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VIA FEDERAL EXPRESS
Thomas K. Kahn, Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: ***Alabama Power Company, et al. v. FCC, et al.,***
Consolidated Docket Nos. 00-14763-I; 00-15068-D; 01-13058-B
Response to Cable Inervenor's Notification of Supplemental Authority

Dear Mr. Kahn:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Eleventh Circuit I.O.P. 28.6, Alabama Power Company and Gulf Power Company (collectively "Petitioners") submit this letter in response to the letter of Intervenors Alabama Cable Telecommunications Association, Inc., Comcast Cablevision of Dothan, Inc., Florida Cable Telecommunications Association, Inc., and Cox Communications Gulf Coast, LLC (collectively "Cable Intervenors") regarding the opinion of the United States Supreme Court in *National Cable & Telecommunications Association, Inc. v. Gulf Power Company, et al.*, Case Nos. 00-832 and 00-843.

In answering a question posed by this Court concerning the potential scope of the FCC's inquiry on remand, undersigned counsel did note that if the FCC lacked the authority to set rates for cable companies' pole attachments outside the formula prescribed by § 224(d), and this Court were to hold that a rate determined in accordance with § 224(d) does not constitute constitutional just compensation for the taking of the Petitioners' property, then the FCC could be powerless to set a different rate on remand. However, counsel also explained that whether the FCC may set rates not prescribed by §§ 224(d) or (e) is an entirely separate question not at issue in this case. While the Supreme Court's opinion suggests (but does not specifically hold)[1] that the FCC may

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[1] The Supreme Court explicitly limits its holding to respond to the narrow issue for which it granted certiorari review:

> In this suit, though, we address only whether pole attachments that carry commingled services are subject to FCC regulation at all. The question is answered by §§ 224(a)(4) and (b), and the answer is yes.

have the authority to set rates that do not fall within the statutory formulas set forth in either §§ 224(d) or (e), as stated at oral argument, the Supreme Court's ruling has no bearing on the merits of this appeal. The issue to be resolved by this Court is whether § 224(d), as applied to the Petitioners in this case, satisfies the standards and requirements of constitutional just compensation. If the Cable Interveners' interpretation of the Supreme Court's opinion is accurate, and this Court rules in the favor of the Petitioners, the Petitioners certainly expect that the FCC will set a rate pursuant to §§ 224(a)(4) and (b) that is constitutionally adequate.

The Cable Intervenors also assert that courts generally defer to agencies such as the FCC in ratemaking cases. While this statement is legally accurate, as undersigned counsel asserted at oral argument (and as demonstrated in the Petitioners' briefs), this is not a ratemaking case. The Petitioners' arguments are not based on ratemaking principles. The central question in this case is constitutional, *i.e.*, does § 224(d), as applied to the Petitioners in this case, afford constitutionally adequate just compensation. Deference is not appropriate in constitutional cases. *See, e.g., Rodriguez v. United States*, 169 F.3d 1342, 1346 (11th Cir. 1999).

Respectfully submitted,

J. Russell Campbell

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Slip Op., p. 10. Indeed, the quotation that the Cable Intervenors extract from the opinion pertains to the proper classification of Internet service for the purpose of determining the scope of the FCC's jurisdiction to regulate attachments that provide Internet services, not for the purpose of determining the appropriate rate for such attachments.

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