

ORIGINAL

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

030000-Pu

RECEIVED FPSC
03 JUL 31 AM 10:05
COMMISSION
CLERK

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

Complainants,

v.

GULF POWER COMPANY,

Respondent,

P.A. No. 00-004

To: Enforcement Bureau

**OPPOSITION TO GULF POWER COMPANY'S PETITION FOR
RECONSIDERATION AND REQUEST FOR EVIDENTIARY HEARING**

**FLORIDA CABLE
TELECOMMUNICATIONS
ASSOCIATION, INC**

**COX COMMUNICATIONS GULF
COAST, L.L.C.**

Michael A. Gross
Vice President,
Regulatory Affairs and Regulatory Counsel
**FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, INC.**

310 North Monroe Street
Tallahassee, FL 32301
(850) 681-1990

Paul Glist
John D. Seiver
John Davidson Thomas
Brian M. Josef
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 659-9750

July 25, 2003

US _____
AF _____
MP _____
OM _____
TR _____
CR _____
CL _____
PC _____
MS _____
EC _____
TH _____

DOCUMENT NUMBER DATE

06926 JUL 31 3

FPSC-COMMISSION CLERK

SUMMARY

The Bureau ruled here, consistent with Commission precedent in the similar *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.* case, that Florida cable operators' payments of makeready and fully allocated costs under the Commission's Cable Formula provide Gulf Power with just compensation for the cable operators' attachments to Gulf Power's poles. While Gulf Power quarrels with the *Alabama Power* precedent, this is not the place to bring that challenge. Indeed, Gulf Power's sister company lost its challenge in the Eleventh Circuit and is now seeking *certiorari* in the U.S. Supreme Court to review the Eleventh Circuit's affirmance. But none of Gulf Power's arguments here – that the Bureau retroactively applied some new, unlawful standard or that Gulf Power must receive an opportunity to present additional factual evidence to meet this standard – are properly considered as part of a reconsideration petition. For example, Gulf Power does not rely upon facts relating to new events or changed circumstances, or unknown facts not discoverable before its last opportunity to present such information. Instead of presenting a proper basis for a reconsideration petition, Gulf Power is using its sister company's challenge to the Eleventh Circuit Court of Appeals' *Alabama Power* ruling as a pretext to re-litigate its case here. But as in *Alabama Power*, there is no justification for submitting new arguments or developing new legal theories. The law of just compensation is well-established, and both *Alabama Power* and Gulf Power simply failed to address it properly. There is no need or justification for relitigating the same case.

Contrary to Gulf Power's claim, neither the Bureau nor the Eleventh Circuit created a new, higher standard that pole owners must satisfy before charging a higher rate. The *Bureau Order* relied upon the full Commission's order in *Alabama Power Co.* and well-established just compensation principles that properly focus on loss to the owner, not gain to the taker. Gulf

Power's Petition is also rife with internal inconsistencies. First, Gulf Power both objects to the Eleventh Circuit's *APCO v. FCC* ruling while simultaneously seeking reconsideration so that it may attempt to satisfy what it calls an unlawful standard. Second, Gulf Power previously represented that the *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.* case was dispositive of the instant proceeding. Now, it claims that the Bureau acted arbitrarily in rejecting precisely the same alternative approach for calculating pole rental rates. Third, Gulf Power abandons and waives its previous arguments for alternative pole height and usable space figures, and now seeks to apply the Commission's presumptions and introduce new facts. But even utilizing the FCC's presumptions, Gulf Power draws unsupported conclusions about crowding on its poles and usable space for additional attachers that conflict with its prior evidence and common sense. Finally, Gulf Power faults the Commission for not ruling in the complaint for three years. However, it was Gulf Power that said the *Alabama Power* case controlled, and then Gulf Power prematurely sought judicial review even before the Bureau could rule initially on the complaint. That premature appeal was consolidated with the *Alabama Power* appeal and it was not until the Eleventh Circuit finally ruled in November 2002 and denied the petitions for rehearing January 8, 2003 that the status of the underlying proceeding was clear and the Bureau could proceed to resolve it.

The Bureau should deny Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing.

