ORIGINAL

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

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.; COX COMMUNICATIONS GULF COAST, L.L.C., *et al.*

Complainants,

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P.A. No. 00-004

vs.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

GULF POWER COMPANY'S RESPONSE TO COMPLAINT

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SUMMARY

Upon the expiration of the terms of the pole attachment agreements of complainants Mediacom Southeast LLC ("Mediacom") and Comcast Cablevision of Panama City, Inc. ("Comcast") and, with respect to complainant Cox Communications Gulf Coast, L.L.C. ("CCGC"), by the relinquishing of former owners and attachers of their pole attachment agreements, Gulf Power Company ("Gulf Power") has given the complainants notice of termination of the agreements pursuant to the terms thereof. Gulf Power has, however, tendered to complainants new pole attachment agreements. The principal difference between the old and new agreements is a higher annual pole rental fee for cable attachments, which charge is challenged in the complaint.

Gulf Power responds herein that the Commission lacks jurisdiction to decide the complaint because the complainant cable companies use their facilities to provide Internet service. Under *Gulf Power II*, attachments used to provide Internet service, either separately or in conjunction with cable service, are not subject to Section 224 of the Telecommunications Act. Moreover, the complainants allege a contractual breach, over which local courts (not the Commission) have jurisdiction.

The new attachment charge is based on Gulf Power's initial determination of conservative measurements of the value of the space occupied by attachments to its poles, regardless of the nature of the attaching entity. The valuation process was set in motion by the Telecommunications Act of 1996, which amended Section 224 to give cable companies

a mandatory right of access to utility poles. Previously, Section 224 required attachment rates to be just and reasonable, but access was not mandatory. Courts construing this section had ruled that since access was not mandatory, there was no *per se* "taking" of utility property.

Now that access is mandatory, the courts in *Gulf Power I* and *Gulf Power II* have unequivocally held that Gulf Power is entitled to just compensation. The so-called "cable rate" assuredly does not result in just compensation, if for no other reason, because it deliberately excludes compensation for the value derived from the space on the pole that cannot be used for attachments – space for which other mandatory attachers must compensate the utility. Moreover, the cable rate fails to allow recovery of all costs associated with the taking, and it is inappropriately based upon embedded costs. Judicial precedent is clear that if a cost-based approach is used for determining just compensation, then forward-looking (as opposed to historical) costs should be used.

Furthermore, Gulf Power's price for the attachments is supported by standard appraisal and valuation principles. Accordingly, limiting Gulf Power to anything less results in a subsidy for the cable industry by utility rate-payers and violates the Takings clause of the Fifth Amendment.

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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.; COX COMMUNICATIONS GULF COAST, L.L.C., *et al.*

Complainants, **P.A. No. 00-004**

vs.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

GULF POWER COMPANY'S RESPONSE TO COMPLAINT

Gulf Power Company ("Gulf Power"), pursuant to Section 1.1407 of the Commission's Rules (47 C.F.R. § 1.1407), submits this response to the Complaint filed by the Florida Cable Telecommunications Association, Inc. (the "Association"); Cox Communications Gulf Coast, L.L.C. ("CCGC"); Mediacom Southeast LLC ("Mediacom"); and Comcast Cablevision of Panama City, Inc. ("Comcast"), hereinafter collectively referred to as "Complainants," on July 10, 2000.

INTRODUCTION

In 1996, cable companies scored a legislative victory when Congress amended 47 U.S.C. § 224 ("The Act") to mandate that utilities must provide cable and telecommunications companies access to their networks of poles, conduits, ducts and rights-of-way. Previously, Section 224 required attachment rates to be just and reasonable, but access was not mandatory. Courts construing Section 224 had ruled that since access was voluntary, there was no *per se* taking of utility property. Upon enactment of the 1996 amendments, utilities immediately objected before courts and this Commission that the forced occupation effected a taking of their private property triggering constitutionally adequate just compensation. Utilities argued that the rates set forth in the Act did not rise to the constitutionally required level, but were instead the continuation of a more than two decade long "favorable" (read "subsidized") rate for cable companies.

Cable companies, and this Commission, told the Eleventh Circuit Court of Appeals, in writing, that if a utility believed it was entitled to a constitutional price higher than that set forth in the Act, it should charge it. Cable companies and this Commission explained that the cable company would then either have to pay the price or forego access. They indicated that the Commission would not stay the imposition of such a higher charge so as to ensure that the utilities are not forced to provide access for a fee that is less than just compensation.

The terms of the pole attachment agreements of Complainants Comcast and Mediacom expired on February 29, 2000, and June 30, 2000, respectively. Cox Communications Gulf Coast, L.L.C. ("CCGC") became a new attacher seeking access to Gulf Power's poles when former owners and attachers of the pole attachments for which CCGC sought pole access relinquished their agreements by transferring ownership to CCGC as the new owner and attacher. With the advent of this termination of the voluntary pole attachment agreements pertaining to the Complainants' attachments and the Complainants' present demand for mandatory access, Gulf Power was out of the business of voluntarily leasing its pole space to these cable companies. As the Complainants were timely informed, Gulf Power is complying with the Act's non-discriminatory mandatory access provision, but at the constitutionally required price. Gulf Power will no longer deal with subsidized voluntary attachments.

When the preceding pole attachment agreements affecting the Complainant's attachments were terminated by expiration or former attachers' relinquishment, Gulf Power provided notice to the Complainants that voluntary cable access to Gulf Power's poles was ending, and that any future access would be pursuant to the Act's mandatory access provision. Gulf Power notified the Complainants of its takings price for 2000 of $38.06 per pole.

Notwithstanding their earlier statements, and those of the Commission with which they did not disagree, Complainants now ask the Commission to rule Gulf Power's actions

in exercising their contractual termination rights "unreasonable." Complainants' express "shock" that Gulf Power would seek a more appropriate price and follow the very rules cable companies explained to the Eleventh Circuit were in place to insure that utilities would be appropriately compensated.[1]

Gulf Power's takings price of $38.06 is derived from a replacement cost methodology that fully allocates both usable and unusable space to all attaching entities. The methodology includes all appropriate FERC accounts and relies upon more accurate assumptions then those previously employed by the Commission. The $38.06 price is *highly conservative* and only begins to move Gulf Power towards the constitutionally required full and perfect price. Gulf Power's price is supported by its cost data, an independent certified appraiser's analysis of various pricing models, and common sense.

This is the case where the Commission should end its two decade long "favorable" treatment of cable companies. As cable companies and telecommunication companies finally move towards competition with each other, the Commission should cease to give the cable companies a competitive advantage through artificially low rates. Now that it is undeniably clear that utilities are entitled to just compensation, the Commission should and must uphold Gulf Power's pole attachment charge.

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[1] *See, e.g., Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999) (noting that judicial estoppel "precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to 'play fast and loose with the courts' ").

RESPONSE TO NUMBERED PARAGRAPHS

1. Upon information and belief, the allegations of this paragraph are admitted.

2. Gulf Power lacks knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph. The allegations are therefore denied.

3. Admitted.

4. Gulf Power denies that the Commission has jurisdiction over this action. In *Gulf Power Co. v. Federal Communications Commission*, the Court held that the Commission lacks jurisdiction to regulate the rates, terms, and conditions of pole attachments that are used to provide Internet service, irrespective of whether the Internet service is provided on a stand-alone basis or on a commingled basis (*i.e.*, in tandem with the provision of cable service or telecommunications services). *Gulf Power II,* 208 F.3d at 1277. As is further explained in Gulf Power's Motion to Dismiss Complaint and Petition for Stay for Lack of Jurisdiction filed in this matter on July 20, 2000, (the "Motion to Dismiss"), its Motion to Strike filed on August 7, 2000, and the three affidavits of Michael R. Dunn (with uncontradicted supporting attachments) filed in this proceeding, it is undisputed that the Complainants are currently using facilities, or intend in the future to expand their use of the facilities, that they have attached to Gulf Power's poles to provide either Internet service or commingled Internet and telecommunications services.[2] As such,

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[2] Gulf Power incorporates herein by reference the arguments made in its Motion to Dismiss and Motion to Strike. By filing this Answer, Gulf Power in no way acquiesces to the Commission's jurisdiction or waives the arguments set forth in its Motion to Dismiss and Motion to Strike. This (continued...)

according to the Eleventh Circuit speaking in *Gulf Power II*, the Commission does not have jurisdiction under Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, to adjudicate the Complainants' Complaint or Petition for Stay.[3]

Additionally, the Commission lacks jurisdiction because Complainants' claims are strictly for breach of contract and do not involve determining whether terms are unjust or unreasonable. The Commission has expressly stated that its jurisdiction over pole attachments does not "supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual rates, terms, or conditions." *In re the Matter of Marcus Cable Associates, L.P. v. Texas Utilities Electric,*

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[2] (...continued)
Answer is filed only as a precaution should the Commission refuse to recognize the binding ruling of *Gulf Power II* and deny Gulf Power's motion. Moreover, by filing this Answer, Gulf Power in no way waives its right to seek judicial intervention should the Commission erroneously assume jurisdiction over this matter.

