1.1418) by terminating existing agreements with the Complainants, forcing them to execute new pole attachment agreements with higher pole attachment rates, and refusing to renegotiate new rates in good faith in accordance with the FCC Cable Formula. (47 C.F.R. §1.1409(e)(i).) [2] Gulf Power unilaterally decided that an attachment rate based on the Cable Formula does not provide just compensation, and that an alternative methodology should be employed to arrive at an appropriate *albeit* much high rate.[3]

3. On May 13, 2003, the Enforcement Bureau ("Bureau") granted the complaint. *Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C. v. Gulf Power Company, Memorandum Opinion and Order,* 18 FCC Rcd 9599 (Enf. Bur. 2003) ("*Gulf Power Order"*). The Bureau determined that the Cable Formula provided just compensation, relying on Commission holdings that Cable Formula rent plus payment of make-ready expenses exceed just compensation. [4] *Gulf Power Order* at 9602-03. The *Gulf Power Order* also relied on the case of *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied,* 540 U.S. 937 (2003)*("Alabama Power").* *Alabama Power* holds that a utility pole owner is

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[2] The Cable Formula is the Commission's methodology to calculate maximum pole attachment rates. 47 C.F.R. §11409(e)(i). *See Amendment of Rules and Policies Governing Pole Attachments*, *Report and Order,* 15 FCC Rcd 6453, 6457, ¶ 5 (2000), *review denied sub nom., Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, 12110, ¶ 10 (2001).

[3] Gulf Power Company's Response to Complaint, File No. PA 00-004 (filed Aug. 9, 2000) at 9-13, 38-52.

[4] *Gulf Power Order*, 18 FCC Rcd at 9609, ¶ 15 (citing *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.,*16 FCC Rcd 12209, 12223-36, ¶¶ 32-61 (2001) ("*Alabama Power Order*")). Alabama Power believed that the Cable Formula did not provide just compensation but the Bureau disagreed. FCC Rcd 17346 (Cable Serv. Bur. 2000). The Commission upheld the Bureau. *Alabama Power Order*, 16 FCC Rcd at 12212, 12241 (Cable Formula not arbitrary or capricious). On appeal, the Eleventh Circuit upheld the Commission's conclusion that "marginal cost was tantamount to just compensation." *Alabama Power Co. v. FCC*, 311 F. 3d 1357 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003).

constitutionally entitled only to marginal costs under the Cable Formula, unless it is shown by a preponderance of the evidence for 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.*

Gulf Power Order at 9607, citing *Alabama Power*, 311 F.2d at 1370-71. (Emphasis added.)

4. Complainants challenged Gulf Power's charging an annual per pole rate of $38.06, an amount exceeding the Cable Formula rate by over 500%, and an amount which the Bureau found to be "unjust and unreasonable."[5] *Gulf Power Order* at 9600, 9608. The *Gulf Power Order* also held that Gulf Power "had submitted no evidence . . . that would satisfy the test set by the Eleventh Circuit." *Id.* at 9607. *See* Para. 3 above. However, because its complaint was filed prior to the Eleventh Circuit's decision, Gulf Power requested and was granted an opportunity to present evidence under the *Alabama Power* regimen. Accordingly, the Bureau has ordered a hearing before an Administrative Law Judge to determine "[w]hether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators." *HDO* at Para. 11.

5. After five days of hearings, Proposed Findings of Fact and Conclusions of Law and Reply Proposed Findings of Fact and Conclusions of Law were filed by Complainants and by Gulf Power.[6]

Arguments

Gulf Power

6. Gulf Power contends that it only need show that poles to which Complainants' cables are attached are crowded, and that there is no need to prove that its poles are at full capacity, which is the standard of proof required by the *Alabama Power* court. *Alabama Power*, 311 F.3d at 1370-71 (proof required that "pole is at full capacity"). Gulf Power would lower the standard of proof to showing merely crowded poles requiring make ready to accommodate another attachment. Gulf Power argues that crowded poles can be rivalrous when a rearrangement of existing equipment and attachments is required in order to accommodate another attacher. It is recognized that a rivalrous condition may occur when possession by one

[5] In 1999 – 2000, Complainants were paying annual rates under the Cable Formula of $6.20 per pole, when Gulf Power announced the rate would increase to $38.06. *Gulf Power Order* at 9600. *Cf. Alabama Power,* 311. F 3d at 1366 (including labor costs and pro rata share of unusable portion of pole, the rate sought was $38.81 compared with $7.47 paid under the Cable Formula).

[6] Each Gulf Power exhibit cited will be referred to as (GP Exh. ____). Each cited exhibit of Complainants will be referred to as (Compls. Exh. ____). Hearing transcripts will be cited by witness name and transcript page (Dunn, Tr. _____).

corresponds to the loss of another.

Complainants

7. Complainants contend that a showing of full capacity requires proof that Gulf Power could not accommodate another attacher on specific poles. Complainants argue that Gulf Power offered no evidence of a particular pole for which it had to turn away some entity because Gulf Power could not accommodate another attachment due to a pole's full capacity. Therefore, Gulf Power has not proven a lost opportunity as to any entity which is waiting in the wings for space on a pole, and has not shown proof that an opportunity for higher valued use was lost to space occupied by a cable attachment. Michael Dunn, a former key employee of Gulf Power, testified at hearing that Gulf Power needed to show full capacity and a buyer waiting in the wings. (Dunn, Tr. 748-49.) Gulf Power's economic expert testified to the two-pronged test: proof of poles at full capacity and a showing of either a buyer in the wings or a higher valued use by Gulf Power. (Spain, Tr. 1155-56.) Another key employee, Ben Bowen, admitted as to fifty selected poles, that he did not determine whether there was another party waiting in the wings seeking to attach to any particular pole. (Bowen, Tr. 1028.) Therefore, for failure of proof, Gulf Power is not entitled to pole rent that exceeds the Cable Formula. (Compls. Exh. A *passim*.)

Fact Findings

Pole Attachments

8. Gulf Power owns approximately 225,000 wooden distribution poles, and 150,000 of these are joint use poles. (GP Exh. B at 6.) A joint use pole is one to which one or more entities other than Gulf Power are attached. (*Id* at 1.) For the usual main line attachment, the wire is secured to the pole with a three-bolt clamp. *Id*. An attachment which is a service drop is a line leading into a customer's house or place of business. *Id.* If a main line attachment is on a pole, that attachment occupies at least one foot of space. *Id*. If a cable company has a service drop as well, the actual usable space occupied could be significantly more than one foot. *Id.* Complainants also attach other fixtures and appliances to Gulf Power's poles, and sometimes bond to Gulf Power's grounding. *Id.* Complainants attach coaxial, fiber, and service drops to approximately 100,000 of Gulf Power's poles. (GP Exh. B at 13.)

Contracting

9. Complainants entered into standard written agreements with Gulf Power. (GP Exh. A at 8; GP Exh. B at 9-10.) These agreements expired in 2000 and Gulf Power announced its intention to cease voluntary attachment relationships. (GP Exh. A at 8; GP Exh. B at. 9.) Since that time, attachments have remained on Gulf Power's poles pursuant to the1996 Telecommunication Act's mandatory access, but the parties have not agreed on new rental terms governing the attachments. (GP Exh. B at 9-10.) Pending final determination, Complainants' attachments remain in place at rates set under former agreements. *Gulf Power Order* at 9609.

10. The contracting process is controlled by Gulf Power, and attaching parties are referred to as licensees. To illustrate the process, Mr. Dunn negotiated an agreement with a

cable company that was executed on January 1, 1997. (GP Exh. A at 8; GP Exh. 7.) Gulf Power rearranged other attachers in order to accommodate the cable licensee. (GP Exh. 7 at 10.) The contract term ran to December 31, 2001. Before attaching a cable, the licensee needed to submit a permit with construction drawings for Gulf Power's approval and the licensee had to pay all make ready costs. The licensee paid an annual per pole rent of $6.20 from 1997 through 2000, and the rental rate was to be recalculated for 2001 under the Cable Formula.

11. The agreement also provided that when two or more entities desire to attach to the same pole location, the first entity applying gets preference if space is available. If a licensee wishes a higher position on the pole, it pays the make-ready costs associated with any reattachment. (GP Exh. 7 at 9.) If a pole is too short or otherwise inadequate and a rearrangement would involve moving other attachers, then the licensee would be required to pay all expenses, including reimbursing the owners of changed facilities on the pole. (GP Exh. 7 at 10.) Installation would be at licensee's expense, and when required by Gulf Power, the licensee must remove, relocate, replace or renew its facilities, transfer to a substituted pole, or perform other work required by Gulf Power. If Gulf Power performs any of the work, the licensee pays for the cost of work plus 15%. (GP Exh. 7 at 13.) These expenses paid by attachers are over and above the Cable Formula, showing that Gulf Power is not operating at a financial loss in complying with the Cable Formula.

Structural Character of Poles

12. Poles have both usable space and unusable space. (GP Exh. B at 13-14, 41; GP Exh. 70 at 121-23.) Unusable space includes: (1) the portion of the pole which is underground; and (2) the portion of the pole above ground required to support minimum mid-span clearances. (GP Exh. B at 13-14, 41.) A forty-inch workers safety zone also is required between the lowest electrical wire and the highest communications wire. (GP Exh. 38.) (Compls. Exh.12, *National Electrical Safety Code* (NESC) §238E.) But this safety space does not prevent additional attachments or alternative uses.