TABLE OF CONTENTS

	<u>Page</u>
I. Background	2
A. The FCTA/Cox Complaint	2
B. The ACTA/Comcast Proceeding	4
II. Gulf Power Fails To Establish Any New Legal Standard Or Additional Facts Justifying A Grant Of Its Petition For Reconsideration	6
A. Gulf Power’s Petition Is Procedurally Defective.....	6
B. Neither The <i>Bureau Order</i> Nor The Eleventh Circuit’s <i>Alabama Power v. FCC</i> Ruling Established A New Standard For Determining Just Compensation	9
III. The Petition Is Internally Inconsistent And Unpersuasive	13
Conclusion	16

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

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

Complainants,

v.

GULF POWER COMPANY,

Respondent,

P.A. No. 00-004

To: Enforcement Bureau

**OPPOSITION TO GULF POWER COMPANY'S PETITION FOR
RECONSIDERATION AND REQUEST FOR EVIDENTIARY HEARING**

The Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. (hereinafter "Complainants"), by their attorneys and pursuant to 47 C.F.R. § 1.106(g), hereby submit this Opposition to Gulf Power Company's ("Gulf Power") Petition for Reconsideration and Request For Evidentiary Hearing ("Petition"). Gulf Power seeks reconsideration of the Enforcement Bureau's ("Bureau") May 13, 2003 ruling in *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 15 (rel. May 13, 2003) ("*Bureau Order*"). Gulf Power urges reversal of the *Bureau Order*, alleging that the Bureau retroactively applied a new, unlawful "evidentiary burden"¹ developed by the U.S. Court of

¹ Petition at 4, 5.

Appeals for the Eleventh Circuit in *Alabama Power Co. v. FCC*.² In addition, Gulf Power requests an evidentiary hearing to introduce additional evidence into the record in an attempt to meet the very same standard which its sister company has criticized as “abstract.” Alabama Power Co. Petition for Writ of Certiorari at 25 (U.S. Docket No. 02-1474, April 4, 2003). For the reasons discussed herein, the Bureau should deny the Petition.

I. Background

A. The FCTA/Cox Complaint

In early-mid 2000, Gulf Power abruptly informed Cable Operator Complainants that it was terminating its long-standing pole attachment contracts and unilaterally imposing new contracts with new pole rental rates of \$38.06 per pole, more than 500 percent higher than the existing rates of between \$5.00 and \$6.20 per pole. On July 10, 2000, after failed attempts at negotiation, Cable Operator Complainants filed a pole attachment Complaint and Petition for Temporary Stay with the FCC’s Cable Services Bureau challenging the new rates and potential removal of cable facilities. The Complainants argued that the exorbitant new pole rates violated 47 U.S.C. § 224 and 47 C.F.R. § 1.1401-1.1418, and that there was no merit to Gulf Power’s argument that the “just compensation” required by the Constitution entitled Gulf Power to a higher pole attachment rate than that calculated under Section 224(d) and the FCC’s regulations (“Cable Formula”).

Gulf Power filed its Response on August 9, 2000, asserting that the Cable Formula failed to provide just compensation for the taking of space on its poles. The Response claimed to derive its \$38.06 rental rate from, *inter alia*: (1) use of a “depreciated replacement cost approach,” (2) inclusion of Federal Energy Regulatory Commission (“FERC”) accounts that had

² 311 F.3d 1357, *petition for cert. docketed* (Apr. 8, 2003) (No. 02-1474) (“*APCO v. FCC*”).

been consistently rejected by the Commission, and (3) its own unusable space and pole height figures that differed from the Commission's established presumptions. Response at 40-42, 49-50. The Response also proposed various approaches for determining fair market value, including the sales comparison, income capitalization, and depreciated replacement cost approaches. Response, 49-51; Wise Affid. 18-29.

In their August 29, 2000 Reply, Complainants emphasized that just compensation is measured by the loss to the property owner and that the market value approach to calculating just compensation does not apply because there is no "market" for attachments to utility poles. Moreover, the "income approach" to valuation could not apply to limited licenses of portions of utility poles. Complainants also argued that Gulf Power had provided no persuasive evidence proving actual loss, nor had it supported its inclusion of consistently-rejected FERC accounts or its alternative average pole height and usable space figures.