[3] Complainants have the brazen audacity to tell this Commission that they are not providing Internet service in Gulf Power's service area. *See* Opposition to Motion to Dismiss Complaint and Petition for Temporary Stay for Lack of Jurisdiction. Complainants obviously ignored the voluminous attachments to Gulf Power's Motion to Dismiss and Motion to Strike that undeniably prove that Complainants **are** providing such services in Gulf Power's service area. Attachments H, I, and J to the Third Affidavit of Michael R. Dunn, submitted herewith, provide further proof of the Complainant's effrontery. The following materials filed in this proceeding speak for themselves: Mediacom's brochure offering Internet service in Gulf Breeze, Florida; CCGC's brochure listing its offices in Pensacola, Crestview, and Fort Walton Beach to be contacted to receive Internet service in those areas; Comcast brochures and photograph of billboard advertising Internet service with cable service through attachments to Gulf Power's poles; Mediacom brochures and photograph of billboard advertising Internet service with cable service through attachments to Gulf Power's poles; CCGC advertising brochures and photographs of billboards advertising Internet service in Gulf Power's services areas; copies of the website pages of Mediacom, Comcast, and CCGC in which the Complainants confirm that they are offering and providing Internet service in those areas covered by the pole attachment agreements involved in this proceeding.

Co., 12 F.C.C.R. 10362, ¶ 10 (1997). In their pleadings in this proceeding, the Complainants attempt to argue that an alleged course of dealing somehow nullifies, in the case of Mediacom and Comcast, the express contractual expiration of the pole attachment agreements; and in the case of CCGC, the termination of pole attachment agreements by CCGC's predecessors in ownership of the attachments to which CCGC now has demanded access. By the agreements' own terms and under Florida law, the pole attachment agreements of Mediacom and Comcast for the attachments at issue here already have expired by passage of time, and CCGC has never had a pole attachment agreement with Gulf Power.[4] Nevertheless, Complainants incorrectly represent that Gulf Power's "intentions

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[4] The pole attachment agreements that Complainants claim in their petition and complaint are with CCGC are actually the contracts of the former attachers and owners of the attachments (entities who became inactive and not authorized to carry on business in Florida) for which CCGC is demanding pole access. Those contracts were terminated or rendered null and void by the former attachers' transfer of ownership to CCGC more than nine months ago, without either CCGC or the former attachers meeting their contractual and statutory obligations of requesting an assignment of the agreements or applying for a new agreement for access.

The facts are clear that CCGC and Gulf have never entered into a pole attachment agreement. Gulf Power entered into a pole attachment agreement with Cox Communications Pensacola, Inc., on January 1, 1997. Exhibit 3 to Complaint. Although unknown to Gulf Power until recently, Cox Communications Pensacola, Inc., ceased to operate as an active corporation in Florida on July 15, 1997, and at no time was Gulf Power notified of this event. Attachment M to Third Affidavit of Michael R. Dunn. Cox Communications Pensacola, Inc. failed to properly seek an assignment of its interests and obligations pursuant to the contract dated January 1, 1997 (Exhibit 3). As a result of the dissolution of Cox Communications Pensacola, Inc., the pole attachment agreement of January 1, 1997, is void. CCGC commenced business as an entity in Florida on September 15, 1999 (Attachment K to Third Affidavit of Michael R. Dunn), and has since attached to Gulf's facilities without notifying Gulf or signing a pole attachment agreement. CCGC was formed well after Cox Communications Pensacola, Inc. became inactive and therefore cannot claim that the new name and entity is simply a name or pro forma change. CCGC is a new entity with whom Gulf Power has not entered into a pole attachment agreement.

(continued...)

[were] to terminate its pole agreements" and that Gulf Power was "unilaterally terminating" the agreements (with only a disingenuously parenthetical mention that pole attachments can expire). Even if this argument as to an alleged "course of dealing" and alleged breaches of contract by Gulf Power were correct (which it is not factually or legally), the Commission lacks jurisdiction over that allegation, because the Complainants are not claiming that the alleged *contractual provisions* are unjust or unreasonable.[5] They instead are asserting and

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[4] (...continued)
Moreover, on January 1, 1997, Gulf Power and TWC Cable Partners d/b/a Emerald Coast Cable Television entered into a pole attachment agreement. Exhibit 3 to Complaint. Emerald Coast Cable Television's authority to conduct business under that fictitious name expired on December 31, 1997. Attachment N to Third Affidavit of Michael Dunn. In addition, a new corporation, CCGC, acquired ownership and control of the attachments in the former Emerald Coast Cable Television system in October 1999, from the former owners, TWC Cable Partners (which was Cox Communications New York/Cox Communications, Inc. [who are inactive corporations in Florida or unauthorized to conduct business in Florida] and Time Warner Communications). Attachments K and L to Third Affidavit of Michael R. Dunn. Since no assignment of this agreement was sought by CCGC, the former owners TWC Cable Partners, and Emerald Coast Cable Television (that company had ceased to operate in Florida legally as a business entity), there is no longer a valid pole attachment agreement for those facilities that were covered by the January 1, 1997, agreement between Gulf and TWC Cable Partners d.b.a. Emerald Coast Cable Television. Cox Communications Gulf Coast, L.L.C. now the new entity that controls and is the owner and operator of Emerald Coast Cable Television's former facilities and is required to enter into a pole attachment agreement covering those facilities. As further evidence that CCGC's acquisition of these pole attachments was not merely part of a pro forma restructuring or a simple name change, revised and new franchise ordinances authorizing CCGC were required to be enacted in the various municipalities where CCGC was attaching its facilities to Gulf Power's poles. Attachments O-Q to Third Affidavit of Michael R. Dunn.

Until questioned by Gulf Power, CCGC and the former attachers avoided informing Gulf Power of these actions that terminated the former attachers' contracts and simply proceeded to maintain attachments on Gulf Power's poles without any license to do so and without payment of compensation. CCGC has continued to do so by refusing to negotiate meaningfully and enter into a new agreement, and by failing to pay for its mandatory access and taking of Gulf Power's property.

[5] If the Commission were for some reason to nullify the contractual provisions to which (continued...)

lamenting that they now believe that the consequences and impact of both their contractual obligations and their having to meet those duties seem unreasonable and unjust to them (simply because, without the utilities' subsidizing cable service attachers as in the past, it might cost them more to attach to poles than it did before the decision in *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd* 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*"), mandating just compensation for attaching to the poles. Such claims do not implicate the Commission's jurisdiction, and the Complaint must be dismissed. *See Marcus Cable*, 12 F.C.C.R. 10362, ¶ 10; *Appalachian Power Co.*, 49 RR 2d 574 at ¶ 7.

5. Admitted.

6. Admitted. Gulf Power denies, however, that the fact that Gulf Power affiliates are involved in telecommunications has any relevance to this proceeding. Indeed, those entities do not provide cable services. Even if they did, the Act statutorily binds Gulf Power to deal with all attaching entities in a non-discriminatory manner.

7. Admitted that the Complainants possess attachments on Gulf Power poles throughout the northwestern region of Florida, but denied that Exhibit 2 to the Complaint completely discloses all areas and poles on which the Complainants have attachments. Additionally, Gulf Power denies the allegations in footnote 2 of paragraph 7 of the Complaint. The agreements attached as Exhibits 3, 4, and 5 to the Complaint have either

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[5] (...continued)
Complainants allude, then that action itself would constitute a taking, because it would convert the previously voluntary arrangement into one characterized by a federal mandate.

expired or are not between Gulf Power and any complainants herein or are null, void, and of no force and effect. Only Mediacom currently has a pole attachment agreement with Gulf Power (*see* Exhibit 11 to the Complaint and Attachment M to the First Affidavit of Michael R. Dunn). Mediacom, however, has refused to make any payment to Gulf Power for its mandatory access to Gulf Power's poles. Comcast's pole attachment agreement has expired, and while it demands mandatory access, it has refused to sign a new pole attachment agreement and also refuses to pay anything for its current access and attachment to Gulf Power's poles. CCGC has no pole attachment agreement with Gulf Power and never had one. It also refuses to sign a new pole attachment agreement and refuses to pay anything for its current access and attachment to Gulf Power's poles. Even in light of mandatory access, there is still a need for an attaching entities to sign pole attachment agreements to address critical matters such as safety, repairs and maintenance, indemnification, and legal liabilities.