13. The typical pole is approximately forty feet tall, having one set of power lines, one cable attachment, and one telephone attachment. (Dunn, Tr. 739, 814-15.) In order to simultaneously accommodate power, cable and telephone attachers consistent with Gulf Power's needs, utility lines must be reduced from 8.5 feet to 7.5 feet on a standard 40 foot pole. (GP Exh. A at 25-26.) Eighteen feet of clearance above ground is needed, and forty inches of separation is required between the highest communication wire and the lowest electric wire. (Bowen, Tr. 1050; GP Exh. 40; GP Exh. B at 29.) An attachment is placed higher than eighteen feet in order to achieve clearance at mid-span. (GP Exh. 40; GP Exh. B at 21.) After the buried portion and required clearances, there is generally 28.5 feet of space that is unusable. (Dunn, Tr.832-33; GP Exh. A at 25-26; GP Exhs. 35-37.) This results in 11.5 feet of usable space for attachers. (GP Exh. A at 25-26; GP Exh. B at 25.) (*See* GP Exh. 35, forty foot pole diagram.) Mr. Dunn considers poles having power, cable and telephone attachments to be typical of the poles in issue. (GP Exh. A at 25-26.)

14. There is no evidence that rearrangements of equipment and attachments on these typical poles cause full capacity or such a degree of crowding that an added cable could not be

arranged, or that there were lost opportunities. Rather, the record establishes that routine changes are made when there are physical obstructions, or to observe safety standards which are conditions requiring correction having nothing to do with capacity. (Dunn, Tr. 754-56.) Those changes are in the public interest, and such modifications do not detract from the mandate under the Telecommunications Act to make space available for cable attachers on utility poles.

Make Ready

15. Make-ready in connection with joint use poles is any rearrangement of equipment and attachments "in order to make room on either an existing pole or a new, different pole for a new attacher." (GP Exh. A at 15.) Gulf Power prepares a work order to determine cost of any make ready. Once cost is determined the work can be completed. (GP Exh. A at 16.) Spacing on the pole must be in conformity with NESC requirements. (GP Exh. A at 17.) (GP Exh. 38 at 2; NESC § 238E.) But compliance with safety has never rendered a pole at full capacity, and Mr. Dunn knew of no instance of denying access to a pole simply "because another cable operator was there." (Compls. Exh. 86 at 129.)

Osmose Survey

16. Gulf Power presented evidence of a survey of poles known as the "Osmose Study." (GP Exh. 40 at 4, Osmose Statement of Work, was to audit Gulf Power's joint use poles to determine number of "crowded" or "full capacity" poles in the context of this proceeding.) Allegedly to insure objectivity, Osmose was not given information about "what constitutes a pole at full capacity." (GP Reply Finding at 7.) (GP Exh. 43.) In Gulf Power's First Report on Pole Survey dated October 31, 2005, Osmose reported surveying 9,663 poles, of which 7,120 were characterized as "crowded" for a percentage of 73.68 %.

17. Mr. Bowen testified that Gulf Power's definition of crowded that was provided to Osmose meant "an NESC violation, Gulf Power violation, or any other applicable code or one that would not accept another attacher." ---- " [T]hat's the way the Osmose Statement of Work was set out ---- ." (Bowen, Tr. 1015.) Osmose considered a crowded pole as one having vertical clearance violations under the NESC safety code, or clearance over roads that would cause violations if corrected, or a pole that cannot accept an additional attachment due to inadequate clearance space between transformers. (GP Exh. 40 at 4.) Thus, Osmose was not taking into consideration make-ready adjustments or reconfigurations in order to accommodate another attachment. In responding to Osmose's conclusions of crowded, 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. (Compls. Exh. 1; Harrelson, Tr. 1568.)

Analysis

18. The *Alabama Power* decision held.

> [I]f the government commits a taking, it is under an obligation to put the aggrieved party in the position it was in before the taking occurred (and no better). In unique cases such as this one, marginal cost meets this test – unless, if course, the aggrieved party proves *lost opportunity by showing (1) full capacity and (2) an higher valued use* --- . (Emphasis added.)

311 F.3d at 1371. Thus, to be entitled to charge rent in excess of marginal cost, Gulf Power must prove: (1) a pole's condition of full capacity, and (2) actual loss of a higher valued use as a result of full capacity.

19. Gulf Power hopes to finesse the full capacity requirement by reference to the court's observation that "if crowded, the pole space becomes rivalrous," because in a genuine full capacity situation, "the zero-sum nature of pole space, like land, is the key."[7] 311 F.3d 1369-70. But the court also pointed out that a showing of lost opportunity remains critical, and crowding is not tantamount to lost opportunity. 311 F.3d 1370. So merely pointing to the need for rearrangement of existing attachments and/or compliance with safety codes in order to accommodate new attachments do not meet Gulf Power's burden.[8] Such changes and rearrangements on poles are normal to accommodate new attachments. (Compls. Exh. A at 32; Kravtin, Tr.1516.) And Gulf Power is never out of pocket because when a cable operator needs make-ready work to accommodate an attachment, the attacher pays the costs. (Dunn, Tr. 807-809.) The *Alabama Power* court neither found nor concluded that crowded was equivalent to full capacity. Rather, the court held to the contrary, that where no lost opportunity is shown and marginal costs incident to attaching are paid, "pole space is, for practical purposes, nonrivalrous." 311 F.3d 1369.

20. Gulf Power does not deny that it can accommodate change-outs, but argues that with a change-out the pole space is *ipso facto* crowded and rivalrous. In another rent regulation case, Amtrak was required to pay only incremental costs while forcing its trains on another carrier's line. *Metropolitan Trans. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986). The *Alabama Power* court examines that case and compares the rare occurrence of a crowded train track with crowding on a utility pole:

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[7] An economist explains that "zero sum" may occur in situations where when one entity gains, another entity loses the quantity gained. (Compls. Exh. A at 25.)

[8] The height of poles identified by Gulf Power was barely over forty feet. (GP Exh. 42 (summary of Osmose data) and GP Exh. 43 (Gulf Power's fifty poles). The height of the poles selected by Complainants was over forty three feet, obviously selected because the three additional feet make it more difficult to show poles that cannot be changed-out because of full capacity. (Compls. Exh. 6.) These height differences are irrelevant since Gulf Power failed to show that a cable company was unable to attach whether the pole is forty feet or forty three feet tall, or that Gulf Power was foreclosed from an opportunity.

> The possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded, the pole space becomes rivalrous. Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.[9]

Alabama Power at 1370. But Gulf Power's argument suffers from a failure of proof that potential users will pay higher rent, or proof of higher valued uses of the space by Gulf Power which were foreclosed by Complainants' cable attachments. Also, Gulf Power always has the ability to adjust poles at the expense of new attachers thus showing that Gulf Power's poles lack full capacity and are nonrivalrous. Most importantly, under the Cable Formula, Gulf Power has not lost any opportunity and therefore, as characterized by the *Alabama Power* court, Gulf Power's utility poles are "for practical purposes nonrivalrous." 311 F.3d at 1369.

21. Gulf Power finally argues that its poles are not essential because there are other options, including underground construction, and that because other options exist, "monopoly rates", "duress" or "essential facilities" are unsubstantiated. This argument amounts to a long-discredited attack on the basis for the Pole Attachment Act which the Commission is not at liberty to ignore, and has nothing to do with the *HDO*. The sole issue as framed by the *HDO* is whether rents are recoverable by Gulf Power that exceed the Cable Formula based on proof of identifiable lost opportunities caused by proven full capacity. Gulf Power has failed to meet this standard of proof and has not met its burden of proof.[10]

Conclusions of Law

[9] *See* 47 U.S.C. § 224(f)(2). [A] utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles --- on a non-discriminatory basis when there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes. It is noted that such conditions can usually be fixed and occur so infrequently as to become *de minimis* to a network. It is always in Gulf Power's interest to locate and correct such problems as soon as possible.

[10] The evidence also fails to prove that Cable Formula rents are insufficient to put Gulf Power in as good a position as it was before any taking of its pole space If it were needed to be shown, replacement cost would be the amount which Gulf Power would charge over and above the Cable Formula rate. (Replacement cost rents range from $38.06 to $64.98 per pole, while rents under the Cable Formula range from $4.61 to $6.30.) (GP Exh. E at 6.) The Commission has already concluded that Cable Formula rates plus payment of make-ready expenses, provides compensation that exceeds just compensation. *Alabama Power Order,* 12 FCC Red 12208, 12223-36. Also, the Commission has twice rejected replacement cost methodology. *In the Matter of Commission's Rules and Policies Governing Pole Attachments, Partial Order on Reconsideration*, 16 FCC Red. 12, 103 at Paras. 15, 17 (2001) (rejected pole attachment rates based on replacement cost), affirming *Fee Order*, 15 FCC Red, 6453, at Para. 10 (2000) (replacement cost methodology rejected). Therefore, if it were necessary to assess damages, replacement cost methodology would not be used.

22. Neither evidence nor reason support Gulf Power's argument that performing any make-ready work on a pole means that it is at full capacity, and that Gulf Power can therefore charge higher unregulated rates. Gulf Power admitted that "a rearrangeable pole would not be at full capacity." (Dunn, Tr. 736-37.) It is only when a "government taking forecloses an opportunity to sell space to another bidding firm that a pole owner may charge rents above the Cable Formula." 311 F.3d at 1370. Through the industry's established remedy of make-ready that is paid for by the attacher, a taking by government mandated cable attachments does not foreclose the opportunity to sell space to another attacher.[11] 311 F.3d at 1370-71. Since Gulf Power failed to show any lost opportunity, it does not meet the criteria for charging rents above the Cable Formula. (Compls. Exh. A at 50.)