On September 11, 2000, after the pleading cycle had closed, Gulf Power filed a Notice of Filing Supplemental Authority, which consisted of a Second Affidavit of Gulf Power's appraiser responding to Complainants' August 29th Reply. In response, on September 21, 2000, Complainants' filed their own Comments On Gulf Power's Notice of Filing Supplemental Authority.

Less than one week later, Gulf Power filed a Petition for Review at the Eleventh Circuit Court of Appeals, seeking review of the Bureau's decision in a separate pole attachment proceeding involving a Gulf Power affiliate, *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Order, 15 FCC Rcd. 17346 (2000). (11th Cir Case No. 00-15068-D, filed Sept. 27, 2000). Gulf Power was neither a party to nor a participant in the proceedings that led to the *Alabama Power* decision. The Eleventh Circuit dismissed Gulf Power's Petition for

Review for lack of standing, finding that the utility was not a party to the agency proceeding under review. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366-67 (11th Cir. 2002).

In the May 13, 2003 *Bureau Order*, the Bureau held that Gulf Power failed to justify its \$38.06 pole attachment rate and directed Gulf Power to permit cable operators to remain attached to its poles at their existing contract rates pending negotiation of new agreements and rates pursuant to the federal cable formula under Section 224.

The Bureau recognized that cable operators had met their burden of establishing a *prima facie* case, and that Gulf Power had failed to establish that it received less than its incremental costs in permitting cable operators' attachments. The Bureau relied on the full Commission's decision *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12209 (2001) ("*APCO Review Order*"), in concluding that the Cable Formula, together with the payment of makeready expenses, affords more than just compensation. Consistent with the full Commission's *APCO Review Order*, the Bureau also rejected Gulf Power's replacement cost methodology and its attempts to include unrelated cost accounts and alternative pole heights in its calculation of rental rates.

B. The ACTA/Comcast Proceeding

Shortly before Complainants filed their Complaint in this proceeding, the Commission was entertaining a complaint filed by the Alabama Cable Telecommunications Association and its members against Alabama Power Company, which was based upon similar facts and arguments. In fact, Alabama Power Company and Gulf Power set forth identical legal arguments concerning just compensation and even used the same expert witness appraiser. In the ACTA/Comcast complaint proceeding, the Bureau rejected Alabama Power's contention that the cable formula did not provide just compensation. It found that Alabama Power was fully

compensated for any loss through the payment of make-ready or change-out costs associated with the attachments and the annual pole attachment rate, which allowed it to fully recover the costs associated with the space used for the attachment, as well as a return on capital. *See In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*, 15 F.C.C.R. 17346 (2000).

The full Commission affirmed the Bureau's order, holding that the pole attachment regulations provided constitutionally sufficient compensation because they enabled Alabama Power "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed" *APCO Review Order*, ¶ 51 (citations omitted). The Commission ruled that Alabama Power had not provided credible evidence that the payment of make-ready and annual rents under the cable formula failed to place Alabama Power in the same position monetarily as it would have been but for the cable operators' attachments. *APCO Review Order*, ¶ 58.

On appeal to the Eleventh Circuit, the appeals court agreed with the Commission's application of the established legal principle that just compensation is measured by the loss to the owner and held that, because FCC regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, Alabama Power received more than just compensation. The Court observed that only if Alabama Power had established facts showing actual lost opportunity, *i.e.*, that its poles were "full," would Alabama Power be able to demand compensation exceeding marginal cost. *See APCO v. FCC* at 1370-71.

On January 8, 2003, the Court denied Alabama Power's petition for rehearing and suggestion for rehearing en banc. On February 4, 2003, the Court then granted Alabama

Power's January 14, 2003 "Motion for Stay of the Issuance of the Mandate," until disposition of the case by the U.S. Supreme Court, pending Alabama Power's filing of a Petition for Writ of Certiorari. Alabama Power filed its Petition with the Supreme Court on April 4, 2003 and the government and Alabama Cable Association filed oppositions to Alabama Power's petition. The Petition is pending.