8. Admitted.

9. Admitted.

10. Gulf Power admits that certain attachments to the Complaint purport to certify that service was effected on Gulf Power and each federal, state and local agency which regulates any aspect of service provided by Gulf Power. Gulf Power lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph. Those allegations are therefore denied.

11. Gulf Power admits that in the past it "voluntarily" entered into pole attachment agreements with cable television companies. The agreements were "voluntary" in the sense that the federal government did not compel these agreements, and Gulf Power was free to terminate the agreements. Nevertheless, Gulf Power (and many other utilities) objected to the artificially low rates the Commission's rules forced it to accept. As such, even though Gulf Power voluntarily entered into pole attachment agreements, it was involuntarily forced to accept artificially low rates which were highly "favorable" to cable operators and effected an unfair subsidy.

With expiration of the agreements with Comcast and Mediacom and the new pole attachment agreement with the new attacher CCGC, Gulf Power is out of the business of "*voluntary*" pole access, as that term is defined above. Consequently, *any* of the Complainants herein that desires to keep or place its facilitates on Gulf Power's poles will be required to mandate such access under Section 224 of the Act. *See* Exhibits 9-11 to Complaint. Such requests will be handled on a non-discriminatory basis.

The remaining allegations of this paragraph are denied.

12. Denied as stated, since only Mediacom has signed a currently applicable pole attachment agreement, but it was entered into after the enactment of the Telecommunications Act of 1996; Comcast and CCGC have no current pole attachment agreement with Gulf Power, and they refuse to enter into an agreement. Additionally, Complainants' reliance on the fact that they do not own any portion of the poles as the basis for asserting that no taking

has occurred is misplaced. It is well-settled that "[n]othing in the Fifth Amendment compels a court to find a taking only when the government divests the total ownership of the property." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994). Rather, as has been conclusively established in the proceedings that determined that Section 224(f) effects a taking, a taking occurs "when the government authorizes a permanent, physical occupation by a third party." *Gulf Power I*, 187 F.3d at 1328; *Gulf Power II*, 208 F.3d at 1272.

13. Admitted as to Mediacom and Comcast, but denied as to CCGC since CCGC has never had an agreement with Gulf Power. Additionally, applicable contracts provide that upon the expiration their term, a new contract can be negotiated and entered into by the parties. Only Mediacom has signed a new contract.

14. Denied. There has never been a "course of dealings" or "regular practice" between Gulf Power and any of the parties during the last two decades. Exhibit 1 to Gulf Power's Answer to Stay, ¶ 2. Additionally, there is no "course of dealings" between Gulf Power and any of the Complainants altering Gulf Power's right to terminate the license agreements. *Id.* at ¶ 2. Gulf Power has entered into new agreements with the cable industry on various occasions over the last twenty years. *Id.* On each of those occasions, Gulf Power notified the cable company that its pole attachment agreement was to expire on its own terms on a date certain and that a new agreement must be reached and signed for the cable company to continue attaching to Gulf Power's poles. *Id.* The circumstances surrounding

those previous contract changes were markedly different than those precipitating Gulf Power's recent notice of termination. Gulf Power has the contractual and constitutional right to terminate the agreements and to end a more than two decades of subsidy. Exhibit 1 to Gulf Power's Answer to Stay, ¶¶ 2-3.

15. Denied as stated. On June 28, 2000, Mediacom exercised its right to mandatory access and executed a pole attachment contract committing it to pay an annual per pole price of $38.06 for the taking. Exhibit 1 to Gulf Power's Answer to Stay, ¶ 5. The price is derived from a cost-based methodology Gulf Power believes begins to move toward constitutionally adequate just compensation. *Id.*[6] Gulf Power properly notified Complainants Comcast and Mediacom that their pole attachment agreements with Gulf Power were to expire by operation of the terms of the agreements and that access to Gulf Power's poles would be through mandatory access with just compensation for the taking. *Id.* at ¶¶ 4 and 5. Comcast was reminded that its pole attachment agreement was to expire on February 29, 2000, by Gulf's letter of January 25, 2000 . *Id.* at ¶ 4. On April 3, 2000, representatives from Gulf and Comcast met to discuss the new operational changes set forth in the new pole attachment agreement based on mandatory access. At that meeting, Comcast representatives declined to discuss the new just compensation annual fee because, as they stated, to do so would be "wasting his time and mine to try to explain the fee." *Id.* Comcast

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[6] Gulf Power also directs the Commission's attention to the Petition for Reconsideration filed on Gulf Power's behalf on June 16, 2000, in CS Docket No.: 97-98, Attachment Z to the Third Affidavit of Michael R. Dunn, filed herewith.

requested and was provided data pursuant to Section 1.1404 (g) of the Commission's Regulations. Certain portions of the requested data were not provided pending Comcast's signing an adequate confidentiality agreement. *Id.* Mediacom's pole attachment agreement was by its terms set to expire on June 30, 2000, and Gulf sent notice of this by a letter dated March 20, 2000. *Id.* at ¶ 5. On April 27, 2000, representatives of Gulf Power and Mediacom met to discuss the new pole attachment agreement based on mandatory access, which had been mailed by letter dated April 26, 2000. *Id.* During this meeting, Gulf Power representatives explained the changing operational items as well as the new just compensation fee. *Id.* On May 2, 2000, a copy of the computation sheet showing the just compensation derivation was sent by letter to Mediacom. *Id.* The new pole attachment agreement was fully executed by Mediacom on July 5, 2000. *Id.*

By letter dated May 17, 2000, CCGC was notified that the pole attachment agreements Gulf Power had entered into with Cox Communications Pensacola, Inc., and TWC Cable Partners d.b.a. Emerald Coast Cable Television were "null and void" by operation of law, since both companies were no longer active business entities with authority to conduct business in Florida. At that time, CCGC was informed by Gulf that it was not voluntarily granting access to its poles and that a pole attachment agreement with a charge based on just compensation resulting from the taking under mandatory access was attached to the May 17, 2000 letter for CCGC's signature. *Id.* at ¶ 6. Despite attempts by Gulf Power to meet with CCGC and explain the just compensation rate, no meetings have taken place.

Id. CCGC requested and was provided data pursuant to Section 1.1404 (g) of the FCC's Regulations. Certain portions of the requested data were not provided pending CCGC signing an adequate confidentiality agreement. *Id.*

Gulf Power has offered to provide Complainants any additional information subject to the requesting entity's executing an appropriate confidentiality agreement. *Id.* at ¶¶ 9 and 10. Such a confidentiality agreement is necessary because Gulf Power has sought confidential treatment of much of the underlying cost data in its most recent FERC Form 1 filing made with the Federal Energy Regulatory Commission. *Id.* at ¶ 10. Only CCGC responded to the offer and requested a copy of the confidentiality agreement. Then on July 7, 2000, CCGC refused to sign the confidentiality agreement, premised on the erroneous statement (a misstatement that it repeated in Mr. Gregory's affidavit filed herein) that the confidentiality agreement was unreasonably designed to preclude any disclosure to the Commission. The confidentiality agreement, contrary to CCGC's remarks, specifically provides for a procedure under which all confidential information can be disclosed to the Complainants *and the Commission* in any proceeding by issuance of a stipulated order directing confidential treatment through filing the information under seal and with restricted disclosure to those persons in actual need of the information.

Gulf Power heard nothing further from CCGC or the other Complainants until it was served with the filings in this proceeding.

Complainants' repeated emphasis on Gulf Power's " more than 514%" increase in its per pole price is misleading. Cable companies are well aware, and admit, that they have enjoyed low rental fees for years. Thus, any increase to a more accurate price for their attachments necessarily will be dramatic. To illustrate the point, one only need compare Gulf Power's price to the fully-phased in Telecom Rate. Gulf Power's price of $38.06 is only slightly more than 95% higher than the $17.86 price it would receive under the Commission's Telecom rate (not 514%). 47 C.F.R. § 1.1409(e)(2); Third Affidavit of Michael R. Dunn at ¶ 17. That difference comes about merely by applying more accurate assumptions and by utilizing current or forward looking costs (instead of embedded/historical costs). When real world numbers are used to calculate the value of what cable companies are getting, Gulf Power's price is not so dramatic.