23. Gulf Power contends in proposed findings that determining whether or not a pole is at full capacity involves an analysis of inches, and where there is an analysis of inches, rivalry cannot realistically be disputed. (GPFCL at Para. 10) Determining such rivalry by such a deduction would be speculative, while the "too close to call" argument is exceedingly narrow and erroneous. Significantly, when an attacher pays the cost of getting on a pole, Gulf Power stands to earn more. Gulf Power has failed to identify any instance of inability to accommodate a new attacher. (Compl. Exh. A at 42.) Moreover, Gulf Power has offered no evidence of an instance when it was prevented from accommodating an attachment because of cable attachments. To the contrary, Mr. Dunn admitted: "unless there was some engineering or safety reason for not allowing attachment to that pole – if it is within our means to do so, we did so." (Compl. Exh. 86 at 58-59.) Similarly, Mr. Bowen testified that Gulf Power will change-out or rearrange a pole if necessary. (Bowen, Tr. 1078.) Gulf Power has not proven that its joint use poles are at full capacity.

24. Gulf Power relies on an inapposite court decision, *Southern Co. v. FCC,* 293 F.3d 1338, 1346-47 (11th Cir. 2002). *Southern Co.* narrowly holds 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. See also Section 224 (f)(2) of the Act*. The decision also holds that the term "insufficient capacity" was not defined by statute, was ambiguous, and that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient*." Id.* at 1348. A finding of whether a pole's "insufficient capacity caused a missed opportunity must consider Gulf Power's "historical willingness to accommodate attachers by performing make-ready*." See interlocutory Order* FCC 05M-50, released October 12, 2005 at 2 (Gulf Power admits to its "historical willingness to accommodate attachers by performing make ready"). Mr. Dunn admitted that he had no knowledge of any instance in which Gulf Power denied any party access to a pole "because another cable operator was there." (Compls. Exh. 86 at 129.) In any event, since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the *Southern Co.* decision is not relevant to any *HDO* issue, and has no decisional

[11] Complainants' expert concluded that through normal and customary make-ready rearrangements, including correcting code violations and pole change-outs, "Gulf Power has historically been able to accommodate an additional attacher." She also concluded that no exclusion on a pole can be said to exist "if the additional attacher is or can be accommodated on the pole." (Compls. Exh. A at 32.) Gulf Power's evidence did not contradict or rebut her opinion. (GP Exh. F *passim*.)

application in this case.

Ultimate Conclusions

25. When capacity is available through rearrangement or expansion of a pole's height, its capacity cannot be full since there is no exclusion of another and no missed, foreclosed, or lost opportunity. Gulf Power erroneously argues that a need to use make-ready to accommodate an attachment constitutes proof of full capacity. To the contrary, make-ready is the means of providing space for attachments on poles already having the capacity to expand, which is the case for practically all of Gulf Power's poles.[12]

26. Had Gulf Power made the requisite showing under the two-part test with respect to a specific pole, it would be entitled to compensation above marginal costs for that pole, whether or not other poles in its network were or were not at full capacity. But Gulf Power has failed to show that any pole is at full capacity and that (1) the Cable Formula has cost it an opportunity to rent space to someone else at a higher rate or that (2) it is prevented from putting the space to a higher valued use within its own operations. Instead, it rails against the fairness of the *Alabama Power* test, overlooking or ignoring that the Enforcement Bureau designated this hearing for the sole purpose of affording Gulf Power an opportunity to present evidence to an Administrative Law Judge under that test. *HDO* at Para. 4-5.

27. The burden of proof is on Gulf Power to prove by a preponderance of the evidence that but for the FCC's mandatory pole attachment regulation, it would be able to rent Complainant's space to someone else at a higher unregulated rate, or use the space for its own higher valued purposes. On the other hand, if space is available for all those who request space, then the cable operator occupies space that would otherwise be vacant. In that case, the regulated rate provides a fair return on investment, and Gulf Power is not entitled to more than marginal or incremental costs as provided by the Cable Formula. The result is that the FCC's regulated rate, which provides for recapturing allocated costs, is found to be entirely just and equitable.

28. Finally, since Gulf Power failed to prove that any pole's utilized capacity makes impossible the attachment of any potential user waiting in the wings, or that Complainant's cable attachments deny Gulf Power an alternative opportunity of higher value, the inquiry under the *HDO* is at an end. Therefore, it is no longer necessary to decide whether the Complainant cable companies are entitled to substitute a longer pole at their own expense since Gulf Power has failed to show that any existing pole to which any Complainant's cable is attached is at full capacity. Nor for that same reason is it necessary to reach the question of what rate other than the Cable Formula would be fair and equitable.

[12] Cf. *Interlocutory Order* FCC 05M-50, *supra*.

Order

IT IS ORDERED that having found that none of Gulf Power Company's poles are proven to be at full capacity, the FCC Cable Formula providing for Gulf Power recovering marginal or incremental (fully allocated) costs is triggered by default.

IT IS FURTHER ORDERED that Gulf Power Company is not entitled to receive any compensation above marginal or incremental (fully allocated) costs for any of Complainants' cable attachments to Gulf Power Company's poles.

FEDERAL COMMNICATIONS COMMISSION[13]

Richard L. Sippel
Chief Administrative Law Judge

[13] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b)/

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

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants*, v. GULF POWER COMPANY, *Respondent.*	E.B. Docket No. 04-381

To: Office of the Secretary

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

COMPLAINANTS' REPLY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RESPONSE TO GULF POWER'S PROPOSED FINDINGS AND CONCLUSIONS OF LAW

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August 16, 2006

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The Florida Cable Telecommunications Ass'n., 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") respectfully submit the following reply to Gulf Power's Proposed Findings of Fact and Conclusions of Law ("GPPFCL").[1]

INTRODUCTION AND SUMMARY

Gulf Power has not met its burden of proving that it is entitled to receive compensation above the marginal costs of hosting Complainants' attachments. *HDO*, ¶¶ 11, 15. In *Alabama Power v. FCC*, the Eleventh Circuit set down the "legal principle" applicable to this case: "[I]n takings law, just compensation is determined by the ***loss*** to the person whose property is taken." 311 F.3d 1357, 1369 (11th Cir. 2002) (emphasis added). The Court pointed out that, as a general rule, the FCC "Cable Rate (which provides much more than marginal cost) necessarily provides just compensation." *Id*. at 1370-71. In order for a utility pole owner to prove the ***exception*** to this rule and seek additional compensation above the marginal costs of hosting attachments, the utility must prove, for "each pole" for which it makes such a claim, a "missed opportunity" (due to "full capacity") to lease pole space to a "buyer waiting in the wings" or put such pole space to a quantifiable "higher valued use" of Gulf Power's own and a resulting loss. *Id*. at 1370-71 (requiring proof of loss and the amount of loss). In this case, however, Gulf Power has failed to present any proof that it incurred any missed opportunity or suffered any loss due to the presence of, or rents paid for, Complainants' attachments.[2]

[1] Complainants' Reply herein tracks the paragraphs of Gulf Power's proposed findings. Complainants will use the same abbreviations for frequent citations used in their proposed findings. Complainants' Proposed Findings of Fact and Conclusions of Law will be referred to as "CPFCL;" Ms. Kravtin's testimony will be cited as "Compls. Ex. A;" and Mr. Harrelson's testimony as "Compls. Ex. B."

[2] In their proposed findings Gulf Power many times fails to cite any facts from the record or precedent from supporting law. *See, e.g.*, GPPFCL, ¶¶ 4, 9, 10, 11, 30, 42, 64-65.

COMPLAINANTS' RESPONSES

1. The Eleventh Circuit made clear that, even if a utility proves that it has specific poles that are at "full capacity," it would also have to identify a loss resulting from such rivalry, in the form of either a "buyer waiting in the wings" who could not be accommodated or a higher valued use that the utility had to forego. 311 F.3d at 1370-71 ("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"). Even if Gulf had identified poles at "full capacity" (which it has not), it has not identified any loss in the form of a buyer of space that could not be accommodated or a foreclosed opportunity. Compls. Ex. A, Kravtin Testimony, p. 50.

2. Gulf Power errs in suggesting that Complainants rely on "excerpts" of the Eleventh Circuit's *Alabama Power* opinion. That characterization better describes Gulf Power's position. Complainants adhere to the entirety of the *Alabama Power* ***holding***, which states:

> 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.

Id. at 1370-71 (emphasis added). The Eleventh Circuit repeated that payment of the marginal costs of pole attachments meets the test of putting the aggrieved party "in the position it was in before the taking occurred (and no better)" unless "the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use." *Id*. at 1372. This hearing was held to see if Gulf Power could "satisfy the *Alabama Power Decision's* standard." *HDO*, ¶ 5 n.21. It has not.

3. Resolution of Gulf Power's claims in this case depends entirely on whether Gulf Power can show that it had to exclude another, higher valued attachment of a third party or its own (a "missed opportunity" caused by "full capacity") ***and*** incurred a quantifiable and actual loss. It's that simple. Gulf's proposed "approach" – that performing any "make-ready" work on a pole means it is and was at "full capacity" (for every year preceding and every subsequent year) and that Gulf can then charge every past, present and future attacher on that pole an unregulated rate of its own choosing – is inconsistent with, and seeks to avoid, the constitutional requirement of proof of loss. *See* 311 F.3d at 1369, 1370-71. As even Gulf itself notes, make-ready is regularly used to "accommodate additional attachments." Therefore, unless make-ready can ***not*** be performed, its availability ensures the opposite of the "zero sum" or "rivalrous" situation denoted by the Eleventh Circuit's term "full capacity," which exists when a "government taking forecloses an opportunity to sell space to another bidding firm." *See* 311 F.3d at 1370; Compls. Ex. A, p. 32 ("[t]he economic realities of make-ready and full capacity cannot rationally coexist"); Compls. Ex. A, pp. 29-33; Compls. Ex. B, 6-8.