II. Gulf Power Fails To Establish Any New Legal Standard Or Additional Facts Justifying A Grant Of Its Petition For Reconsideration

The Petition argues that the Bureau retroactively and arbitrarily applied a new, higher evidentiary standard to Gulf Power that requires a reversal of the *Bureau Order* and opening of an evidentiary hearing. *See* Petition at 5-7, 10. In reality, the *Bureau Order's* actual holding is at odds with Gulf Power's embellished version. Gulf Power does not meet the Commission's requirements for bringing a petition for reconsideration. Further, Gulf Power fails to establish that either the Bureau or the Eleventh Circuit developed a "novel" legal standard that was applied to the utility's detriment.

A. Gulf Power's Petition Is Procedurally Defective

A petition for reconsideration that relies on facts not previously presented to the Bureau may be granted only if the facts fall within one or more specified categories, or if the Bureau determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.106(c). The relevant categories are whether the petition relies on: (1) facts which relate to events which have *occurred* or circumstances which have *changed* since the last opportunity to present such matters; or (2) facts *unknown* to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior

to such opportunity. *Id.* (emphasis added). *See also Capital Cities Cable, Inc. v. Southwestern Pub. Serv. Co.*, File No. PA-85-0005, 1985 FCC LEXIS 2595, ¶ 5 (1985).

Gulf Power's Petition points to no changed facts associated with new events or changed circumstances, nor does it specify undiscovered facts that it could not have presented upon reasonable due diligence while the record was still open. In fact, Gulf Power's previous submissions to the Bureau already addressed much of the relevant information that it would seek to introduce in an evidentiary hearing. For instance, Gulf Power's Petition includes pole attachment agreements with other attachers *executed prior to* the filing of the Complaint or Gulf Power's Response due date, including agreements specifically noted in Gulf Power's Response. *Compare* Petition Tab A *with* Response, Wise Affid. at 26. Gulf Power provides no explanation of why it failed to include these agreements in its prior pleadings, or supplement its Response.³ In addition, Gulf Power previously represented to the Bureau that it had an average of 2.64 attachers on its poles, thereby indicating that sufficient room exists for additional attachers given the Commission's pole space presumptions, which presumptions Gulf Power now concedes. *Compare* Petition at 11 *with* Response, Third Affid. of Michael R. Dunn, ¶ 21 and Wise Affid. at 24. In its earlier pleadings, Gulf Power also offered expert testimony on the purported existence of an active "willing buyer/willing seller market for access to Gulf's poles, *see* Response at 50; Wise Affid. at 26-27, as well as its ability to put pole space to higher-valued use. *See* Wise Affid. at 26-30. Further, Gulf Power already offered information about other attachers willing to purchase space on Gulf Power poles at higher rates, and its Response specified other attachers

³ In the proceeding below, Gulf Power had ample opportunity to include all the materials supporting its position in its Response. Gulf Power even submitted, and the Bureau accepted, supplemental authority outside of the established pleading cycle). *See* Gulf Power Company Notice of Filing Supplemental Authority (filed Sept. 11, 2000); *Bureau Order*, ¶ 14, n.54. Thus, its criticism of the FCC's unwillingness to accept supplemental evidence is unfounded. *See* Petition at 2-3 and n.1.

paying higher pole attachment rental rates on a handful of poles. *Compare* Response at 49-51; Wise Affid. at 26-27 (noting rental of space on nine (9) poles to R.L. Singletary, Inc. and seven (7) to Frangista Beach Inn), *with* Petition at Tab B (invoice to The Crest Corporation of Panama City Beach Inc. for rental of two (2) poles and Madison River Communications, LLC for eleven (11) poles). However, Complainants demonstrated that this “evidence” was unpersuasive to establish the existence of a market for Gulf Power’s utility poles, because such an insignificant number of poles are sometimes priced at arbitrary “per pole” levels to generate minimum charges to cover the “floor” of transactional costs, and that such a small number cannot be extrapolated to the 86,713 pole attachments at issue in the Complaint. *See* Comments On Gulf Power Notice of Filing Supplemental Authority at 10 (filed Sept. 21, 2000).