16. Gulf Power denies the allegations of this paragraph and states that the communications, both written and verbal, of Gulf Power speak for themselves and are the best evidence of their contents.

17. Denied, but footnote 3 to paragraph 7 of the Complaint is admitted. Gulf Power's averments in paragraph 15 above are restated and incorporated by reference herein.

18. Denied that Gulf Power refused to engage in any negotiations with Complainants. *See* First, Second, and Third Affidavits of Michael R. Dunn. After the initial meetings with the designated points of contact for Comcast and Mediacom, which were initiated by Mr. Dunn of Gulf Power to explain the new pole attachment agreements, neither

of these Complainants has attempted to meet to negotiate any changes to Gulf Power's proposal. CCGC has not accepted any of Gulf Power's offers to meet and discuss the new pole attachment agreement. Contrary to the assertions in the Complainants' allegations and contentions in this proceeding, Gulf Power has never represented that "no negotiation was possible." Gulf Power has repeatedly offered to explain Gulf Power's use of replacement cost in an attempt to establish a fair payment to be made by Complainants that approaches just compensation. Ample notice of changes and a willingness to negotiate have been provided in all cases. Gulf Power has offered to discuss just compensation with all the Complainants, but they have deliberately ignored Gulf Power's offer and refused to engage in any meaningful discussions. It is the Complainants who have failed to negotiate by refusing to pursue any discussion of just compensation. Complainants consciously have avoided even mentioning in communications before filing this proceeding and also in this proceeding that the Eleventh Circuit has mandated in *Gulf Power I* just compensation from attachers to the utilities' poles. Because they want to maintain subsidized pole attachment fees, the Complainants have made it clear, both when Gulf Power tried to engage them in meaningful negotiations and in their filings with the Commission, that they have no intention of discussing just compensation for their taking of Gulf's property.

Gulf Power denies that it "refused to provide Complainants with cost data required by 47 C.F.R. §§ 1.1404(g) and (j)." Gulf Power has offered to provide Complainants any additional information subject to the requesting entity's executing an appropriate

confidentiality agreement. *Id.* at ¶¶ 9 and 10. Such a confidentiality agreement is necessary because Gulf Power has sought confidential treatment of much of the underlying cost data in its most recent FERC Form 1 filing made with the Federal Energy Regulatory Commission. *Id.* at ¶ 10. Only CCGC responded to the offer and requested a copy of the confidentiality agreement. Then on July 7, 2000, CCGC refused to sign the confidentiality agreement, premised on the erroneous statement (a misstatement that it repeated in Mr. Gregory's affidavit herein) that the confidentiality agreement was unreasonably designed to preclude any disclosure to the Commission. The confidentiality agreement, contrary to CCGC's remarks, specifically provides for a procedure under which all confidential information can be disclosed to the Complainants *and the Commission* in any proceeding by issuance of a stipulated order directing confidential treatment through filing the information under seal and with restricted disclosure to those persons in actual need of the information. Gulf Power heard nothing further from CCGC or the other Complainants until it was served with the filings in this proceeding.

Gulf Power denies the remaining allegations of this paragraph 18.

19. Admitted that the Commission's cable rate calculation formula yields an annual attachment rate under Section 224 of approximately $4.61. Gulf Power lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph and its footnote, and the allegations are therefore denied.

20. Denied. Although the market for pole attachment corridor space has only begun to rapidly develop, when left unfettered by government regulations, working, private enterprise market analogues for rental of pole space exist. *See* Affidavit of Henry J. Wise at 9-17 (lines 150-337). For example, (1) wireless transmission tower companies rent rights-of-way from state departments of transportation; (2) fiber optic companies execute similar rental contracts with departments of transportation; (3) wireless communications tower companies contract with paging companies or other wireless users for corridor access; and (4) fiber optic communications companies lease rights-of-way from municipalities. *Id.* These markets share the same types of problems and the same opportunities as the pole rental market. These markets yield prices for similar valuable corridors that exceed Gulf Power's replacement cost price of $38.06 by extreme multiples. The values that can be gleaned from these market analogues illustrate that Gulf Power's price is highly conservative and eminently fair. *Id.*

"Joint use agreements" also shed light on how low the Commission's cable rate is in terms of even a cost based approach. Joint use agreements are agreements negotiated between utilities and telephone companies. *Id.* at 4-5 (lines 77-92). Joint use agreements are reciprocal arrangements that recognize that the companies have a common interest in sharing poles at an equitable rate, and that both have inventories of poles to share. For Gulf Power, the typical fees for joint use agreements range from about $23 to $57 per pole per year. First Affidavit of Michael R. Dunn at ¶ 14. It is important to note that each company's

price would be much higher if each were not factoring in the benefit of the reciprocal arrangement. *Id.* at ¶ 14.

21. Denied. This Commission has previously been presented with evidence concerning substitute facilities in CS Docket 97-98. A report prepared by Reed Consulting Group (Pasadena, CA) ("Reed Report") (attached hereto as Attachment R to Third Affidavit of Michael R. Dunn) discussed the following as potential substitute facilities: (1) direct buying of underground cable (including specific examples in San Diego, CA); (2) cable owned conduit systems and rights-of-way; (3) conduit space from water utilities; (4) space on telecommunications poles; (5) highway authority rights-of-way; (6) transit authority rights-of-way; (7) sewage system operations; (8) freight tunnels; (9) gas and petroleum pipelines; and (10) railroad rights-of-way. *See* Attachment R at 36. In any event, Complainants' alleged concerns about lack of substitute facilities is inapposite. There will be no disruption of service or need for substitute facilities. Cable companies would, however, finally have to pay a more appropriate price. In 1996, cable companies asked Congress for and received the right of mandatory access. All the Complainants have to do is exercise their right of mandatory access and pay the constitutionally required price for their taking. With the exception of the price for the taking, the day-to-day operations of the cable companies should not be affected. Several companies have already requested and received mandatory access to insure that the September 11, 2000, termination date does not

disrupt their service. First Affidavit of Michael R. Dunn at ¶ 15. The cable companies control their own destiny.

22. Denied. Complainants' entire Complaint rests on the faulty notion that Gulf Power has no right to terminate what Complainants themselves insist is a "*voluntary*" contract. Of course, a "voluntary" contract that cannot be terminated is not voluntary. This fundamental truism dooms Complainants' entire Complaint. Gulf Power can terminate the agreements.[7] In fact, Complainants themselves describe the agreements in public filings as being terminable on short notice and terminable after an initial period by either party upon notice. *See* Petition for Temporary Stay at 3, 8; Complaint at ¶¶ 13, 14 , Exs. 3-5 at §§ 1, 23, Ex. 7 at ¶ 15. At least two courts have recognized Gulf Power's right to terminate contracts. *See FPC*, 480 U.S. at 251, n. 6 ("[t]he language of the [1978] Act provides no explicit authority to the FCC to require pole access for cable generators, and the legislative history strongly suggests that Congress intended no such authorization"); *Gulf Power II*, 208 F.3d at 1263, n. 6 ("[s]ince the 1978 Act did not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions . . . by canceling the existing arrangements, and having the attachments removed").

Moreover, there has been no unilateral action by Gulf Power. The prior pole attachment agreements of Mediacom and Comcast terminated on their own through the

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[7] If the Commission were for some reason to nullify the express termination provisions, then that action itself would constitute a taking because it would convert the previously voluntary arrangement into one characterized by a federal mandate.

mutually agreed expiration dates within those agreements. The former attachers, from whom CCGC acquired the attachments on Gulf Power's poles, unilaterally decided to terminate their agreements by relinquishing their rights and interests under those contracts. It is the unilateral actions of the Complainants in demanding and maintaining access (taking access) and failing to pay just compensation (or in this case, failing to pay *anything* for the access) that is violative of Section 224, the United States Constitution, and fundamental contractual law.

As stated in paragraph 21 above, there is no need for any cable company to have its business interrupted or to be "prevent[ed] . . . from continuing to provide service to customers." All of the Complainants have ample time within which to exercise their rights to mandatory access, as did Mediacom, to insure that they do not suffer any interruption in service. Several cable companies have already exercised their mandatory access rights. First Affidavit of Michael R. Dunn (Exhibit 1 to Gulf Power's Answer to Stay) at ¶ 15. Again, the cable companies control their own destiny.

Gulf Power denies the remaining allegations of this paragraph.