4. Gulf Power has not identified a single pole that meets the Eleventh Circuit's definition of "rivalrous" – where "use by one entity" actually "diminish[es] the use and enjoyment of others. 311 F.3d at 1369. Compls. Ex. B, pp. 29-33. More importantly, the Court also required proof of a lost opportunity, *Id*. at 1370-71, and since Gulf has none, *see* Compls. Ex. A, p. 50, it does not have "a proven claim."

5. The long-standing principle of takings jurisprudence that applies in this case is that "just compensation is determined by the loss to the person whose property is taken." *Id*. at 1369. This "legal principle" is not "narrow," "result driven," or "impossible to apply." *See*

GPPFCL, ¶ 5. Thus, it is Gulf, not Complainants, who try to depart from this principle by seeking a huge annual increase in pole rents without proving that it has suffered a loss.

6. Gulf is flatly wrong in arguing that "crowding" is the same as "full capacity." As Patricia Kravtin explained,

> For a facility to be at full capacity, it must be a situation where a user (be it an airplane, automobile, employee, or attachments) would actually be excluded from the facility because of a true capacity constraint or scarcity with respect to the underlying infrastructure.

Compls. Ex. B, p. 26. Similarly, Gulf witness Michael Dunn admitted that a "rearrangeable pole would not be at full capacity." Dunn Cross, April 24, 2006 Tr., pp. 726-27. Mr. Bowen further testified that "[i]t would be impractical to distinguish between rearrangement and change-out…." Gulf Power Ex. B, p. 27. In light of these admissions, the Osmose data, which did not consider make-ready measures such as re-arrangement or change-outs, has no probative value. Compls. Ex. B, pp. 9-14.

7. The Eleventh Circuit defined "nonrivalrous" as meaning that "use by one entity does not necessarily diminish the use and enjoyment of others." 311 F.3d at 1369. Gulf errs in arguing that this definition does not apply to poles. As *Alabama Power* noted just two paragraphs after discussing make-ready, "space on a pole" "may be, for practical purposes, nonrivalrous." *Id*. Unlike Gulf Power's attempted analogies to land, make-ready is the reason why poles are, with very limited exception, Compls. Ex. B, pp. 6-11, essentially non-rivalrous.

8. Gulf Power's contention that pole capacity should be determined by poles' "current" condition is farcical. GPPFCL, ¶ 8. Current when? In 2000, when Gulf initiated its rate increases? In 2006, at the time of the hearing? Or sometime in between? Gulf never defines what it means by "current" because trying to do so would highlight the constantly

changing nature of its poles and how make-ready is used, when necessary, to "provide space" for new licensees. Compls. Ex. 2, p. 5. The Presiding Judge noted in April 2005 that Gulf could not identify any poles at "full capacity" before the completion of the Osmose audit. *Status Order*, FCC 05M-23, p. 1. Subsequently, Gulf only presented data from Osmose based upon an observation on one day in the spring of 2005; it has no data for 2000, 2001, 2002, 2003, 2004, 2006, or, indeed, the other 364 days of 2005. Compls. Ex. B, pp. 11-13. Indeed, since the Osmose survey, a number of poles Osmose reviewed have been changed out to taller poles or had extensions bolted to the top. *See, e.g.*, Compls. Ex. 6, pp. 8-9; pp. 52-54. Because, as Mr. Bowen admitted, Gulf's pole network is "variable" in nature, CPFCL, ¶ 49, "full capacity" depends upon a concrete instance of someone's being excluded over a period of time – not a hypothetical inability to accommodate other parties on one particular day within a 7-year span.

9. Gulf has ***not*** established (let alone even offered cites to the record in this paragraph) that space on its poles is "nonrivalrous." It incorrectly uses the term "finite space" to suggest that poles are not regularly changed to accept new attachments. GPPFCL, ¶ 9. In fact, Gulf's own permitting procedure provides for payment of make-ready costs to re-arrange or change-out poles. Compls. Ex. 2, p. 5. Gulf's Rex Brooks 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. As Complainants' expert, Ms. Kravtin, pointed out, "the ability to perform make-ready work on a pole provides direct evidence of the nonrivalrous condition of the pole." Compls. Ex. A, p. 32. In this case, Gulf Power has "not presented any evidence to suggest it has not been able to accommodate all entities [including itself] seeking to attach to its poles because of the presence of a cable company . . . ." Compls. Ex. A, p. 42.

10. Whether or not a particular Gulf Power pole is at "full capacity" is not, as Gulf Power contends (without supporting citation), "an analysis of inches." Instead, as Complainants' expert witnesses explained, an analysis of pole capacity must ask whether there is any physical, regulatory, or other reason why Gulf cannot use its historical and regular practice of make-ready to accommodate another attachment. See Compls. Ex. A, pp. 28-33; Compls. Ex. B, pp. 9-14. In this case, Gulf Power has failed to identify any such circumstance. Compls. Ex. A, p. 42. And Gulf Power's claim that, for example, a separation of less than 52" between power and communications equals "full capacity" would mean that in the make-ready process an attacher would have to exceed the 40" required separation and make room for the next attacher – even if there wasn't any new attacher for that space and despite the law requiring that the next attacher (or pole owner) pay for making added space available for the next attacher or the pole owner's own uses. Tr. 7/6/06 at 2189; 47 U.S.C. § 224(i).

11. Even if Gulf had been able to identify poles that were truly at "full capacity," that would not be enough to make pole space "congruent with" land. As *Alabama Power* required, the utility would still have to prove a loss. 311 F.3d at 1370. Furthermore, if Gulf had identified "full capacity" poles as to which it had actually suffered a "lost opportunity," the concept of "fair market value" would still not be applicable to this case. 311 F.3d at 1368; *Alabama Power Commission Order*, ¶ 55. Instead, Gulf would have the "burden of proving loss, as well as the amount of any loss," and that would be the limit of any claim for "just compensation." 311 F.3d at 1370. In this case, Gulf established no "market" for pole space – it only showed that it has the leverage and monopoly control to impose higher rates in some instances where new communications service providers need access to poles in order to do business. *See* Compls. Ex. 77, pp. 1, 5; see also Compls. Ex. A, pp. 13-14, 59-60. This makes sense as the Court would

have referred to a "hypothetical" buyer of space and not a buyer "waiting in the wings" if fair market value was to be the applicable valuation standard. 311 F.3d at 1370. Because it did not, Gulf's reliance on "hypothetical" buyers and "fair market" valuations is entirely misplaced.

12. Just as "fair market value" has no application to utility pole space, Gulf's proposed "replacement cost" cannot be a "proxy" for "fair market value." As explained in Complainants' Proposed Findings of Fact and Conclusions of Law, Gulf Power's "replacement cost" methodology is not based upon "loss to the owner," *see* CPFCL, ¶¶ 81, 83, 494-499; was developed before *Alabama Power*, CPFCL ¶¶ 86-89, 94-97; has no relation to capacity on Gulf's poles or whether Gulf incurred a loss related to Complainants' attachments, CPFCL, ¶¶ 79, 91, 92, 139-41, 147, 500-07; and has been deemed by the Commission to be "particularly unsuited" to valuing pole space, CPFCL, ¶ 514. Gulf's "replacement cost" calculations are not at all "similar to" the FCC Cable Rate Formula. Gulf's calculations apply four times the "space factor" from FCC regulations and, under the rubric of using "present day pole costs," seek to charge more than twice the actual pole investment incurred by Gulf Power for poles containing Complainants' attachments. *See* CPFCL, ¶¶ 109, 112-15, 132-34. The Commission has already explained that it is not appropriate to use "forward-looking" costs in regulating pole attachments.[3] And the *Alabama Power* court never suggested that some modification to the FCC formula using "present day pole costs" was appropriate in any situation – only that something more than marginal costs (which the court noted were already more than compensated under the federal formula) could be appropriate ***if*** the loss factors were satisfied.

13. *Alabama Power* explicitly recognized that utility poles are "essential facilities. 311 F.3d at 1362. Gulf's claim that Complainants "have other viable options" is based only

[3] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 F.C.C.R. 12103, ¶¶ 15-25 (2001)("*Recon Order*").

upon "new construction." *See* GPPFCL, ¶ 13. As Ms. Kravtin explained, because of legal, economic, and practical barriers, "attachers do not have the option of duplicating the pole networks constructed by the utility …." Compls. Ex. B, p. 9 (citing *Alabama Power Commission Order*, ¶ 69). Similarly, Mr. Spain conceded that any attacher is compelled to deal with the pole owner and that attachers cannot replicate Gulf's pole system. *See* CPFCL, ¶¶ 250, 269-70.

14. Gulf Power and other utilities have fought pole attachment regulation since its inception. CPFCL, ¶¶ 115-16; Complainants' Trial Brief, p. 3 n.2. However, the FCC and the Courts have regularly and consistently rejected utility challenges that the FCC Cable Formula rate is "unfairly low." *See Id*. *Alabama Power* explained that "any implementation of the Cable Rate (which provides for much more than marginal costs) necessarily provides just compensation" unless a utility can prove that it incurred both a missed opportunity and a resulting loss. 311 F.3d at 1370-71.

15. In *Gulf Power v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit ruled that the process for determining pole rental and other payments under the formulas prescribed in Section 224 and FCC regulations satisfies constitutional requirements for paying pole owners just compensation for mandatory attachments.

> There is nothing … which indicates that the rate of compensation provided in this Act (before its amendment) for voluntarily provided access was just above confiscation. 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 plaintiffs' 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 utility industry more than the constitutional minimum).

Id. at 1338.

