

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

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FLORIDA CABLE  
TELECOMMUNICATIONS  
ASSOCIATION; COX COMMUNICATIONS  
GULF COAST, L.L.C., *ET AL.*

Complainants,

P.A. No. 00-004

v.

*undocketed*

GULF POWER COMPANY,

Respondent.

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To: Cable Services Bureau

GULF POWER COMPANY'S MOTION  
FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

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*W. J. ...*  
Dated: September 11, 2000

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**GULF POWER COMPANY'S MOTION  
FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY**

Respondent, Gulf Power Company ("Gulf Power"), respectfully files this Motion for Leave to File<sup>1</sup> the accompanying Notice of Supplemental Authority in the above-styled proceeding. As set forth below, and in the accompanying Notice, good cause exists for Gulf Power's filing.<sup>2</sup>

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<sup>1</sup>Gulf Power is filing this Motion for Leave to file the accompanying Motion to File Supplemental Authority in conformity with 47 C.F.R. § 1.1407(a), which provides that "no other filings [*i.e.*, other than the response and the reply] and no motions other than for extensions of time will be considered unless authorized by the Commission."

<sup>2</sup>Gulf Power has not had sufficient time to respond to Complainant's Reply and evidentiary filings. However, in light of the Cable Services Bureau's actions in *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company* (P.A. No. 00-003), the attached affidavit must be considered in the interests of fairness and due process.

Due process requires that “a party be aware of and allowed to refute ‘the evidence against the merits of his case.’” *Clifford v. United States*, 136 F.3d 144, 149 (D.C. Cir. 1998) (quoting *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5<sup>th</sup> Cir. Unit B 1981)). Furthermore, due process “requires that there be an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citing *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); see also *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934). Additionally, [t]he right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues.” *Holt v. Commonwealth of Virginia*, 381 U.S. 131, 136 (1965) (citation omitted).

The Complainants’ Opposition to Gulf Power’s Reply was Gulf Power’s first notice of the Complainants’ specific arguments and evidentiary submissions regarding why § 224 of the Communications Act affords Gulf Power just compensation. Accordingly, for the Commission to protect Gulf Power’s due process rights, it must afford Gulf Power the opportunity to at least potentially respond to those arguments with support from the Second Affidavit of Mr. Henry J. Wise, before its ruling on the Complaint.

The Administrative Procedure Act also requires the Commission to allow Gulf Power to supplement the record. Under the arbitrary and capricious standard of judicial review of administrative proceedings,<sup>3</sup> courts must set aside agency action that “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Courts have held that “[w]here deficiencies in

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<sup>3</sup>5 U.S.C. § 706(2)(a) requires courts to “hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

the administrative appeals process call into question whether adjudicative officials considered all relevant factors, agency action will be set aside. Agency action will also be set aside if the administrative process employed violated 'basic concepts of fair play.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1583 (10<sup>th</sup> Cir. 1994).

The Commission rushed to judgment on the Complaint in the Alabama Power Company proceeding in order to protect the Complainants in that proceeding from a September 11, 2000, termination date. A similar rush to judgment in this proceeding without considering Gulf Power's supplemental evidence would not afford Gulf Power an opportunity to respond to important evidence in the proceeding concerning just compensation.

The Commission should allow Gulf Power to file this Opposition because Fifth Amendment just compensation principles demand that Gulf Power be afforded an adequate process. In *Gulf Power Co. v. United States*, the Eleventh Circuit followed well-settled Supreme Court authority to unequivocally hold that the Fifth Amendment requires that a "reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking." 187 F.3d 1324, 1331, 1333 (11<sup>th</sup> Cir. 1999) (quoting *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985)). The law ensures this Commission will comply with its constitutional duty to employ a "reasonable, certain and adequate" process for making just compensation determinations by providing for immediate appellate court review of those determinations. *Id.* at 1334 (decisions concerning just compensation are "the province of judicial—not legislative [or administrative]—determination"). Thus, although § 224 allows this Commission **initially** to

determine just compensation in the event utilities and attachers are unable to arrive at an agreed upon price,<sup>4</sup> the process must be “adequate for a judicial determination of just compensation.” *Id.*

The rule in *Gulf Power I* and *Williamson* demonstrates that in this proceeding the Commission must allow Gulf Power to respond to the Complainants’ just compensation arguments before an order is issued and before the record is assembled and forwarded to the Eleventh Circuit for review. Allowing Gulf Power’s supplemental evidence will help alleviate a clear due process violation.

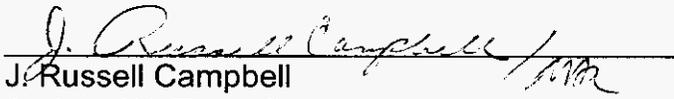
Finally, in *Gulf Power Co. v. United States*, the court found that valuing pole attachments is a fact intensive analysis involving “multiple geographic technological, and safety considerations which constantly change according to a variety of elements.” 998 F. Supp. 1386, 1397-98 (N.D. Fla. 1998) (citing Report and Order of the FCC, Implementation of Section 703(e) of the Telecommunications Act of 1996, FCC 98-20 (adopted Feb. 6, 1998)). Thus, even though the Commission may consider the just compensation rate in the first instance, the promise of judicial review of its decision theoretically ensures the agency will comply with the dictates of the Fifth Amendment. *Id.* at 1398. As the court held in *Gulf Power I*, it is the federal appellate courts that have the “jurisdiction to decide that an FCC rate order is constitutionally invalid because it does not provide just compensation.” 187 F.3d at 1334. Although the Commission already knows how it will rule on the Complaint, the record upon which the appellate court will make a just compensation decision should be as complete as possible.

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<sup>4</sup>47 U.S.C. § 224(b(1)); 47 C.F.R. §§ 1.1404(m), 1.1409(e).

WHEREFORE, Gulf Power respectfully urges the Commission to supplement the evidentiary record with the attached Notice of Supplemental Authority.

Respectfully submitted,

  
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DATED: September 11, 2000

**CERTIFICATE OF SERVICE**

I, CASANDRA 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 Motion for Leave to File Supplemental Authority" upon the following on this the 11th day of September, 2000:

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