23. In response to the allegations of this paragraph, as stated in paragraphs 14 and 22, there is no "course of dealing" between Gulf Power and any cable company (much less all cable companies) sufficient to nullify Gulf Power's express contractual right to terminate the agreements. As stated in paragraph 4, this Commission lacks jurisdiction over this matter making its rules concerning "good faith" negotiation inapplicable. Moreover, Gulf

Power is acting in good faith because it is simply following the procedure outlined by the Complainants themselves and this Commission *in writing* before a Federal Appeals Court in *Gulf Power I.*[8] In addition, regardless of jurisdiction, Gulf Power has at all times proceeded in good faith and attempted to satisfy the Complainants' requests for information. It is the Complainants, not Gulf Power, who have refused requests and offers to negotiate. The remaining allegations of this paragraph are denied.

24. Denied. Gulf Power hereby restates and incorporates by reference its averments in paragraph 14.

25. Denied. In their filings in this matter, Complainants paint a picture of certain doom if they are required to actually pay a fair share for the pole space they occupy. Complainants assert that the cash flow of the entire cable industry is so tight that paying their fair share for pole space (instead of being blessed with a "favorable" rate) will vastly change their business plans, halt expansion of facilities and new services, cause cable rate increases which will in turn cause certain and permanent loss of customers, and other devastating financial harm. This litany of harms is based upon the following false premises: (1) cable companies cannot absorb the increased expenses, but instead must pass them through, dollar for dollar, to the consumer; (2) any resulting increase in cable rates will automatically result

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[8] *See, e.g., Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999) (noting that judicial estoppel "precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to 'play fast and loose with the courts'").

in lost customers; and (3) that competition from DSB threatens the very existence of the cable television industry.

A quick review of publically available financial information filed by several of the Complainants makes clear that cable companies are blowing smoke. First, pole attachment expenses, even if increased 514%, comprise a minuscule part of a cable company's total operating expenses. *See* Exhibits 4-6 to Gulf Power's Answer to Stay. Second, cable companies and rate increases are synonymous. Indeed, cable rates have increased almost every year there has been such a thing as cable television, outpacing inflation in most years. *See, e.g.*, Attachment S to Third Affidavit of Michael R. Dunn (*The Cable TV Financial Databook 2000*, Paul Kagan Associates, Inc.) at 7. Yet, during the last decade, cable companies have thrived in terms of subscribers, revenue, and expansion of facilities and services offered. In the first quarter of 2000 alone, cable companies "are reporting significant new RGU's (revenue generating units), and in most cases, at rates that exceed their own and investor expectations." Attachment S at 6. Paul Kagan described cable companies as having "fine execution" and "simply blowing away their targets" on expanded services such as "digital, high speed data and even telephony." *Id.* at 97. In short, cable companies are "hitting on all cylinders." *Id.* at 97.

With cable rates increasing every year, cable companies have nevertheless managed to put together *multi-billion dollar expansions*. *Id.* at 193. Cable companies have become so large, they should not be able to argue inequity of bargaining power with a straight face.

Kagan added that "[c]able companies have morphed into two-way broadband behemoths, . . . with newfound size and scale. . ." *Id.* at 149.

Finally, the dramatic concerns for competition from the DSB industry are grossly exaggerated. Just this year, the Commission itself recognized that "DSB exerts only a *modest* influence on the demand for cable service." *Report of Cable Industry Priced; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 2000 WL 767685, *7 (June 5, 2000) ("2000 Report"). Cable has thrived, is thriving, and will in the future thrive. Cable companies are more than capable of paying their own way. The "favorable" treatment must stop.

Pole expenses are a small part of a cable company's overall operations, as demonstrated by Comcast's own financial reports. Comcast is the third largest cable company in the United States, servicing 5.6 million subscribers. Exhibit 5 to Gulf Power's Answer to Stay, at 1. Comcast plans to add 1.2 million additional subscribers by the end of 2000. *Id.* at 1. Comcast reported a total service income of $2,906,500,000 in 1999. *Id.* at 5. Comcast's total operating expenses for 1999 were $1,242,400,000. Comcast's total rental expenses (including office space and pole attachments) totaled $33,700,000, or 2.7% of total operating costs. *Id.* at 35-36.1

Additionally, rate increases and cable television go hand-in-hand. This Commission itself has recognized that from January 1990 to April 1993 (prior to cable regulation), there was an average annual growth rate in cable rates of 8%. *Report on Cable Industry Prices;*

Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment, 12 FCC Rcd. 3239 (Jan. 2, 1997). Even after regulation, (from April 1993 to November 1996), cable rates continued to rise at a 2.2% annual rate. *Id.* The Bureau of Labor Statistics found that from 1990-2000 cable rates rose an average of 5.83%. Attachment T to Third Affidavit of Michael R. Dunn.

In 1997-1998, the Commission reported that average monthly rates for both regulated and unregulated cable companies rose by rates of 6.8% and 8.9%, respectively. *Report on Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 14 FCC Rcd. 8331 (May 7, 1999). Just last year, in 1999, regulated and unregulated rates rose from 4.6% and 5.8%, respectively. *2000 Report* at *2.

Yet, in a three month period during 1999 alone, Complainant Comcast added 20,600 basic cable customers, representing a 1.3% twelve month trailing growth rate. Attachment U to Third Affidavit of Michael R. Dunn. During first quarter 1999, Comcast added more than 20,000 customers to its high speed data service and in April alone added 5,700 new digital cable subscribers. *Id.* Industry wide numbers are equally impressive. In 1999, basic subscriptions grew 1.8% to 67.3 million. Attachment S at 6. Even more amazing was the industry wide surge in the "new services sector." Cable added 1.4 million high-speed data customers in 1999. *Id.* Digital subscriptions "increased to over 5.1 million, from just 1.4 million at year end 1998." *Id.* Analysts project that by 2010, there will be 59 million digital

set top boxes in the field, with 31 million cablephone subscribers and 25 million high-speed modem users. *Id.* at 5.

The Commission's own studies explain the counter-intuitive fact that even as cable companies continue to increase their rates, they continue to add subscribers. The Commission found that "[c]ompetitive status, non-urban population, and average monthly rate[s]" are all variables which have an inverse effect on the demand for cable services. *2000 Report* at *16. As these variables increase, the demand for cable services decrease. In the end, however, the Commission concluded that "demand for cable service is [only] *somewhat sensitive* to changes in cable rates." *Id.* at *18.

Any downward pressure on the demand for cable services caused by increased rates is more than offset by the upward momentum enjoyed by cable companies from increase in such variables as "median household income, number of homes passed, and number of satellite channels offered." *Id.* at 16. That is, as these variables increase, the demand for cable services increases. With the improvements and expansion discussed below, cable companies are going to continue to increase rates as they continue to provide more services and better quality. At the same time, they will continue to add customers, expand revenues and reap more profits.

The Commission recognized the trend in a recent report titled *1999 Assessment of the Status of Competition in Markets for the Market Delivery of Video Programming.* Attachment V to Third Affidavit of Michael R. Dunn (MVCG, March 2000) at 1. The

Commission found that "[d]espite . . . increased competition, . . . cable rates rose faster than inflation." *Id.* Notwithstanding the rate increases, "the cable industry continued to grow in terms of subscriber penetration, channel capacity, the number of programming services available, revenues, audience ratings, and expenditures on programming. *Id.* at 2. Obviously, cable customers are well adjusted to and undeterred by the fact that cable rates have historically increased and will continue to do so. There appears to be little to no real likelihood that the increase in expenses attributable to pole attachments will result in any lost customers to cable companies.

The top seven cable companies (which include Complainants Comcast and CCGC) "invested between $9 billion and $11 billion [in 1999] to upgrade their networks." Attachment W to Third Affidavit of Michael R. Dunn (Network World Article, 4/24/00) at *3. "That is on top of about $6 billion they spent in 1998." *Id.* It is difficult, if not impossible, to perceive that these companies would take on multi-billion dollar expansions without foreseeing incredible expansion in revenues. Revenues generated from multi-billion dollar expansions will obviously dwarf the increase in pole attachment fees. Additionally, it is unbelievable that these multi-billion dollar expansion efforts will be halted because pole expenses climb from less than 1% of their operating expenses to as much as 4%.

Finally, industry analysts believe most of the expenses for expansions are complete. The activities of Complainant Comcast confirm Kagan's observations. Comcast reports that "83% of the subscribers are in rebuilt systems." Attachment X to Third Affidavit of Michael

R. Dunn (Multichannel Video Compliance Guide - 11/15/99) at 8. Paul Kagan stated, "Operators have a diminishing amount of build-out work ahead, and they are already relying meaningful revenues from those services they spent so lavishly to deploy." Attachment S at 149. Increases in pole attachment fees are not likely to reverse expansion already completed or to slow down the incredible momentum cable companies currently enjoy.

