**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., *et al.*,

070000

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

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To: Office of the Secretary

Attn: The Commission

**GULF POWER'S REQUEST FOR ORAL ARGUMENT ON EXCEPTIONS TO INITIAL DECISION**

Ralph A. Peterson
**BEGGS & LANE LLP**
P.O. Box 12950
Pensacola, Florida 32591-2950
Telephone: (850) 432-2451
Facsimile: (850) 469-3331

J. Russell Campbell
Eric B. Langley
Allen M. Estes
**BALCH & BINGHAM LLP**
1710 Sixth Avenue North
Birmingham, AL 35203-2015
Telephone: (205) 251-8100
Facsimile: (205) 226-8798

**Counsel for Respondent**

**March 19, 2007**

Gulf Power Company ("Gulf Power"), pursuant to 47 C.F.R. § 1.277(c), requests oral argument on the exceptions to the Initial Decision, filed by Gulf Power on March 2, 2007. In support of this request, Gulf Power says the following:

1. Among the many important issues at stake in this proceeding, there are two questions on which the Commission should hear oral argument:

- When is a pole (or pole network) "crowded" or at "full capacity"?
- Once a pole (or pole network) is shown to be "crowded" or at "full capacity," what proof is required for a utility to obtain pole attachment rents higher than the regulated rate?

These questions, and the manner in which the Initial Decision answers these questions, have ramifications beyond this case on both an operational and financial basis.

**The Capacity Issue**

2. The Initial Decision's "capacity" analysis is irreconcilable with 47 U.S.C. § 224(f)(2) and *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir 2002), which reversed the Commission's rule requiring utilities to expand capacity to accommodate new attachers. Importantly, in the underlying rulemaking reversed by the Eleventh Circuit in *Southern Co.*, the Commission defined "expansion of capacity" to mean pole rearrangement or change-out – the same conditions Gulf Power urges here should be the measuring stick for "full capacity" as the term is used in *Alabama Power Co. v. FCC,* 311 F.3d 1357 (11th Cir. 2002).

3. The Initial Decision and the Complainants also twist the following important language from the *Southern Co.* decision:

> When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'

The Initial Decision reasons (erroneously), "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 application in this case." (Initial Decision, ¶ 24). Complainants argue:

> Because Complainants and other third party attachers (and the Initial Decision) would only agree that capacity is insufficient where make-ready engineering is not feasible, one may deduce from the *Southern Company* language that a pole could not be at full capacity where make-ready *could* accommodate a third party attacher.

(Reply To Gulf Power's Exceptions, p. 10) (emphasis in original).

4. Respectfully, both of these interpretations do a disservice to the holding in *Southern Co.* The *Southern Co.* decision was addressing the Commission's "forced make-ready" rule. In both the underlying rulemaking and the *Southern Co.* case, "expansion of capacity" (make-ready) was the remedy for "insufficient capacity." Thus the "agreement" on insufficient capacity referenced in *Southern Co.* can only be read as an "agreement" on whether make-ready needs to be performed to accommodate an attachment request. It is this condition – the need to perform make-ready -- that renders a pole at "full capacity" and triggers a utility's statutory right to deny access under § 224(f)(2).[1]

5. The "full capacity" analysis in *Alabama Power* cannot be divorced from the "insufficient capacity" analysis in *Southern Co.* The *Alabama Power* case specifically tied these concepts together when it said: "Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime." 311 F. 3d at 1370 (citing 47 U.S.C. § 224(f)(2)).

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[1] In this case, Complainants conceded that there is virtually *never* a disagreement as to when make-ready needs to be performed. (*See* GP Proposed Findings, ¶ 51).

6. The capacity issue is broader than this case alone, though. On multiple recent occasions, attachers – including the Complainants in this case – have asked the Commission to "clarify" that utilities can deny access for reasons of insufficient capacity only where make-ready *cannot* be performed.[2] This "clarification" sought by attachers and the Initial Decision's capacity analysis are in direct conflict with § 224(f)(2) and *Southern Co.*

**The Rent and Rate Issue**

7. "Full capacity" or "crowding" (as *Alabama Power* used alternatively) is the condition precedent to a utility obtaining pole attachment rents higher than the regulated rates.[3] Under the Initial Decision's rationale, though, a utility would *never* be entitled to a higher rent unless it could show that there was an actual, identifiable buyer who was willing to pay more for the specific space occupied by Complainants. This is an unworkable, unrealistic paradigm.