In short, Gulf Power already had an opportunity to provide – and did provide – all the factual information that was available to it. Its request for an evidentiary hearing is thus unwarranted.⁴ “An evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances” and all that is required is that a party has a meaningful opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). While the Commission has discretion to conduct evidentiary hearings to further examine material factual issues it finds have been raised in the pleadings, this is not the case here. *See* 47 C.F.R. § 1.411. Gulf Power presented the Bureau with an alternative methodology for calculating its excessive rental rate, and its Petition raises no material facts in dispute. Because Gulf Power has offered

⁴ In another pole attachment matter involving Gulf Power’s affiliate, Georgia Power Company, the Commission denied the utility’s belated attempt to introduce new material that it could have provided in its Response, stating: “[w]e cannot allow a party to ‘sit back and hope that a decision will be in its favor and, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.’” *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd. 19859, n.54 (2002) (internal citations and quotations omitted), *appeal pending sub nom. Georgia Power Co. v. FCC*, Nos. 02-10222-BB & 02-15608-B (11th Cir. 2002).

no explanation that its Petition “depends on newly discovered evidence” that it could not have submitted upon reasonable due diligence, the Bureau should deny its request. *Teleprompter of Fairmont Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia*, 85 F.C.C.2d 243 (1981) (Feb. 6, 1981) (*amended by Erratum*, Mimeo No. 000203 (April 9, 1981)). *See also General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.*, PA-84-0015, Mimeo No. 2141 (January 28, 1985) (“Nor can we, in light of the Congressional directive for ‘simple and expeditious’ procedures, make the requisite public interest finding otherwise necessary before we may entertain a petition for reconsideration based on facts and arguments which [Petitioner] could have presented below”).

B. Neither The Bureau Order Nor The Eleventh Circuit’s Alabama Power v. FCC Ruling Established A New Standard For Determining Just Compensation

The *Bureau Order* correctly relied on the full Commission’s *APCO Review Order* to conclude that Gulf Power received more than adequate just compensation through the Cable Formula and the reimbursement of make-ready expenses. *See Bureau Order*, ¶ 15. Contrary to Gulf Power’s assertion, neither the Bureau nor the Eleventh Circuit created a “new standard” that a pole owner must meet in order to justify a higher rate. Petition at 2. Gulf Power’s mischaracterization of the *Bureau Order* and the Eleventh Circuit’s *APCO. v. FCC* decision is merely a pretext to get a “second bite at the apple” to present additional evidence that it could have presented previously.

Gulf Power grossly mischaracterizes the *Bureau Order* as retroactively applying a purportedly “new standard,” developed by the Eleventh Circuit, that prejudiced Gulf Power by “significantly alter[ing] the rules of the game.” Petition at 5-7. Instead, the Bureau relied on the binding precedent of the *APCO Review Order* as the basis for its decision, holding that: “[t]he Commission has concluded that its pole attachment formulas, together with the payment of

make-ready expenses, provide compensation that exceeds just compensation.” *Bureau Order*, ¶ 15 (citing *APCO Review Order*, ¶¶ 32-61).⁵ The Bureau did not base its decision on the Eleventh Circuit’s decision, nor was it part of the *Bureau Order*’s holding. Rather, the Bureau merely cited *APCO v. FCC* for the Eleventh Circuit’s persuasive observation – entirely disregarded by Gulf Power – sustaining the FCC’s determination that payment of fully-allocated costs under the pole rent, plus marginal costs in the form of up-front make-ready expenses, exceeds just compensation. *See Bureau Order*, ¶ 15 (quoting the Eleventh Circuit’s statement that: “[w]ithout such proof [of actual lost opportunity], any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.” *APCO v. FCC* at 1370-71.

Second, despite the Eleventh Circuit’s stay of the mandate in *APCO v. FCC* and Gulf Power’s submission of evidence in an attempt to justify an alternative replacement cost methodology, the Bureau sought to give Gulf Power the “benefit of the doubt,” by looking beyond the Cable Formula and the *APCO Review Order*. The Bureau evaluated Gulf Power’s submissions to see whether the utility had arguably proven any specific instances of lost opportunities incurred as a result of Complainants’ presence on the poles. *See Bureau Order*, ¶ 15. Specifically, if Gulf Power could have shown that its utility poles were already at full capacity and that another entity was prepared to pay Gulf Power compensation exceeding that required of Complainants under the Cable Formula, this could have helped establish actual loss that might have enabled Gulf Power to claim higher compensation. *See id.* Gulf Power simply