Cable companies have been fighting competition for years. While the sources of competition have become more varied, industry analysts do not predict the demise of cable television. In fact, the Commission has recognized that "[d]espite increased competition, "cable rates rose faster than inflation." Attachment V (MVCG - March 2000) at 1. As explained above, even with increased rates, "the cable industry continued to grow in terms of subscriber penetration, channel capacity, the number of programming services available, revenues, audience rulings, and expenditures on programming." *Id.* at 2. Consequently, the Commission recognizes that "DSB exerts only a *modest* influence on the demand in cable service." *2000 Report*, at *17. Paul Kagan adds that even though cable operators are not completely invulnerable, "where they have cleaned up their digital, programming, and service act," cable operators "remain tough to beat." Attachment S at 5. As set forth above, the cable industry is thriving and, as the Commission has recognized (rate increases notwithstanding) "the cable industry continues to implement expanded broadband service offerings." Attachment V at 2.

26. Denied, and specifically denied that the pole attachment agreements under which Complainants are predicating their claims herein are valid or still in force and effect. Only Mediacom has signed a new pole attachment agreement (but still has failed to pay anything for its access). Comcast's agreement expired, and CCGC has never had an agreement with Gulf Power Company.

27. Denied. Gulf Power hereby restates and incorporates by reference its averments in paragraph 26 above and in its Answer to Petition for Stay, Motion to Dismiss, and Motion to Strike establishing that there will be not only no substantial and irreparable harm to Complainants, but they will suffer no harm.

28. Because the Commission lacks jurisdiction over this matter and because its methodology falls well short of the constitutional requirement of just compensation, Gulf Power admits that its takings price of $38.06 does not comply with the Commission's methodology for calculating pole attachment rates. As Gulf Power urges in its Petition for Reconsideration filed in FCC Docket 97-98 on June 16, 2000, the Commission should abandon its current cable rate. Gulf Power incorporates herein by reference as if set forth fully herein its Petition for Reconsideration (attached hereto as Attachment Z to Third Affidavit of Michael R. Dunn).

Implicit in Complainants' allegations and their other filings in this proceeding is their continued avoidance of Gulf Power's entitlement under *Gulf Power I* to just compensation. Gulf Power's taking claim is based upon the decisions in *Gulf Power I* and *Gulf Power II*

which make clear that the mandatory access provision constitutes a *per se* taking of utility property. Should cable companies choose to exercise that right as the Complainants have in the present case, Gulf Power will insist on a price for that taking that moves closer to the constitutionally required full and perfect price. Complainant's still are expressing doubt about whether their exercise of mandatory access under the Act will effect a taking of Gulf Power's property. This contention has been unequivocally rejected by the Courts in *Gulf Power I* and *Gulf Power II*, wherein the Eleventh Circuit repeatedly held that the mandatory access provision constitutes a *per se* taking or private property. The Complainants also contend that even if a taking occurs, the Cable Rate is still somehow lawful, because, as they alleged in their complaint against Alabama Power Company in *Alabama Cable Telecommunications Association v. Alabama Power Company*, FCC P.A. No. 00-003, "a rate providing for the recovery of fully allocated cost . . . is not confiscatory." P.A. No. 00-003 Complaint at ¶ 31.

While the Complainants' first argument can be readily rejected under *Gulf Power I* and *Gulf Power II*, this second contention suffers from so many factual and legal infirmities that it requires exploration in depth. Specifically, this contention is false because (among other things): i) the "confiscatory" standard applied in regulated rate cases has no application where a *per se* taking has occurred as the later requires the immediate payment of just compensation/market value; ii) the Cable Rate fails to provide the "full and perfect" value required for just compensation because it fails to allow Gulf Power to recover all of

the costs attributable to cable attachments; and iii) the Cable Rate is unlawfully predicated upon embedded costs instead of upon a forward-looking cost (such as replacement costs).

A. The Complainants Confuse Rate Regulation With Just Compensation

The Complainants' position that the "confiscatory" rate regulation standard applies is an apparent attempt to convince the Commission to continue with its existing regulatory regime for pole attachments and thereby apply the wrong legal standard in this proceeding. While the lesser, confiscatory standard recognized by the Court in *FPC* applied to pole attachments for the voluntary access that existed prior to the 1996 amendments, the world has changed with the advent of mandatory access. Indeed, in the *FPC* decision itself, while upholding the Cable Rate for the voluntary access regime that then existed, the Supreme Court cautioned that it would be a different day if "the FCC in a future case required utilities, over objection, to enter into, review, or refrain from terminating pole attachments agreements." 480 U.S. 245, 251-252, n.6 (1987). That different day is upon us. Consequently, any approval the *FPC* Court gave to a 1978 embedded cost *rate* methodology, is wholly inapplicable to the constitutional *just compensation* analysis required under the 1996 Act.

The *FPC* Court cautioned against mandated access because constitutional just compensation is a vastly different concept than rate regulation.

In *United States v. Miller*, the U.S. Supreme Court defined just compensation to mean "the full and perfect equivalent in money of the property taken." 317 U.S. 369, 373 (1942)

(citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)); *see also Olson v. United States*, 292 U.S. 256, 254-55 (1934) (stating that the government may not appropriate private property unless the "full and exact equivalent for it be returned to the owner"); *see Almota v. Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 471 (1973) (just compensation equals the full monetary equivalent of the property taken). That full and perfect price is to be determined at the time of the taking. *Olson v. United States*, 292 U.S. 246, 255 (1934). The just compensation standard is much higher than the "reasonableness" analysis applied in rate regulation cases that merely seeks to determine if the rate is so low as to be confiscatory.

The distinction between compensation standards and rate regulation was best explained by Judge Tjoflat in the *City Gas* case. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1314-16 (11th Cir. 1990), *vacated by City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.*, 111 S. Ct. 1300 (1991). In that case, Judge Tjoflat explained that once a taking occurs, once the element of compulsion enters the equation, the court applies a more rigorous standard for just compensation than the broad zone of reasonableness applicable to rate regulation. *Id.* at 1314, n.52 (dissenting opinion). He went on to state that:

> Of course, the just compensation price established by the court under the present facts must satisfy a more stringent standard that the standard that applies to rates set by a regulatory agency.

Id. at 1319.

It is a different day. The world has changed. Gone are simplicity and rate regulation. The change in focus from regulation to full and perfect value means that the Complainants' reliance upon confiscatory rate regulation is completely misplaced. Instead, Gulf Power is entitled to just compensation. That distinction is critical and must not be ignored.

B. The Cable Rate Desired by the Complainants Fails to Allow Recovery of All Costs

1. <u>The Cable Rate Fails to Allow an Appropriate Recovery for Unusable Space</u>.

The Complainants argue for the continued use of the old, subsidized cable rate, arguing that it is not confiscatory. *See* P.A. No. 00-003 Complaint at ¶ 31. While the old rate may or may not be confiscatory, the rate, without question, fails to provide the "full and perfect" price required for just compensation. A primary failure of the Cable Rate is that it does not allow the pole-owning utilities to recover all of the costs attributable to the cable companies' attachments. In particular, the Cable Rate fails to have the cable companies pay their fair share of the costs of unusable space.

In the 1996 Act, Congress recognized that the unusable space on a pole "is of equal benefit to *all* entities attaching to the pole." House Conference Report No. 104-458, at 206 (emphasis added). This is a common sense recognition that the usable part of the pole is not suspended in mid-air. *See* Third Affidavit of Michael R. Dunn at ¶ 18). The usable space is available for attachers to take only because of the unusable space buried six feet in the ground and the space left empty in order to safely provide the usable elevated corridor. In

accordance with this recognition, Congress required that the Telecom Rate must incorporate an allocation for unusable space based upon an "equal apportionment" of that space. 47 U.S.C. § 224(e)(2).

While the Telecom Rate appropriately allows for the recovery of such an apportionment of unusable space, the Cable Rate does *not*. Instead, the Cable Rate limits recovery to an allocation based only upon the amount of usable space occupied without taking into account that the unusable space equally supports all attachments on the pole. Since the Cable Rate fails to allow for the recovery of these verifiable and legitimate costs attributable to the taking, it will never provide for the "full and perfect" value of the affected property. Cable companies impose the same costs in terms of unusable space as do telecommunications companies and should pay their fair share.