16. Gulf's characterization of the Commission and Eleventh Circuit decisions involving Alabama Power is incomplete and incorrect. The Commission rejected the utility's arguments for higher rates on two distinct grounds: first, that section 224(f) had not changed any actual conditions of the attachments (something Gulf also admitted, *see* CPFCL, ¶ 39) and that compensation already received was just and reasonable; and second, that even if a different analytical framework were used, just compensation is still measured by "loss to the owner," and the three appraisal methods offered up by the utility, including replacement cost, were not appropriate. *Alabama Power Commission Order*, ¶¶ 53-58. On appeal, the Eleventh Circuit followed the Commission's order, focused on the "legal principle" that just compensation is limited to the loss to the owner, and set forth requirements for proving loss. 311 F.3d at 1369.

17. The Bureau's decision found: (1) that the Commission's pole formulas, together with make-ready, provide compensation that exceeds "just compensation"; (2) that to claim an entitlement to additional compensation, a utility has to meet the Eleventh Circuit's test of showing "full capacity" and a lost opportunity of greater value; and (3) all of Gulf's challenges to specific aspects of the Cable Rate Formula were without merit. *Memorandum Opinion and Order*, ¶¶ 15-16.

18. Gulf Power has to maintain its pole system for its own "core business" of "the distribution of electricity to ratepayers."[4]

19. Gulf 's poles range in size quite broadly, from 30 feet on up to 100 feet. Gulf Power Ex. 54, p. 1. Gulf's 2004 ledger shows that only about 31 percent of Gulf's approximately 224,000 wood poles were 40 feet in height, and that Gulf had significant numbers

[4] Gulf is compensated for the expenses it incurs in maintaining its poles at rates approved by the Florida Public Service Commission. *See, e.g., Notice of Proposed Agency Action Order Requiring Each Electric Investor-Owned Utility to Implement Eight-Year Pole Inspection Cycle and Requiring Reports*, Order No PSC-06-0144-PAA-EI, Docket No. 060078-EI (Feb. 27, 2006).

of poles that were comprised of 30, 35, and 45-foot poles. Gulf Power Ex. 54, p. 1; *see also* Compls. Ex. 56, pp. 15-16. While Gulf contends that Mr. Dunn said that a "typical" joint-use pole was 40 feet "or taller," Gulf did not identify, either by specific numbers or general percentages, the heights of the poles to which Complainants are attached. *Alabama Power* required proof of loss for "each pole." 311 F.3d at 1370.

20-21. Complainants, or their predecessors-in-interest, originally obtained the vast majority of their attachments to Gulf Power poles not through mandatory access but through longstanding relationships governed by voluntary pole attachment contracts. *Memorandum Opinion and Order*, ¶ 2. In June of 2000, Gulf threatened to terminate all Complainants' rights of attachment unless Complainants agreed to sign new contracts that, in addition to invoking section 224(f), required payment of annual pole attachment rates 500 to 600 percent higher than the rates then in effect. *Id*., ¶ 3. In the Bureau's order of May 13, 2003, it found that new rates proposed by Gulf were unreasonable and ordered that the parties' prior pole attachment agreements be continued pending good faith negotiations that were to be "in accordance with the Commission's rules." *Id.* (Ordering Clauses, ¶¶ 3, 6). Gulf has chosen to litigate, not negotiate.

22. Cable television attachments occupy one foot of usable space on a utility pole. *See Fee Order*, ¶ 16. Gulf contends that cable attachments "could" occupy more, but it did not submit any evidence in this proceeding of any instance in which Complainants' attachments actually occupy more than one foot of usable space. *See, e.g.*, Gulf Ex. 42. Indeed, Gulf used one foot of usable space for cable attachments in its "replacement cost" calculations. Gulf Ex. 52, p. 7.

23. Gulf correctly describes the Eleventh Circuit's explanation of the concept of a "nonrivalrous" good. It errs, however, in suggesting that rivalry is the only important part of

Alabama Power's analysis. The baseline "legal principle" is that just compensation is limited to the loss incurred by a property owner. 311 F.3d at 1369.

24-25. Gulf says it uses the terms "crowding" and "full capacity" synonymously. This is not true. When it was asked in an interrogatory, Gulf 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. Gulf's own distinction is important because, at the same time in April 2005 that Gulf answered this interrogatory, Gulf only asked Osmose to evaluate crowding, not full capacity. *See* CPFCL, ¶¶ 150-52. Only later did Gulf witnesses claim that "crowding" and "full capacity" are the same. Gulf cites Complainants' witnesses in support, but Ms. Kravtin and Mr. Harrelson both made clear that, while poles may be congested at a moment in time, they are not at "full capacity" unless, taking account of routine make-ready procedures, space cannot be made for another attachment. Compls. Ex. A, pp. 26-29; Compls. Ex. B, pp. 8-11. Ultimately, Gulf's attempt to make "crowding" the same as "full capacity" is a side-show. The real test, which Gulf did not meet, is whether Complainants' presence on a pole actually deprived another (including Gulf itself) of the ability to attach to that pole and caused a lost opportunity. Compls. Ex. B, p. 28.

26-28. It is Gulf Power, not Complainants, who put forth an unrealistic and "hypothetical" view of pole capacity by claiming, without presenting evidence of a "buyer waiting in the wings" or a 'higher valued use," that a pole is at "full capacity" merely if make-ready needs to be done in order to address a code violation. As Gulf's own permitting procedure states, make-ready is used to "provide space" for licensee's attachments. Compls. Ex. 2, pp. 3-5. It is an integral part of the way Gulf, and indeed all utilities, handle pole attachments. Compls. Ex. B, pp. 9-14. Mr. Dunn agreed that a pole that could be re-arranged to accommodate more

attachments is not full, and Mr. Bowen testified that it was impractical to distinguish between re-arrangements and pole change-outs. CPFCL, ¶ 71; Gulf Power Ex. B, p. 27. As noted above in response to Gulf's paragraph 8, Gulf never explains what the "current" time means when it refers to poles, and never submitted any evidence pertaining to any period or span of time pertaining to its poles' capacity. CPFCL, ¶¶ 156-59. The fact that Gulf spent two months (April and May of 2005) and up to $100,000 paying Osmose to identify safety violations doesn't change the fact that that survey, because it ignored make-ready and contained other defects, has no probative value. CPFCL, ¶¶ 160-72.

29. Gulf's reliance upon *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), is inapposite, because that case merely 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. By contrast, in *Alabama Power*, the issue was whether there is 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. The FCC has always made clear that make-ready is part of determining available capacity. Complainants' Trial Brief, p. 14 n.23. Accordingly, under *Alabama Power*, the question of whether capacity is "full" such that the pole owner suffered a missed opportunity must be answered by taking account of Gulf Power's incorporation of make-ready in its permitting procedure and its "historical willingness to accommodate attachers by performing make-ready." *See* Compls. Ex. 2, pp. 3-5; CPFCL, ¶ 60.

When *Alabama Power* and *Southern Company* are considered together, proof of "full capacity" must involve a situation where "it is agreed" by the parties (owner and attachers) that the pole owner, taking account of Gulf's customary use of make-ready, cannot accommodate an additional attachment and has actually incurred a "missed opportunity." *See Complainants' Response to Gulf Power's Interrogatories* (April 18, 2005), pp. 16-18. Gulf has introduced no evidence of any such instance. Instead, the evidence supports the opposite finding – that 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. *See* CPFCL, ¶¶ 53, 54, 62, 63, 67, 90, 227-28, 230, 334, 347.

30. As described above in response to Gulf paragraphs 9 and 24-25, Gulf has not identified a single pole at full capacity (where Complainants' use caused Gulf to incur a missed opportunity), let alone proven that "its network of poles" is at "full capacity."

31. A pole may be a "tangible piece of property," but that is not the issue. The relevant point is that Gulf does not treat a pole as having "a finite amount of space upon which attachments can be made." GPPFCL, ¶ 31. Instead, its permitting procedure provides either that attachment can be made without make-ready, or, if necessary, with make-ready, "to provide space for [a] [l]icensee's attachments." Compls. Ex. 2, pp. 3-5. Thus, a pole is only unable to accommodate a new attacher for purposes of determining exclusion, or a "missed opportunity," if make-ready cannot be performed, and Gulf did not identify any such instance in this case. CPFCL, ¶¶ 53-67.

32-35. Gulf departs from the FCC Cable Rate Formula by using 28.5 feet of "unusable space" to obtain a "space allocation" factor in its "replacement cost" calculations of 28-29 percent, some four times the space allocation used by the Commission. CPFCL, ¶¶ 129-134.

This is inappropriate, because Gulf incurs expenses for "unusable" space regardless of whether Complainants are attached or not, and because the FCC formula already includes what the Commission has found is an appropriate allocation of costs, based upon the entire pole. *See Fee Order*, ¶¶ 16-24; *Reconsideration Order*, ¶¶ 46-54; *Alabama Power Commission Order*, ¶ 60 (utility's claims a "complete mischaracterization"). Gulf's arguments concerning the 40-inch "safety space" have also been repeatedly rejected by the Commission. *See Fee Order*, ¶¶ 20-22; *Reconsideration Order*, ¶ 51. Finally, Gulf Power's focus on the "typical" joint use pole and its claim that the height of such a pole is 40 feet is irrelevant to the issues in this case. *Alabama Power* requires proof of full capacity (exclusion) and a loss for "***each pole***" for which Gulf has a claim. Gulf never proved it had to exclude someone (or itself) or that it suffered a loss. CPFCL, ¶¶ 62-63, 67, 139-41, 147, 333-34, 347.[5]

36. Gulf's claims about the usable space on a "typical" pole, like its claims about unusable space on a hypothesized generic pole, are irrelevant to meeting *Alabama Power*'s requirements, as explained in the previous paragraph. *See* FCC 05M-49, ¶ 6 (Oct. 12, 2005). More generally, Gulf has not submitted evidence based upon a survey of all poles that would warrant reversal of the Commission's repeated rejection of the utility's industry's claims that average usable space is 13.5 feet. *See Fee Order*, ¶¶ 16-19; *Reconsideration Order*, ¶¶ 46-51; *Alabama Power Commission Order*, ¶ 60.

