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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
Room TW-A325 445
12th Street, S.W.
Washington, D.C. 20554

undocketed

Re: Florida Cable Telecommunications Association, Inc.; Cox Communications Gulf Coast, LLC, et al. v. Gulf Power Company, P.A. No. 00-004

Dear Ms. Salas:

On Monday, September 11, 2000, Gulf Power Company filed its Notice of Filing Supplemental Authority in the above-captioned proceeding. That document included a fax copy of The Second Affidavit of Henry J. Wise, MAI. Enclosed herewith is the original Affidavit with original signatures.

Sincerely,

Raymond A. Kowalski

Raymond A. Kowalski

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STATE OF GEORGIA

FULTON COUNTY

SECOND AFFIDAVIT OF HENRY J. WISE, MAI

Before me, personally appeared Henry J. Wise, who being known to me and deposes on oath and states as follows: My name is Henry Joseph Wise. I am over the age of nineteen years. All of the statements in this affidavit are true based upon my personal knowledge and based upon information compiled for my review in preparing this affidavit. This affidavit is submitted in response to the Cole, Raywid & Braverman, LLP comments on the Gulf Power Company (GULF) response to the Gulf Cable Telecommunications Association; Comcast Cablevision of Dothan, Inc., ET AL complaint to the FCC; P.A. No. 00-004, dated August 29, 2000.

The purpose of this memo is to identify and comment upon major misstatements and or misunderstandings of my affidavit contained in the Cole, Raywid & Braverman, LLP response to the FCC dated August 28, 2000, and includes, by reference, corrections to the interpretation of my affidavit as characterized in the Declaration of Timothy S. Pecaro dated August 28, 2000, cited in the Cole, Raywid & Braverman, LLP response. My affidavit stands on its own. I have not attempted to restate the observations and or judgments I made within the affidavit or to take issue with all of Mr. Pecaro's objections, criticisms or characterizations of my opinions.

On pages iv and v of the Summary to the Cole response, and again on pages 3 and 4 and on page 15 through page 20 of the main body of the response, Cole disputes the fact that the GULF poles constitute a corridor. Furthermore, he states that if a corridor exists it is the public right of way to which the cable companies have gained access by the payment of a franchise fee.

Clearly the network of poles constitutes a functionally useful corridor that permits the cable companies, the telephone companies and the power company (or any other attacher) an unobstructed route from the signal's source to the retail customer. Any reasonable person's view along almost any street in Gulf will include a string of power poles, one after another, about 200' apart, branching at cross streets, as far as the eye can see. To consider each pole, sui generis, and to disregard the network of poles is to miss the forest for the tree. In fact, on page 25, Cole states "that utility poles and like structures are essential facilities – mandatory corridors that communications services must share." The cable company would have only a very limited interest in the power company poles if all the power company had was one pole.

It is true that many of the power company poles are located in the public right of way. It may be that the cable company's payment of a franchise fee entitles it to use the public right of way. It may be that the franchise fee is a payment for a monopoly right or a payment in lieu of a business license. Nothing in my first affidavit relates either to the payment of a franchise fee or to the cable company's use of the public right of way. Other franchised users of the public right of way, including the cable companies in some

locations, burrow underground establishing a subterranean corridor in order to overcome obstacles on the surface of the right of way.

The power company's corridor begins at a point 18 feet in the air, at the low point of the permitted sway in the lines of the lowest attacher. However, it is not a grant of air rights or a request for payment for air rights over the public right of way. The cable company and the other attachers are probably using air rights over the surface public right of way as the space within which they string their cables.

The contribution to functional utility by the power company is the construction of the network of poles and the space between 18' and 40' above the ground that the power company has cleared of trees. Absent the advent of Harry Potter's universe, the poles will not hold themselves up in the air. The unusable portion of the pole; the six feet underground and the 18 feet to get to the useful corridor are true components of the cost that Congress said are of equal benefits to all and the cost to establish and maintain the foundation for the corridor should be born by all attachers[1]. The peculiarities of the special advantage granted to the cable companies by the FCC has nothing to do with just and adequate compensation. It constitutes a subsidy that results in the power company customers paying a higher price for electricity in order to subsidize the cable television industry.