To demonstrate that the Cable Rate's failure to appropriately allow the recovery of those costs results in a woefully inadequate attachment fee, Gulf Power is including in this filing the third affidavit of Mr. Michael R. Dunn. In that affidavit, Mr. Dunn, among other things, determines that the Cable Rate for Gulf Power only produces a rate of $4.61 on an annual basis using Fiscal Year 1999 data, while the fully phased-in Telecom Rate produces a rate of $17.86,[9] with the only difference between these rates being that the latter rate contains an allocation for unusable space while the former does not. Third Affidavit of

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[9] As noted above, just compensation is measured at the time of the taking. While rate regulation principles may allow a phase-in of rights, constitutional rights cannot be so parceled. Although the Telecom Rate is not at issue in this proceeding, this flaw again illustrates how critical the distinction is between rate regulation concepts and constitutional just compensation standards.

Michael R. Dunn at ¶¶ 16-18. This gross disparity between the Cable Rate and Telecom Rate dramatically demonstrate that the Cable Rate does *not* provide just compensation because it does not allow for the recovery of all costs associated with the taking.[10]

2. <u>The Cable Rate Fails to Take Into Account All Appropriate FERC Accounts</u>.

In addition, even the Cable Rate's failure to require cable companies to pay their fair share of unusable space were somehow found to be constitutional, the Cable Rate would still fail to provide the "full and perfect" price because the current methodology for determining that rate fails to allow for the recovery of all appropriate costs associated even with that woefully inadequate rate. For example, Gulf Power (and other electric utilities) have previously informed the Commission that at least the following costs booked in FERC accounts should be recognized by the Cable Rate:[11]

FERC Capital Accounts:

360 (Land and Land Rights)
365 (Overhead Conductors and Devices)
368 (Line Transformers)
389-399 (General Plant)

FERC Operation and Maintenance (O&M) Accounts:

580 (Operation Supervision and Engineering)

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[10] Because the allocation for unusable space will never be zero, (Third Affidavit of Michael R. Dunn at ¶ 18), the Cable Rate fails to provide just compensation not only in the instant proceeding but in *all* circumstances. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

[11] *See, e.g., Joint Comments of the Electric Utilities Coalition*, CS Docket No. 97-98, at 43-60 (filed 6/27/97) (the "Joint Comments").

583 (Overhead Line Expenses)
588 (Miscellaneous Distribution Expenses)
590 (Maintenance Supervision and Engineering)
598 (Miscellaneous Distribution Expense)

Where appropriate, Gulf Power, along with others, recommended fair allocations. Third Affidavit of Michael R. Dunn at ¶ 16.

The Commission rejected the utilities' arguments, instead choosing to cling to cable friendly notions of simplicity and conclusory statements by cable companies that the evidence did not support a change. *See, e.g., In the Matter of Amendment of Rules and Policies Forcing Pole Attachments*, CS Docket No. 97-98, 2000 WL 339774 at n. 86 and associated text (quoting cable and telecommunications commentators who admit that pole height is increasing yet concluding that there is "no basis" for changing usable space presumptions). For example, the Commission admitted that including FERC Account 590 expenses in the formula for determining utilities' maintenance costs would result in a more "appropriate" and "equitable" attachment charge. Yet, the Commission refused to include these amounts, because doing what is right and fair would be "too complex." *Id.* at 31,273, ¶ 21. This admitted sacrifice of more complete compensation for administrative convenience itself proves that the Cable Rate does not fully compensate utilities for the taking they suffer from forced attachments. *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 631 (1961) (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)) ("The word 'just' in the Firth Amendment evokes ideas of 'fairness' and 'equity'.").

The Cable Rate's failure to incorporate costs from these other accounts that even the Commission acknowledges are properly attributable to pole attachments establishes that the Cable Rate will never, under any set of circumstances, achieve just and full compensation. An attachment fee that leaves out expenses actually incurred by a utility that are directly attributable to the function of building, operating, and maintaining the pole distribution networks to which cable companies are attaching, is not a "full and perfect equivalent in money of the property taken."

3. The Commission's Presumptions Concerning Pole Height and Usable Space Do Not Square With the Realities of the Utility Industry and Do Not Reflect Gulf Power's System of Poles

The $4.61 Cable Rate for Gulf Power that is derived using the Commission's Cable Rate formula incorporates the Commission's presumptions concerning pole height and usable space. In previous comments filed in other proceedings before the Commission, Gulf Power, along with many other utilities, put overwhelming evidence before the Commission that the current presumptions concerning pole height and usable space were erroneous.[12] Moreover, the attached affidavit of Michael R. Dunn shows that in 1999, the average pole height for new poles was 39.94 feet. Third Affidavit of Michael R. Dunn at ¶ 21. In addition, the $4.61 Cable Rate is also inappropriate because it reflects the Commission's rebuttable presumption of 13.5 feet of usable space. Third Affidavit of Michael R. Dunn at ¶ 21. As shown in the Third Affidavit of Michael R. Dunn, Gulf Power's poles, in

[12] *See, e.g.*, The Joint Comments, at 27-40.

actuality, have 11.5 feet of usable space. Accordingly, the use of a 40-foot pole and 11.5 feet of usable space is appropriate for purposes of determining a cost-based rate for Gulf Power.

C. The Cable Rate is Unconstitutional Because Use of Embedded Cost Does Not Provide Just Compensation

The use of the Cable Rate is also unconstitutional because it is based upon embedded costs. Long-standing judicial precedent teaches that the use of embedded costs is not appropriate in determining just compensation.

In most instances, just compensation is the "fair market" value of the affected property. *Miller v. United States*, 317 U.S. 369, 374 (1942). That is, courts will look to determine what a willing buyer and a willing seller would agree to as a price. *Id.* Market value is not an appropriate measure of just compensation when the property's value is too difficult to determine or when it is rarely, if ever, sold on the market. *United States v. 564.54 Acres of Land in Monroe and Pike Counties, Penn.*, 441 U.S. 506, 512 (1979) (noting that public facilities such as roads or sewers are examples of properties for which market value is difficult or impossible to determine); The Appraisal Institute, THE APPRAISAL OF REAL ESTATE, 338 (11 ed. 1996) ("*Appraisal*"). In these cases, courts apply other measures of value to ensure the compensation meets the constitutional standard. *United States v. Toronto, Hamilton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949).

These various "market value" proxies include, without limitation: Replacement Cost, Reproduction Cost, Income Approach, and Substitute Facilities Doctrine. 8 NICHOLS ON EMINENT DOMAIN, §§ 14A.01-14A.09.

Among the various alternatives, however, the "original cost of the property is generally rejected as a past measure that is unreliable in determining a current fair market value." 8A NICHOLS at § 20.01; *see also United States v. Toronto, Hamilton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949) (discussed above). Yet, this least favored "original" cost- or embedded cost- methodology remains the basis of the Cable Rate.

The embedded cost approach is disfavored for a reason. The Court in *U.S. v. Toronto* explained that "original cost is well termed 'the false standard of the past,' where, as here, present market value in no way reflects that cost." *Toronto*, 338 U.S. at 403 (citations omitted). Here, measuring the value of a pole system on the basis of original cost will not achieve just compensation, or anything remotely close thereto. The cost of materials, labor, easements, placement, etc. is far greater today than it was at the time the system was constructed. The market value of the pole system is far greater than the historical cost of the system. Demand for the utility corridors has increased dramatically over the years and will continue to be a sought after property. The value of these linear corridors in the modern technological era bears absolutely no relation to the original cost of a single pole. The Commission has offered no reasonable explanation to the contrary.

Indeed, even members of the Commission recognize that embedded or historic costs do not advance Congress's goals in enacting the 1996 Act. One member of the Commission explained that forward-looking, or replacement, cost is the proper measure on which to base the prices new entrants into the telecom market must pay to incumbents to purchase unbundled elements of the incumbent's network. In a speech extolling the pro-competitive policy of the 1996 Act, then Commission Chairman Reed Hundt championed the mandate that these prices must be based on "forward-looking costs." Reed Hundt, *Speech before the FCC Business Development Associates, Antitrust Conference for Corporate General Counsels*, 1996 FCC LEXIS 5935 (Oct. 22, 1996). Mr. Hundt insisted that:

> [t]o be pro-competition these 'cost-based' prices must be based on forward-looking cost. When the incumbent in a competitive market contemplates expanding or rebuilding or selling or generating a retail price for a customer using its network, it is forward-looking cost that it considers: thus only forward-looking cost gives the new entrant the same opportunities from the existing network that the incumbent gets.
>
> Indeed, *sound business decisions*, by competitive and monopolistic firms alike, are *based on forward-looking costs*, so it is in terms of forward-looking costs that the playing field must be leveled.
>
> Moreover, only prices based on forward-looking costs can prevent incentives for arbitrages retail prices become more competitive. It's true that Congress gave entrants the right to choose which unbundled elements to take from the incumbent. And it's also true that the value of network elements can fluctuate. But that is a policy problem only if the price for the network elements is based on historic cost.