8. First, consider the likely "other" identifiable buyers -- Section 224 attachers who are protected by the Commission's rate regulation. The artificial suppression of the market puts utilities in a circular situation. With respect to the evidence Gulf Power submitted regarding the unregulated market for Gulf Power's pole space, the Complainants contended (without evidence) that it was "hold-up" value. Complainants' contention also does not square with the fact that they are paying electric cooperatives (not subject to § 224) more than $17.50 per attachment for

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[2] In the *Fibertech* rulemaking petition (RM-11303), state cable associations (including the FCTA, a complainant in this case) asked the FCC to "clarify" that "only where a third-party attacher agrees that a taller pole, rearrangement, or other make-ready is not feasible could capacity be deemed 'insufficient' to justify a denial of access." (March 21, 2006 Letter from Chris Fedeli, on behalf of FCTA and other state cable television associations, to Marlene Dortch). Similarly, in the United Power Line Council's petition for declaratory ruling on the classification of BPL, cable operators (including the FCTA) asked the Commission to condition classification of BPL as an "information service" on "[a] finding that the term 'capacity' in section 224(f)(2) refers not only to capacity on installed poles but all capacity at the disposal of the utility, though reasonable make-ready." (Joint Cable Operator Comments, p. 6, WC Docket No. 06-10).

[3] To be clear, Gulf Power does not agree with *Alabama Power*. But as long as *Alabama Power* is controlling law, it needs to be applied meaningfully and in a way consistent with other binding precedent. *Alabama Power* even described the "full capacity" condition precedent as an "anomaly" when it said, "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." 311 F.3d at 1371.

*identical* space as occupied on Gulf Power's poles. Complainants admitted that these were freely negotiated rates.

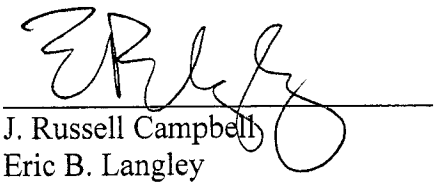
9. Second, in takings cases (and this is a taking case), a property owner has *never* been required to show an actual, identifiable buyer. The consequences of such a requirement would be severe. To the contrary, the analysis focuses on a *hypothetical* buyer. Nothing in *Alabama Power* precludes harmonizing the long-standing reliance on the hypothetical buyer with the new condition precedent to seeking just compensation ("full capacity"). In this proceeding, Gulf Power urged a paradigm in which the focus turned to valuation of the space occupied by Complainants once a showing of "full capacity" was made – a paradigm that focused on *actual* poles and hypothetical buyers. The paradigm urged by Complainants and adopted in the Initial Decision instead focused on *hypothetical* poles and actual buyers.[4]

## Conclusion

10. The Initial Decision's capacity analysis and its reliance on the "actual, identifiable buyer" standard raise important issues of first impression to the Commission. Gulf Power believes oral argument would better elucidate these issues and illuminate the material facts in the record, and thereby further aid the Commission in rendering a sound Final Decision in this matter. Gulf Power respectfully requests that the Commission hear oral argument on Gulf Power's exceptions to the Initial Decision.

[4] In the rulemaking proceeding underlying the *Southern Co.* decision, Commissioner Furchtgott-Roth dissented from the Commission's capacity expansion rule in part because it focused on "wholly imaginary facilities that simply do not exist." *Order on Reconsideration,* 14 FCC Rcd. 18049 (Oct. 20, 1999). That is exactly what the Initial Decision does.

Respectfully submitted,



J. Russell Campbell
Eric B. Langley
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**BALCH & BINGHAM LLP**
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P.O. Box 12950
Pensacola, Florida 32591-2950
Telephone: (850) 432-2451
Facsimile (850) 469-3331

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Request For Oral Argument On Exceptions have been served upon the following by United States mail and E-mail on this the 19th day of March, 2007:

| | |
|---|---|
| Lisa Griffin<br>Federal Communications Commission<br>445 12th Street, S.W.<br>Washington, D.C. 20554<br>**Via E-mail** | Honorable Richard L. Sippel<br>c/o Mary Gosse<br>Federal Communications Commission<br>445 12th Street, S.W.<br>Washington, D.C. 20554<br>**Via E-mail** |
| Rhonda Lien<br>Federal Communications Commission<br>445 12th Street, S.W.<br>Washington, D.C. 20554<br>**Via E-mail** | Marlene H. Dortch, Secretary<br>Federal Communications Commission<br>Office of the Secretary<br>445 12th Street, SW<br>Washington, D.C. 20554 |
| Gary P. Schonman<br>Federal Communications Commission<br>445 12th Street, S.W.<br>Washington, D.C. 20554<br>**Via E-mail** | Kris Monteith<br>Federal Communications Commission<br>445 12th Street, S.W.<br>Washington, D.C. 20554 |
| Director, Division of Record and Reporting<br>Florida Public Service Commission<br>2540 Shumard Oak Blvd.<br>Tallahassee, Florida 32399-0850 | Federal Energy Regulatory Commission<br>Docket Room 1A-209<br>888 First Street, NE<br>Washington, D.C. 20426 |
| John D. Seiver<br>Christopher A. Fedeli<br>DAVIS, WRIGHT & TREMAIN, LLP<br>1919 Pennsylvania Avenue, N.W.<br>Suite 200<br>Washington, D.C. 20006<br>**Via E-mail** | |

OF COUNSEL