The market rent that I appraise in the affidavit is equivalent to just and adequate compensation for the fact that the power companies are compelled to make space on their

poles available to the cable companies and the telecommunications companies. It is a reasoned judgment of the fair share or pro rata allocation of the continuing annual cost of the pole as a part of the system of poles and the continuing annual cost of maintaining the clear space for the common corridor and the cost of protecting all of the lines, cable, telephone and electric power, from lightning strikes.

Cole contends on page 15 and on pages 19 and 20 that the power company poles do not constitute an "end-to-end" network and that the fact that there are other pole providers in the network somehow invalidates the fact that where the cable company uses the power company's network of poles (as opposed to a municipal or EMC's poles or telephone company poles), the power company provides a corridor. It uses this argument to challenge our judgment that the network or corridor reflects an enhanced value (over the value of a single pole), based on the concepts of plottage value as applied to real estate assemblage or corridor value as reflected in the railroad right of way appraisal literature.

I concede that other companies, other than GULF, contribute to the network that the cable companies find beneficial. However our approach to estimating just and adequate compensation to the power company reflects only the share of the network owned by the power company. Nothing in our affidavit imputes value to or payment for poles owned by other companies. The joint use agreements seamlessly integrate the other companies' poles into the network that all attachers find useful. The compensation to GULF for the taking can be calculated simply by counting the power company's share of the entire

[1] House Conference Report No. 102-204, @ 92.

inventory. The cable companies are free to negotiate any rate that they can with the owners of the rest of the poles.

Cole contends that the appropriate measure of just and adequate compensation is "the owner's loss, not the taker's gain, which is the measure of the value of the property taken." (See Cole, page 20 citing *First English*.) On page 30 Cole categorizes the taking as "a sliver of such poles" and a "one foot section of unused, excess capacity on the pole." Both Cole and Pecaro actually recognize what was taken in the quote on page 34 where Mr. Pecaro explains the benefits of ownership of the poles, including the right to "use the poles in perpetuity, occupy any space on the pole they desire, rent to others ... and enjoy all other benefits of ownership."

In fact what was taken from the power company is its right to lease the required "sliver" to the market of potential attachers who find that the corridor of power poles has, for them, functional utility. The 1996 Telecommunications Act requires that they lease to the cable companies. As a consequence, I believe that the power company is entitled to just and adequate compensation, which I understand to be functionally equivalent to market rent.

Cole, citing Pecaro, contends that "the market value approach to calculating just compensation does not apply because there is no market for attachments to utility poles." Cole, pages 25-29, Pecaro ppg. 12, 25 and others.) I have appropriately characterized this as a limited market. That there is not a wider market is a result of the current

regulatory environment. There is no monopoly or "hold-up" value to the pole 'owner' in the present market and Mr. Pecaro has shown no evidence thereof. I have given evidence of Joint Use Agreements, and I listed other usable transactions between power companies and third-party attachers. In the First Gulf Power Affidavit I cited additional, similar evidence of a nascent market. For example, Gulf Power leases space on seven poles to the Frangista Beach Inn at an annual charge of $40/pole/year, and they lease space on nine poles to R. L. Singletary, Inc. for $40/pole/year.

Mr. Pecaro implies in paragraphs 24 through 32 that the term "Fair Market Value" requires transactions for its existence. This is not so, even though I have relayed transaction data. As a parallel, the county property tax assessors are required each year to estimate a market value for all parcels in their jurisdiction. Of course, in some market segments there will have been no transactions during the past year so it will be necessary to simulate how buyers and sellers would behave if they did undertake transactions. This will be supplemented by the best comparable property sales data available, or, failing that, meaningful analogues.

Analogues are not direct market comparables, but they are nonetheless useful to show that absent the constraints of the FCC regulations that limit the rent that the cable companies pay, free market pricing mechanisms work to make it possible for owners of resources like rail corridors or subway systems or transmission towers and attachers wishing to make use of the communications corridor to agree upon a market based rent.

The analogues show that what was taken from the power company is the right to participate in this free enterprise marketplace.