37. Fees paid by the ILECs, BellSouth, Sprint, and GTC, to Gulf Power do not bear upon Gulf's burden to show that Gulf has suffered a loss due to Complainants' attachments.

[5] Even if the Gulf's claims about a pole height were relevant, they are inconsistent with Gulf's own evidence, which, as discussed above in response to paragraph 19, show that Gulf has many different pole heights to which Complainants are attached. *See, e.g.*, Gulf Power Ex. 68, Routh Dep., pp. 75-75 (height of pole "could be a 35-foot pole. It could be a 50-foot pole. … Or somewhere in between"); see also Compls. Ex. 9 (Osmose survey included 30, 35, 40, 45, and 50-foot poles).

38-39. The ILECs' agreements with Gulf Power accord the ILECs the right to use up to three feet of space on Gulf Power poles. But this does not change when a new attacher pays make-ready to change-out to an incrementally taller pole. *See* Gulf Power Exs. 32-34. Moreover, where an ILEC attaches within its allocated portion of space does not bear upon Gulf's burden to show that it has in fact had to exclude someone (incur a "missed opportunity") because of "full capacity" on one or more poles.[6]

40. Gulf's contention that a "typical" 40-foot pole with three attachers cannot accommodate another attacher is irrelevant to whether Gulf can show that it incurred a "missed opportunity." 311 F.3d at 1370. Gulf uses make-ready to accommodate attachments when necessary "unless there is an engineering or safety reason for not allowing the attachment" and testified as to no such instance. CPFCL, ¶¶ 52-67.

41-42. Gulf's citations to *Alabama Power* do not support its argument that a utility could claim its entire "network" of poles is at "full capacity. When the Court set forth its requirements, it said that "before a power company can seek compensation above marginal cost" of attachments, it must show "full capacity" and a lost opportunity to sell to another or employ its own higher valued use "***with regard to each pole***." 311 F.3d at 1370-71 (emphasis added). The requirement of proof for "specific poles" is the standard, as stated by the Presiding Judge. *See Status Order*, 05M-23 (April 15, 2005), p. 4.[7] Of course, Gulf cannot meet the "each pole" standard as to the issue of capacity (let alone loss), since it admitted that, even under its legal claim that any make-ready equals lack of capacity, "there is no way of identifying each instance

[6] It is also common for ILECs to re-arrange their wires (including lowering their cables or allowing attachments below their cables) as part of the make-ready process to accommodate additional attachers. *See, e.g*., Compls. Ex. B, pp. 14, 22 , 25-26; Compls. Ex. 6, pp. 10, 12; Compls. Ex. 7, pp. 2, 125, 183. Under Section 224(i), the pole owner and existing attachers (including ILECs) are protected from having to bear any of the costs of re-arranging or replacing their attachments when a new attachment is sought.

[7] Gulf inaccurately suggests that Mr. Harrelson testified that a pole-by-pole analysis is not realistic. In fact, Mr. Harrelson explained that "you can evaluate poles on an individual basis, so long as you look both ways [at the surrounding or connecting poles]." Gulf Power Ex. 70B, Compls. Cross-Designations, Harrelson Dep., p. 335.

where this has occurred." Compls. Ex. 56, p. 17 (Interrogatory No. 29). As for Osmose, Gulf had said that it would provide data for each of its 150,000 joint use poles, but ultimately Osmose reviewed less than 7 percent of those poles and took measurements of an undetermined smaller percentage. CPFCL, ¶¶ 166-84. Gulf's claim that it could extrapolate from Osmose's two months of work to its entire network was rebutted directly by the testimony of Ms. Kravtin, who explained that Gulf's claims are not supported by any statistical evidence and that they are based upon the fundamental error of defining a pole as "crowded" (not even "full capacity") when it merely has code violations that are readily correctable. *See* Compls. Ex. A, pp. 49-57; *see also* Gulf Power Ex. 23 (violations to "be corrected" or Gulf will correct and bill the attacher).

43. Complainants and Gulf each identified 50 specific poles in their testimony, but Gulf failed to show that for any such pole, it had to exclude either a third party buyer or a higher valued use of its own and therefore suffered a loss. CPFCL, ¶¶ 334, 347. Mr. Harrelson also testified that none of the 100 poles could reasonably be said, given Gulf's use of make-ready, to be at "full capacity." Compls. Exs. 6 and 7.

44. Complainants do not assert that the poles identified by the parties are themselves irrelevant – only that they do not show a single instance of where Gulf incurred: (1) a foreclosed opportunity to lease space to an additional party or use space itself; and (2) suffered a resulting loss. Ms. Kravtin testified as to what Gulf would have had to show to prove a loss. Compls. Ex. A, pp. 30, 46-47.[8]

[8] Gulf's suggestion that Complainants formed their opinions before they reviewed the evidence is incorrect. With respect to Ms. Kravtin, Gulf cites only to a March 2005 "outline" which the witness explained she would then develop based on her review of the evidence. Kravtin Cross, April 26, 2006 Tr., p. 1472. Mr. Harrelson's testimony about Gulf's lack of proof of "full capacity" is based upon the documents provided by Gulf itself (which, in the case of the ten "Knology" poles was very limited), his personal observations of 39 out of 40 Osmose poles, and Gulf's regular practice of performing make-ready and its failure to identify a single instance of where make-ready could not be performed. *See* Compls. Ex. B, pp. 12, 31-43, 59-61.

45-46. Gulf's argument that it's wrong to consider make-ready in determining pole capacity is undermined by its multiple admissions: that it is a regular part of its pole permitting process; that Gulf routinely uses make-ready to accommodate new attaching entities and new attachments by existing attachers or by itself; that its practice and policy is to accommodate attachments unless there is an engineering or safety reason not to; that make-ready is paid for only by the party benefiting; that make-ready frequently benefits Gulf Power; that rearrangeable poles are not at full capacity; and that Gulf cannot identify any instance in which it denied an attacher the right to attach because of an inability to provide space. CPFCL, ¶¶ 47-71. Section 224(i) makes clear that the way attachments work is that the last attacher in time pays make-ready, if necessary, either to accommodate a new attachment or to modify an existing attachment. 47 U.S.C. 224(i).

47-50. For the reasons discussed above in response to Gulf's paragraph 29, Gulf's claim that its arguments are more consistent with *Alabama Power*, *Southern Co.*, and 47 U.S.C. § 224 are incorrect. *Alabama Power* explained that "full capacity" had to mean a "missed opportunity" to sell to another or for the pole owner to use space for a higher valued use, which is exactly what Ms. Kravtin explained when she testified about "one entity's presence on the pole actually depriv[ing] another of the ability to attach to that pole." Compls. Ex. A, p. 28. Gulf has not shown any such exclusion or deprivation.[9]

51. The issue in this case is not simplicity of approach but whether Gulf can show it incurred a lost opportunity to employ a higher valued use by another attacher or itself because of

[9] Make-ready does not equate to proof of full capacity because make-ready is the means of providing space (capacity) for attachments. Gulf jumps on the word "expand," arguing that if make-ready is necessary to "expand" capacity, capacity was not present before. GPPFCL, ¶ 49. But Gulf misses the point. The point is that if capacity can be made available, whether through re-arrangement or expansion of the pole height in a change-out, then capacity cannot be "full" under *Alabama Power* since there is no exclusion of another and no "missed," "foreclosed," or "lost" opportunity. *See* CPFCL, ¶¶ 60-71; Bowen Testimony, p. 27 ("impractical" to distinguish between re-arrangement and change-out); *see also* FCC 05M-50, p. 3 (Oct. 12, 2005).

Complainants' attachments. 311 F.3d at 1370-71. It has not done that. Gulf's suggestion that the need for make-ready by itself justifies a 5 to 10-fold increase in annual pole rents and that an attacher should initiate "a complaint proceeding" at the FCC anytime there is a disagreement about make-ready shows just how ridiculous Gulf's "approach" is – it would transform questions of field engineering into rate disputes.

52. Gulf Power's definition of "crowding" in the Osmose survey is disputed by Complainants – it is defective for several reasons. It's not a definition of full capacity, because it doesn't take account of make-ready, and, as Mr. Dunn admitted, a pole is not at full capacity if the utility can use make-ready to rearrange attachments to cure code violations. CPFCL, ¶¶ 68-71, 150-51, 160. In addition, the code violations listed are transitory – and capable of being fixed. Indeed, Gulf has an obligation to see that they are fixed, and fixing them will affect pole capacity. Compls. Ex. B, Kravtin Testimony, p. 55; Compls. Ex. A, Harrelson Testimony, pp. 9-11. Other deficiencies in the Osmose survey are identified in Complainants' proposed findings. CPFCL, ¶¶ 149-84.[10]

53. With respect to Gulf Power's 50 poles, the issue is not whether they require make-ready but whether Gulf had to exclude a third party or itself—that it incurred a missed opportunity. Gulf submitted no such evidence. The ten "Knology" poles and documentation in particular show that Gulf successfully accommodated additional attachments from Knology and incurred no loss. CPFCL, ¶¶ 194-200.[11]

54. Similarly, Gulf did not submit any evidence that it had to exclude someone or incur a loss with respect to any of Complainants' 50 poles. CPFCL, ¶¶ 228, 334, 347.