> If the price the entrant must pay is economic user cost with economic depreciation, based on forward-looking, or *replacement cost*–i.e., *reflects current market value*–then the incumbent doesn't get left holding the bag. It gets paid enough to continue to invest in, to maintain, to operate, to profit reasonably from, its network. Lease prices for elements based on historic cost pricing do not provide such guarantees . . . ."

Id. (Emphasis supplied.) This call for prices that are based on present-day costs refers to provisions of the same Act in which the pole attachment statute is contained. Consistency demands that the same pricing methodology be applied throughout the Act. Admittedly, the prospective attaching entities are not the pole owners' competitors in providing electric services, but the same pro-competitive concerns mandate forward-looking or replacement costs in this setting as well.

It would be patently *unfair* to conclude that the past value of property constitutes a "full and perfect monetary equivalent" of the present value of the same property. No willing seller would freely and voluntarily sell his property at the price he paid to obtain it. Rather, he would sell it at the current, present-day price he could get for it in the market. *Appraisal* at 20-26. For this reason, a valuation method based on backward-looking, historical, embedded costs does not derive a fair and equitable award, and could never be the measure of just compensation. Original cost would not make a property owner whole because it is not a reflection of the value of the property at the time of the taking.

In addition, it should be noted that courts have also used the replacement cost valuation method to determine the value of special purpose property. *Massachusetts-*

American Water Co. v. Grafton Water District, 631 N.E.2d 59, 61 (Mass. App. Ct. 1994).[13] Water supply facilities were considered special purpose property for which the condemnee in *Massachusetts-American* was entitled to recover the amount necessary to replace them. *Id.* The court justified its holding on the fact that there was no evidence of comparable sales, the property was used for a unique purpose, and it was of a type not frequently bought and sold. *Id.* at 60, 61. Similarly, it cannot be disputed that utility poles are special purpose property, and can be accurately valued under the replacement cost methodology.

In its *Local Competition Order*, the Commission sided with cable companies to hold that utilities were not automatically entitled to deny a request for access on the grounds that its poles lacked the capacity to accommodate any more attachments. 11 FCC Rcd. 15,499, ¶¶ 1161-1164.[14] It based its holding on the fact that because a utility has the ability to expand capacity for its own needs, Section 224(f)(1) requires it to expand capacity to meet the needs of attaching entities. *Id.* at ¶ 1162. According to the FCC, even if expanding capacity means the utility must replace poles and add conduits, it must go to these costly measures to satisfy its duty under the statute.

Although obviously designed to again benefit the cable companies, the Commission's erroneous interpretation of the Act actually provides additional support for the utilities'

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[13] Special purpose property is that which is used to provide a unique service and is not regularly bought and sold.

[14] The Commission's cable friendly interpretation of the statute obviously ignores the safe harbor provision in Section 224(f)(2).

argument that replacement cost must be the basis of valuing the pole system. If, as a result of the governmental taking, the utilities are required to replace elements of the system in order to satisfy their statutory duty, the Fifth Amendment demands it be compensated according to the costs it expends in replacing these assets. Again, just compensation requires the utilities receive the "the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1942).

The Cable Rate thus fails to provide just compensation because it is predicated upon backwards-looking, embedded costs.

Therefore, the $4.61 rate produced by application of the Cable Rate formula fails to provide just compensation, and limiting Gulf Power to the use of that subsidized rate would be an unconstitutional taking.

29(a)-(i). Gulf Power denies that Complainants are entitled to any of the requested relief.

GULF POWER'S ARGUMENTS

I. GULF POWER'S $38.06 CHARGE IS CONSERVATIVE AND SUPPORTED BY STANDARD MARKET VALUATION METHODOLOGIES

Gulf Power's primary argument is that Gulf Power's charge of $38.06 is a conservative appraisal of the price that it is entitled by law to receive for the taking of its property at issue in this proceeding. As discussed throughout this pleading, the *Gulf I* and *Gulf II* decisions held that utilities are entitled to just compensation for the taking effected

by the Act's mandatory access provision. And as discussed above, case-law establishes that just compensation is generally defined as the market value of the property being taken. *Miller v. United States*, 317 U.S. 369, 374 (1942). If there is no clear market value, then various "market value" proxies have been used, including, without limitation: Replacement Cost, Reproduction Cost, Income Approach, and Substitute Facilities Doctrine. 8 NICHOLS ON EMINENT DOMAIN §§ 14A.01-14A.09.

Gulf Power's development of its $38.06 price is consistent with this judicial precedent because it is predicated upon a reproduction cost methodology. As further explained in the Third Affidavit of Michael R. Dunn, Gulf Power's price, which only begins to move toward the just compensation to which it is constitutionally entitled, is based on a gross pole investment price arising from the replacement cost of the pole at current prices. Gulf Power's methodology also includes all proper FERC accounts. Gulf Power's methodology fully allocates the cost of both usable and unusable space to all attaching entities – including cable companies. Third Affidavit of Michael R. Dunn at ¶¶ 19-24. This replacement cost methodology actually produces a charge of $38.06.

To further demonstrate the reasonableness of the $38.06 charge, Gulf Power is also including in this filing the Affidavit of Henry J. Wise, MAI. Mr. Wise is a Certified Real Estate Appraiser, who has great experience in making market valuations for property. Applying standard appraisal techniques and looking to analogues of valuation for similar property, Mr. Wise concluded that there is an active and competitive market for

communications corridors, clusters, and systems. Affidavit of Henry J. Wise at 9-17 (lines 150-337). Mr. Wise then conducted three approaches to determine market value that are generally used by appraisers: the Depreciated Replacement Cost Approach, the Sales Comparison Approach, and the Income Capitalization Approach. *Id.* at 18-29 (lines 339-618).

In performing the Depreciated Replacement Cost Approach, Mr. Wise noted that an "enhancement factor" is often used in valuing communications corridors, and included such a factor in his pole rental fee determination. In addition, Mr. Wise also followed the standard appraisal practices of including a factor for entrepreneurial profit, of using an economic-based depreciation rate (as opposed to a tax-based depreciation rate), and used an even lower depreciation rate for purposes of determining the carrying charge to reflect one fact that portions of capital could be re-invested over time. *Id.* at 19-21. The result of this analysis indicates that cable companies should be paying Gulf Power an annual rate of $42 per pole, a charge exceeding the one being sought by Gulf Power in this proceeding. *Id.* at 24.

Concerning the Sales/Rental approach, Mr. Wise discussed difficulties in obtaining pertinent information from third parties,[15] but did note that the rates in Gulf Power's Joint Use Agreements with telephone companies range from $22 to about $59 per pole, with other

[15] *Id.* at 5. Mr. Wise did note that MARTA is charging $13,300 per mile for access to its corridors. If this value is converted to a pole attachment rate based upon 21 poles per mile, then the rate would be $628 per pole. *Id.* at 27.

power companies interviewed reflecting rates per pole of $25-$40. *Id.* at 26-27. It should be emphasized, however, that Mr. Wise considered those arrangements extremely conservative and only a slight move toward a true market determination for attachments, because those regulated entities have been rooted in embedded cost calculations and because the parties thereto receive additional consideration due to the shared nature of those arrangements. *Id.* at 4-6, 26.

With regard to the Income Capitalization Approach, Mr. Wise determined that many investors want to recover their investment over a specified number of years (normally 3-5 years). Mr. Wise then determined that this methodology produces a pole attachment rate ranging from $51.58-$30.95. *Id.* at 27-29.

In conclusion, Mr. Wise reasoned that, based upon presently available information, a reasonable attachment fee for cable companies attaching to Gulf Power's poles is between $40-$45; thereby establishing that not only is the fee being sought by Gulf Power here

conservative, but it is also reasonable as Gulf Power moves toward the just compensation to which it is constitutionally entitled. Accordingly, its use should be affirmed by this Commission.

Respectfully submitted,

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DATED: August 9, 2000

CERTIFICATE OF SERVICE

I, Cassandra Hall, a secretary in the law firm of Keller and Heckman LLP, certify that I have served a copy of this "Gulf Power Company's Response to Complaint" upon the following on this 9th day of August, 2000:

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