⁵ Conspicuously absent from the Petition is any significant discussion of the *APCO Review Order*. Gulf Power’s cursory treatment of the *APCO Review Order* is telling because (1) the *Bureau Order* rejected Gulf Power’s rate justification based on this “nearly identical” case, *see* Petition at 3, and (2) given the stay of the mandate in *APCO v. FCC*, the full Commission’s *APCO Review Order* constitutes the binding, applicable law in this case.

failed to make any such proof. Gulf Power's complaint that it was somehow "prejudiced" by the Bureau's analysis is therefore without merit. *See* Petition at 5-7.

Third, no "new standard" was established in *APCO v. FCC* and erroneously applied in the *Bureau Order*. Both the Bureau and the Eleventh Circuit ruled, consistent with more than 100 years of "takings" jurisprudence, that "just compensation is determined by the loss to the person whose property is taken." *United States v. Causby*, 328 U.S. 256, 261 (1946). *See also Bauman v. Ross*, 167 U.S. 548, 574 (1897).⁶ As the Eleventh Circuit correctly observed, "the question is, What has the owner lost? not, What has the taker gained?" *APCO v. FCC* at 1369 (quoting *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961) (citation omitted)). The Eleventh Circuit held that, upon the specific facts presented by Alabama Power, the utility's monetary "loss" for purposes of determining the level of just compensation required by the Constitution, is limited to its actual incremental, or marginal, costs, and the pole owner receives "much more than" this amount through the combination of make-ready and annual payments pursuant to the FCC's Cable Rate Formula. *Id.* at 1369-70. The Court then merely articulated a limited factual circumstance in which a utility could attempt to establish that its

⁶ Even the recent law review article cited by Gulf Power improperly focuses on value to the buyer, rather than loss to the seller. *See* Petition at 4, n.4 (citing Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 Cornell L. Rev. 885, 892 (May 2003) ("the market value of an object depends not only on the costs that compelled access forces the network owner to incur, *but also on how much the would-be purchaser is willing to pay*. The opportunity costs associated with foregoing the arms-length transaction with any single buyer are real economic costs for which the network owner should be compensated.") (emphasis added)). Further, while Spulber and Yoo may theorize about the costs resulting from lost opportunities to rent pole space to others at higher rates, as noted *supra*, Gulf Power utterly failed to provide any examples of such real, actual losses in this proceeding. *See Bureau Order*, ¶ 15.

The lead author of the article is hardly disinterested, as he has made known his position as a strong advocate of utilities, and submitted an affidavit on behalf of Gulf Power's affiliate, Georgia Power Company, in a separate pole attachment complaint proceeding involving just compensation under 47 U.S.C. § 224(e) ("Telecom Formula"). *See Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, Response of Georgia Power Company To New Evidence Submitted In Teleport's Reply, Ex. A (filed Apr. 26, 2001). Mr. Spulber's testimony similarly advocated the incorporation of replacement cost and opportunity cost values as part of the just compensation purportedly due to Georgia Power.

loss, *i.e.*, its actual lost opportunity beyond marginal costs, was greater than that obtained through Cable Formula rental payments and reimbursement of make-ready expenses. *Id.* at 1370-71. Alabama Power, however, had not attempted to make such a showing. Thus, contrary to Gulf Power's contention, the Eleventh Circuit's ruling was entirely consistent with well-established just compensation jurisprudence and did not create any "new standard."

In this proceeding, Gulf Power consciously chose to present its case based upon the theory that its poles could be analogized to privately-owned real estate in order to derive what it deemed to be a "fair market value." Response, Wise Affid. at 9-17. The basis for Gulf Power's approach was its rationale that attachers should pay according to their savings from not having to reproduce their own network of poles. See Response, Wise Affid. at 4, 19-25. These infirm legal and factual underpinnings looked to what the attacher gains rather than the owner's loss, and failed to provide sufficient evidence to rebut the Commission's presumptions concerning pole height and usable space, and exclusion of unrelated capital cost accounts.⁷ *United States v.*

⁷ Curiously, Gulf Power's alternative methodology seeks to reject the FCC's historic cost approach for poles even when Gulf Power's own affiliates have promoted the use of such "book" costs over fair market value to justify their own affiliate-to-affiliate transactions. See Rebecca Smith, *How Southern Co. Flourishes In Humbled Electricity Industry: The Atlanta Titan Capitalizes On A Regulatory Quirk, Ties Between Its Units*, Wall St. J., at A1 (June 27, 2003).