[10] Gulf's contention that Mr. Harrelson erred by not performing a pole "loading" analysis is incorrect. The question of "full capacity" hinges upon whether Gulf had to exclude someone (because of pole space or loading issues). Gulf did not prove that it in fact had to exclude itself or any other third party for any reason.

[11] Gulf is wrong in claiming that Complainants "did not dispute" that each of the Osmose poles would in fact require make-ready. For example, Osmose erred in classifying at least three of the 40 poles. CPFCL, ¶¶ 185-88.

55-58. Gulf is mistaken that Mr. Harrelson challenged Gulf's specifications generally. He did make the points that some specifications (i.e., plates C-7 and C-11) were incorrect or out of date; that Gulf's control over its poles was relatively lax; that Gulf violated its own standards; and that Gulf failed to acknowledge both its duty to cure code violations and the role of make-ready. Compls. Ex. B, pp. 10, 30, 44-45.

59. Mr. Harrelson provided specific examples to support his conclusion that Gulf's control over its pole attachment process is relatively lax, and that Gulf has regularly issued permits based upon "far fewer requirements than were applied to the Osmose survey." Compls. Ex. B, p. 44-48. He also pointed to Mr. Bowen's admission that "Gulf Power does not check after the attachments are made to see if the attachers did what they were supposed to do." Compls. Ex. B, p. 45.

60-61. Gulf's contention that attachers must comply with NESC and Gulf construction specifications is a truism that has no legal relevance. Notably, however, Gulf failed to show who caused the violations Osmose recorded, CPFCL, ¶ 162 ,which is significant in light of Gulf's concession that if other attachers were properly permitted and *Gulf* caused a violation, "it would be incumbent upon *Gulf Power* to either change out or rearrange the pole to bring it back into compliance." CPFCL, ¶ 72 (emphasis added).

62-63. As discussed in paragraphs 9 and 11, Gulf could not be more wrong in arguing: that it has identified "full capacity" poles; that it can skip over the requirement of proof of loss to get to valuing damages;[12] or that "fair market value" is applicable to poles. CPFCL, ¶¶ 62-63, 67, 138-41, 147, 227-28, 334, 347, 508-14; 311 F.3d at 1368.

[12] Significantly, Gulf quotes Ms. Kravtin's testimony but ignores the critical point – "proving lost opportunity." GPPFCL, ¶ 63.

64-70. Gulf has produced no evidence that would undermine the courts' and the Commission's findings that utility pole networks are "essential facilities" and that utilities have "superior bargaining power." *See NCTA v. Gulf Power*, 534 U.S. 327, 330 (2002); *Alabama Power*, 311 F.3d at 1362; *Southern Co.*, 293 F.3d at 1341; *Alabama Power Commission Order*, ¶ 55. Indeed, Mr. Spain's testimony reaffirms the point. CPFCL, ¶ 269-70. It bears repeating – the issue here is what, if anything, has Gulf lost, not, what options do Complainants have in new construction (i.e., when a developer opens a new subdivision).[13]

71-75. It is not Complainants' "interpretation," but rather *Alabama Power*'s ***holding***, as discussed in paragraph 2 above, that requires Gulf Power to prove a missed opportunity **and** a resulting loss. 311 F.3d at 1370-71. The Eleventh Circuit 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. Even if Gulf had been able to meet the *Alabama Power* test, the concept of "fair market value" would still be inapplicable. Any additional compensation would be based upon the loss to Gulf and limited to the amount of that loss. *See* 311 F.3d at 1370.

76-81. Gulf wants to skip over proof of loss because it has none. *Alabama Power* does require proof of an actual buyer – otherwise the court's statements about a "missed opportunity" "to sell space to another bidding firm" and the utility's "burden of proving loss" have no meaning. 311 F.3d at 1370. Moreover, while Gulf complains that it is unreasonable to require a contract or other agreement as proof of "another bidding firm," the Presiding Judge doesn't have to reach that question, because Gulf did not even mention at the hearing any prospective "buyer

[13] As discussed above in paragraph 13, the deposition excerpts relied upon by Gulf that discuss Complainants' ability in some instances to pay additional costs of underground lines pertain only to "new construction." None of Complainants' witnesses testified that they could duplicate or replace Gulf's poles.

waiting in the wings" who couldn't be accommodated or any higher valued use that it was prevented from implementing.[14] The fact that three telecommunications companies pay Gulf an annual pole rate of $40.60 is not proof of a "missed opportunity" or "loss" from a taking but rather of Gulf's ability to use its "leverage" to extract monopoly pole terms from some new entrants to the communications marketplace, as one of those companies complained in writing, Compls. Ex. 77, and as Ms. Kravtin explained in detail. CPFCL, ¶¶ 280-85, 357. More generally, it's not accurate to say that the *Alabama Power* requirements of proving "full capacity" (exclusion) and loss of a higher valued use "can never be met." Ms. Kravtin explained precisely how a utility with a real lost opportunity would prove it. Compls. Ex. A, pp. 30, 46-47. Gulf simply failed to come forward with such proof.[15] It would make no sense to award Gulf additional pole rent even if it can and has accommodated everyone *and* not suffered any loss.

82-84. With respect to proof of a "higher valued use," *Alabama Power* requires that a power company "must show with regard to each pole that … the power company is able to put the space to a higher-valued use with its own operations." 311 F.3d at 1370-71. This cannot be, as Gulf claimed in its interrogatory responses, see Compls. Ex. 56, p. 5, a mere assertion that "any space occupied by a cable company can be put to a 'higher valued use,'" that space can be "reserved" for other future uses, or that it is desirable to "merely forc[e] the cable companies to develop their own infrastructure," otherwise the utility has no proof in fact of lost opportunity. No, instead, as the *Klay* and *Alabama Power* decisions make clear, the owner claiming just compensation for a taking must show it actually "suffered a loss," not merely the opportunity to

[14] Notably, Gulf's argument that FCC regulations "constrain" their negotiations with attachers conflicts with their claim that it is entitled to a "market" rate.

[15] Gulf's analogy to the government's condemnation of a house is faulty. In that circumstance too, there is an actual buyer – the government. But poles are not like land, as *Alabama Power* recognized when it concluded that pole space "may be, for practical purposes, *nonrivalrous*," that fair market value could not be used, and that to obtain compensation above marginal costs of attachments, a utility would have to prove a loss (either a lost sale/lease to another or a lost higher valued use). 311 F.3d at 1370-71.

charge what it wants. 425 F.3d at 986; 311 F.3d at 1369.[16] Gulf does recite "uses" it believes are valuable, but importantly ***none of these have been precluded!*** *See* Tr. 7/6/06 at 2104, 2111.

85-88, 91. As discussed in detail in paragraph 12 above, Gulf's "replacement cost" methodology and "fair market value" have nothing to do with pole capacity or whether Gulf incurred a loss, and therefore have nothing to do with "just compensation." Gulf's efforts to re-work the FCC Cable Rate Formula to increase the space allocation factor by four hundred percent and more than double the pole investment component have been repeatedly rejected by the Commission, *Alabama Power Commission Order*, ¶¶ 58-61; *Reconsideration Order*, ¶¶ 15-25, and are an unconstitutional attempt to dramatically increase Complainants' share of Gulf's own overhead costs and thereby have Gulf be placed in a better position than it would be without their attachments. 311 F.3d at 1370 (*citing Metropolitan Transp. Auth. v. ICC*, 792 F.2d at 297). Furthermore, what Complainants, or anyone else, has to pay to unregulated municipal or cooperative electric companies has nothing to do with Gulf's costs or losses.

89-90, 92. Gulf admitted that it wants "replacement cost" rates for ***all*** its poles, regardless of pole capacity, and that "replacement cost" has no relation to any actual loss. CPFCL, ¶ 79, 86-92, 139-41, 147. Thus, "replacement cost" is not merely "not perfect," GPFCL, ¶ 90; it is legally irrelevant and, as the Commission said, "particularly unsuited for valuing pole attachments." *Alabama Power Commission Order*, ¶ 53. Moreover, the Commission's rejection of "replacement cost" is not "inconsequential," since the Commission explicitly considered replacement cost for poles in the context of its being a "technique for determining market value." *Id*. Why would it apply to existing attachers if there is no demonstrated "lost opportunity?"

[16] The references to testimony by Mr. Bowen are all in the conditional tense. However, Mr. Bowen also testified that if it needs additional space, then, if necessary, it performs make-ready in order to obtain space. Gulf Power Ex. B, pp. 38-39. Gulf Power did not present any evidence in this proceeding of un-reimbursed costs relating to Complainants' attachments.

93. Gulf's "replacement cost" methodology is hardly "conservative," since it quite obviously results in rates from $38 to approximately $65, or from 600 to 1000 higher than FCC Cable Rate formula rates. CPFCL, ¶ 135. Gulf's admission that it uses "system averages" and that it seeks its exorbitant rates for every pole is demonstrably inconsistent with *Alabama Power*'s requirements of proof of a missed opportunity and resulting loss for "each pole" for which a utility seeks additional compensation. 311 F.3d at 1370-71.[17]

94-95. Gulf's witnesses admitted that its "replacement cost" rates are based on the unconstitutional notion of value, or gain, to the taker – indeed, that they are specifically based upon the costs of cable attachers' duplicating Gulf's network, even though Gulf admitted that that was not possible. CPFCL, ¶¶ 81, 83, 133, 143, 148, 252, 269-71.[18] Gulf's repeated attempt to analogize to land is not only wrong; it confuses loss with valuation of the loss. If you lose your house, you lose all rights to use your property and can look to comparable transactions for a valuation. But when a cable attacher uses one foot of a Gulf pole, Gulf rarely if ever is prevented from using the pole for its own purposes or from leasing to other third parties. CPFCL, ¶¶ 62-63, 67. Gulf certainly presented no such evidence here. Compls. Ex. A, ¶¶ 334, 47.