The limited market characteristics of these corridors means that power poles constitute a special purpose property. As J. D. Eaton has written in REAL ESTATE VALUE IN LITIGATION, Second Edition, The Appraisal Institute, 1995, Chapter 11, Special Purpose Properties, pp. 227-244, "The Uniform Eminent Domain Code provides that 'the fair market value of any property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable." (Uniform Eminent Domain Code, 1974, Section 1004 (a) p. 10.7, Eaton, p. 228.) Eaton states "In valuing a special purpose property, it has been held that the reproduction cost, or replacement cost minus depreciation, may be considered and may even be the only method in some situations. Usually reproduction costs or replacement costs are used as a starting point, with no recognition made of the distinction in these two terms." (Eaton, p. 232. See also, THE APPRAISAL OF REAL ESTATE, 11TH EDITION, The Appraisal Institute, p. 338.) Cole and Pecaro have used the terms interchangeably, although I specified replacement cost (excluding the arms) as the proper beginning point.

The Depreciated Replacement Cost Approach is not based in a doctrine of "share the savings" as concluded by Mr. Pecaro, and of course does not contemplate the construction of a second system of poles. Rather, it simulates the value in use through estimating replacement costs to the attacher. In this regard, the relevant concept is indeed replacement rather than historical reproduction cost based on regulatory precedent.

"When applicable, the cost approach reflects market thinking because market participants relate value to cost." (THE APPRAISAL OF REAL ESTATE, 11th Edition, p. 335.) The cost approach, like the market approach, is based on the economic principle of substitution. "This principle affirms that no prudent buyer would pay more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay." (THE APPRAISAL OF REAL ESTATE, 11th Edition, p. 336.)

Cole, citing Pecaro, states that my use of the cost approach contains flaws, specifically that I did not verify the number of poles and actual ages of the poles. I cited the GULF depreciation study, which I believe to be authoritative. Since the appropriate unit upon which to base market rent is the price per pole, there is no need or benefit in counting the total number of poles, although GULF provided that information.

After calculating the depreciated replacement cost of a pole, I applied a rate that reflects the return on and the return of the required investment plus the cost of maintaining and protecting the corridor through space from which all of the users benefit. This is generally referred to as the carrying charge rate. The point that some of the components of the rate are based on imbedded cost rather than weighted average cost of capital is a distinction without a difference. I chose to utilize a carrying charge rate structure that has already been approved by the FCC, rather than argue with each of the components. The

only component I changed is the component for depreciation, which, had I utilized the FCC approved rate, would have substantially overstated the required return.

In paragraphs 13 through 17 of his affidavit, Mr. Pecaro implies that I valued a fee simple ownership interest, but I have clearly described a rental rate, as for a leasehold, throughout the affidavit. I recognize that the rights to use the pole do not totally deplete its usability by all other users. If it did, the replacement cost would be for 100% of the cost of the pole, not just the pro rata amount (27%) associated with the cable attachers. In fact, the entire thrust of our judgment about market rent is based on the need for all users to equitably share the costs that make the corridor possible. Since I am not appraising the fee estate in the pole there is no need to apply a discount for partial interests, as implied in paragraph 18.

In paragraphs 19 and 20 and again 33 through 35 Mr. Pecaro's affidavit shows that he misunderstands the nature of an income approach. There is no need to apply a multi-period discounted cash flow approach when investors apply simpler decision rules. Nor have I, as he implies, claimed the entire income of the cable venture. What is necessary in every approach to setting an annual rate for all attachers is to recognize that cost (or value) times a carrying charge (or capitalization rate) is equal to rent (or income). This simple formula, generally reported in the literature of finance as V=I/R, is also the basis of what Pecaro characterizes as a "simple division" that permits us to apply "payback rules" that the private marketplace uses to evaluate investments in capital improvements such as a network of poles as a test of the reasonableness of our estimate of market rent.

I, the undersigned, a Notary Public in and for said county, in said state, hereby certify that Henry J. Wise, whose name is signed to the foregoing Affidavit, who is known to me, and who did take an oath, acknowledged before this day that, being informed of the contents of said instrument, he executed the same voluntarily on the day the same bears date.

Subscribed and sworn to me this 14th day of September 2002.

Notary Public, Gwinnett County, Georgia
My Commission Expires July 21, 2001

Notary Public