Further, the Spulber article cited by Gulf Power, see Petition at 4, n.4, advocates the use of replacement costs as a more reliable indicator than embedded, or historical, costs. See *Access to Networks* at 903. While this position overlooks the lack of a market for poles or viable alternatives and the inapplicability of the replacement cost approach where reproducing the asset would not be reasonable, Mr. Spulber's argument contradicts a position he set forth in at least one previously published article. In his article, notably entitled, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, Mr. Spulber and his co-author, J. Gregory Sidak, "expose the economic fallacies in the notion of 'forward-looking costs' as that term has been used by the Federal Communications Commission and state public utility commission to set prices for mandatory network access under the Telecommunications Act of 1996." 72 N.Y.U.L. Rev. 1068, 1068 (1997). Arguing against the use of forward-looking costs, Messrs. Spulber and Sidak assert that "setting prices on the basis of competitors' costs is a good competitive strategy, but only when market alternatives are available." *Id.* at 1142. They further conclude that:

The fact that the regulated firm's capital has a lower (or higher) replacement value in comparison with embedded cost is not relevant to the compensation decision. The embedded cost is a part of cost recovery because it underlies the incumbent firm's investment-backed expectation.

John J. Felin & Co., 334 U.S. 624, 641 (1948) (holding that the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking). Because Gulf Power's approach conflicted with (1) well-established just compensation jurisprudence concerned with loss to the owner, and (2) decades of Commission precedent addressing pole attachment accounts and rebuttable presumptions, the Bureau correctly rejected Gulf Power's evidence and arguments.

III. The Petition Is Internally Inconsistent And Unpersuasive

Gulf Power presents numerous contradictory legal theories and confused factual arguments that demonstrate the legal infirmities upon which its Petition lies.

First, Gulf Power objects to the Eleventh Circuit's *APCO v. FCC* ruling while simultaneously seeking reconsideration so that it may attempt to satisfy what it deems to be an unlawful standard. Gulf Power concedes that the Eleventh Circuit stayed the mandate in *APCO v. FCC*, Petition at 4, 5 n.5, but seeks reversal of the *Bureau Order* and an evidentiary hearing so that it may submit evidence to show that its poles are crowded. *See* Petition at 10. This contradictory argument is striking. Indeed, the very counsel for Gulf Power that rely on *APCO v. FCC* to justify the Petition for Reconsideration have requested and received the stay of the mandate on behalf of Gulf Power's affiliate, Alabama Power Company. Gulf Power cannot have it both ways. Its present attempt to use the stay of the mandate to its advantage should be rejected.

Id. at 1145. Nonetheless, Mr. Spulber now conveniently argues that forward-looking costs, rather than historical costs, are appropriate for pole attachment rates. *See Access to Networks* at 993-95.

Second, in seeking review of the Cable Services Bureau's Sept. 8, 2000 *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.* order,⁸ Gulf Power previously represented to the Eleventh Circuit that the Alabama Power case was dispositive of its own case. Gulf Power claimed that its "arguments relative to just compensation are virtually identical" to Alabama Power's, and "... the adverse ruling in APCo's case injures Gulf Power because *the FCC has reached an unfavorable decision with respect to the same law and substantially similar facts that are present in Gulf Power's case before the FCC. The APCo Order [15 FCC Rcd. 17346] essentially adjudicates Gulf Power's case too.*" Gulf Power Company's Response to Motion to Dismiss at 4, 16 (11th Cir, filed Oct. 31, 2000) (emphasis added). See also Reply Brief of Alabama Power Company and Gulf Power Company at 24, n.17 (11th Cir., filed May 18, 2001). Given Gulf Power's previous admission regarding the applicability of the Commission's APCO ruling to its case, it is disingenuous for Gulf Power now to allege inconsistent decision-making by the Commission. Petition at 5 and n.5.⁹

Third, in setting forth the justification for its \$38.06 pole rental rate, Gulf Power's Response presented a "reproduction cost methodology" incorporating its own alternative average pole height (40 feet) and usable space figures (11.5 feet) in an effort to rebut FCC presumptions. Now on reconsideration, however, Gulf Power abandons its methodology and seeks to apply the Commission's presumptions and introduce new facts. But Gulf Power's approach is flawed,

⁸ 15 FCC Rcd. 17346 ("*ACTA v. APCO Bureau Order*").