96-101. *Alabama Power* states that, without evidence of a proven lost opportunity for "each pole" for which a utility make a claim, "any implementation of the Cable Rate . . . necessarily provides just compensation." 311 F.3d at 1370-71.[19] The Commission has repeatedly rejected Gulf's claims that the Cable Rate Formula does not provide just

[17] Gulf's argument that the Commission uses "presumptions" in arriving at its administrative pole rate formulas is not pertinent to Gulf's ***constitutional*** claim for compensation over and above such administrative rates, which, as *Alabama Power* held, must be based upon proof of loss. *Id*.

[18] Gulf's contention that attachers have benefited from "cherry-picking," while not proven or quantified, is but one example of it's reliance upon a methodology that seeks to recover value to the "taker."

[19] The Eleventh Circuit also concluded that, "[s]ince marginal cost provides just compensation so long as [proof of lost opportunity is] absent, it is irrelevant that the Telecom Rate … yields a higher rate." Id. at 1371 n.23. Similarly, "other" higher rates are irrelevant unless the express conditions of *Alabama Power* are met.

compensation and that it should use "replacement" costs and include a greater allocation of "unusable" space. *Alabama Power Commission Order*, ¶¶ 57-6; *Reconsideration Order*, ¶¶ 15-25. Mr. Spain, upon whom Gulf Power relies, admitted he was not aware of the Commission's orders. CPFCL, ¶¶ 240-43.

102-05. Gulf Power has not met its burden of proof for claiming more than its marginal costs – of "show[ing] with regard to each pole" that it has incurred a "missed opportunity" and consequently suffered a loss. 311 F.3d at 1370-71; *Klay*, 425 F.3d at 986. Gulf did not even present evidence of its marginal costs, let alone identify a loss caused by Complainants. CPFCL, ¶¶ 139-47, 238, 334-47. Only such a loss, and not "fair market value," is relevant to Gulf's "takings" claim for "just compensation." 311 F.3d at 1368-69. In its final paragraphs, Gulf moves away from specific "replacement cost" rates,[20] and asks only for a finding that the "Cable Rate is an unacceptable benchmark," a result directly inconsistent with the Eleventh Circuit's holding that, without proof of loss, it "necessarily provides just compensation." *Id*. at 1370-71.

CONCLUSION

Gulf Power's position is that any pole that did or will require make-ready is or will be "full" so that, even without evidence of either a lost opportunity to rent space to another attacher or any foreclosed use of its own, the FCC rate formula no longer applies (despite the fact that the formula provides *more* than just compensation); marginal costs can be ignored (including those make-ready costs such as rearrangement or changeout that are fully reimbursed); and a new regime of "fair market value" in the guise of "replacement cost" establishes an appropriate rental. Gulf Power's position, however, is not consistent with Section 224, *Alabama Power*, or any precedent. Simply stated, Gulf has not shown any entitlement to any additional

[20] Gulf's apparent decision not to seek its replacement cost rates is not surprising, given their origin before *Alabama Power* and their lack of any connection to pole capacity or lost opportunity. *See supra*, ¶ 12, p. 7.

compensation under its takings claim because it has not met the requirements for proof of loss set forth in *Alabama Power*. Indeed, the proof showed that Gulf Power has been, is, and will be more than fully reimbursed for the marginal costs of Complainants' attachments, that it will earn a profit above marginal cost reimbursement under the FCC formula, and that not one single use or attacher was ever foreclosed due to Complainants' presence on any Gulf Power pole.

Gulf power has suggested that this whole proceeding would be a waste if the *Alabama Power* standard means what Complainants say. GPPFCL, ¶¶ 5, 79. However, Gulf Power never lived up to its allegations. Three years ago, Gulf claimed it had proof of "identifiable lost opportunities."[21] But in discovery and at the hearing, Gulf showed that it had no proof of loss. The bottom line: no loss; no claim. 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.

Respectfully submitted,

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August 16, 2006

[21] Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing, p. 11.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Reply Proposed Findings of Fact and Conclusions of Law in Response to Gulf Power's Proposed Findings and Conclusions of Law*, has been served upon the following by electronic mail and via Federal Express (non-FCC recipients) or hand-delivery (FCC recipients) on this the 16th day of August, 2006:

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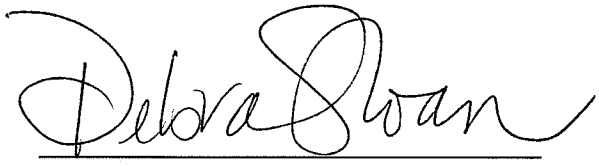

2. On page 17 of her Reply Report, Ms Kravtin makes the following statement:

> Accordingly, such concerns [safety, operational or engineering concerns] are not proper grounds for denying the same non-discriminatory right of access to utility poles for all telecommunications carriers, without regard to whether the attachments involve wireline or wireless facilities.

(a) Is Ms. Kravtin aware of any jurisdiction, in Canada or the United States, which has denied the non-discriminatory right of access to utility poles for all telecommunications carriers, without regard to whether the attachments involve wireline or wireless facilities, based on safety, operational or engineering concerns? If so, please identify the relevant jurisdictions, and provide copies of any decisions or orders reflecting those concerns as the basis for denying that right of access.

(b) Please provide copies of any decisions by regulatory authorities in jurisdictions in Canada or the United States, in which the issue of safety, operational, or engineering concerns has been addressed through reliance on existing electrical safety codes or other objective standards of access.

(c) Has Ms Kravtin examined the existing electrical safety codes and objective standards of access in Ontario? If so, is she satisfied that the safety, operational and engineering concerns identified by Ms Byrne can be satisfied by reliance on those existing codes and standards?

Response:

(a) No, Ms Kravtin is not aware of any jurisdiction in Canada or the US that has denied non-discriminatory access to utility poles for all telecommunications carriers based on safety, operational or engineering concerns, with the exception of the position taken by THESL in connection with wireless attachments of DAS providers.

To the contrary, Ms Kravtin is aware of recent efforts by U.S. regulators to promote wireless attachments to utility poles by bringing "regularity and predictability to attachment of wireless facilities": see FCC's Report and Order and Order on Reconsideration dated April 7, 2011 (the "FCC's April 7, 2011 Order") in WC Docket No. 07-245, GN Docket No. 09-51 (appended to CANDAS' Application at Tab 22) and in particular paragraphs 40-44 thereof.

(b) See *e.g.,* the FCC's April 7, 2011 Order, *supra,* paragraphs 44 and 77-80. See also the response to Board Staff Interrogatory at CANDAS(OEB)Kravtin REPLY-1(b).

(c) Ms Kravtin has not personally examined existing safety codes and standards of access in Ontario. However, through the course of her involvement in numerous pole proceedings, she is very familiar, albeit as an economist and not as an engineer, with the US National Electric Safety Code (NESC) as it applies to utility poles. Based on that

understanding, her familiarity with the FCC's deliberations in its recent pole proceeding (WC Docket No. 07-245, GN Docket No. 09-51) addressing access provisions for wireless attachments, and the Reply Evidence of Tormod Larsen in this proceeding, it is Ms Kravtin's opinion that the safety, operational, or engineering concerns as related by Ms Byrne in her Affidavit sworn September 1, 2011 apply to wireline communication lines just as they may apply to antenna attachments and that these may be and are addressed routinely through reliance on existing codes or objective standards of access.

These codes and standards of access have generally been regarded as working effectively over the many decades that wireline attachments have been accommodated on utility poles and the several years that wireless attachments have similarly been accommodated. Moreover, and most pertinent to the issue of non-discriminatory access to utility poles, to the extent that any safety, operational or engineering concerns might arise on a given pole or subset of poles for a given telecommunications deployment, as found by the FCC, those concerns "do not hinge necessarily on whether the service is wireless or wireline" (see FCC's April 7, 2011 Order, paragraph 44). Indeed, to the extent that particular issues may arise for a particular deployment or type of equipment, be it wireline or wireless, the appropriate response would not be to deny access categorically and permanently, or to inappropriately delay access, but rather to follow, in a non-discriminatory manner, the applicable evaluation procedures to the degree necessary to ensure safety.

There is no evidence on the record of this proceeding to suggest that antenna attachments to poles are unknown to authorities that promulgate safety codes and access standards to poles in Canada. To the contrary, there is evidence on the record of this proceeding that demonstrates that existing safety codes and access standards in Ontario specifically contemplate and provide for safety-compliant antenna attachments to poles, including on pole-tops. See Ontario Electrical Safety Authority, "Guideline for Third Party Attachments," October 5, 2005, at 15 of 24, found on the record of this proceeding at Exhibit F to the Affidavit of Ms Mary Byrne sworn September 1, 2011. See also Canadian Standards Association, "Overhead Systems", Standard C22.3 No. 1-10 at 18, clause 4.6.1.1, at 31, clause 5.10.2.2 and at 99, clause A.5.10.2.2, found on the record of this proceeding at Exhibit G to the Affidavit of Ms Mary Byrne sworn September 1, 2011. See also THESL, "Section 23: Foreign Attachments, Index of Standards, at page 23-3000, section 3), found on the record of this proceeding at Attachment 1 to THESL(CANDAS)Byrne-1 filed September 30, 2011 as Tab 5.1, Schedule 1, Attachment 1 of THESL's responses to interrogatories.