⁹ As noted *supra* Section II.B., the Bureau did not apply the Eleventh Circuit decision in *APCO v. FCC*. Rather, it merely cited it for the Court of Appeals' agreement with the binding *APCO Review Order*. Nevertheless, Gulf Power's complains of differential treatment involving the Commission's refusal to apply the Eleventh Circuit's holding regarding Internet jurisdiction from *Gulf Power Co. v. FCC*, 208 F.2d 1263 (11th Cir. 2000) because further litigation was in progress and the Bureau's apparent application of the *APCO v. FCC* decision where the mandate has also been stayed. Petition at 5, n.5. However, these two decisions are distinguishable. The Eleventh Circuit's *Gulf Power v. FCC* determination reversed the district court and would have upset substantial pole attachment caselaw. Here, the Eleventh Circuit's stay of the mandate in *APCO v. FCC*, in which the Court affirmed the full Commission, retains the status quo and would not result in significant disruption.

even using these presumptions. In its Response, Gulf Power stated that it had an average of 2.64 attachers, with 7.5 feet allocated to the utility, three feet to the incumbent local exchange carrier, and one foot allotted to the cable attacher. *See* Response, Third Affid. of Michael R. Dunn, ¶ 21 and Wise Affid. at 22, 24. However, if one utilizes the FCC’s presumption of 13.5 feet of usable space per pole (a presumption which Gulf Power now concedes, *see* Petition at 8), there are at least an additional two feet of usable space, and Gulf Power therefore could accommodate *two additional communications attachers* (besides the cable operator), each allotted one foot of space under the Commission’s presumptions. Even under Gulf Power’s previous utilization of 40-foot poles in its distribution network,¹⁰ which the Bureau ultimately rejected for lack of evidence,¹¹ the increased amount of usable space on each pole would have accommodated *four additional communications attachers* (besides the cable operator). For the same reasons, Gulf Power’s claim that the FCC presumptions result in only 1.5 feet of usable space for cable and telecommunications attachers is also incorrect and should be rejected. *See* Petition at 10.

Furthermore, Gulf Power misapprehends the locations and manner of Complainants’ attachments. Gulf Power offers no basis or support for its flatly erroneous statement that, utilizing the FCC’s presumptions, “Gulf Power has space for *one* attaching entity. There are at least five Complainants in this case. Obviously, Gulf Power’s poles are ‘crowded.’” Petition at 8. Gulf Power’s statement seems to imply that the *four* cable operator Complainants all operate in the same geographic areas and that all would seek to attach to the same poles. However, as demonstrated in the pleadings below, Cox, Comcast, Mediacom, and Time Warner/Advance Newhouse operate cable systems in distinct, non-overlapping geographic areas

¹⁰ *See* Response at 42-43, Third Affid. of Michael R. Dunn, ¶¶ 21 & Attach. E.

¹¹ *See Bureau Order* at ¶ 16.

and, therefore, would not all seek to attach to the same poles. *See* Complaint, Exs. 3, 4, and 5 (Complainants' Pole Attachment Agreements, Ex. A); Reply, Ex. 3; Supplement, Ex. 5.

Finally, Gulf Power appeals to the Bureau to overrule the Eleventh Circuit's non-final *APCO v. FCC* ruling. *See* Petition at 7-10. The Bureau, however, lacks jurisdiction to overrule, vacate, or remand the Eleventh Circuit's ruling, whether final or not. Only the court itself, in rehearing or rehearing en banc (which Petition by Alabama Power was denied Jan. 8, 2003),¹² or the U.S. Supreme Court could take such action.¹³ Indeed, Gulf Power's counsel has filed a Petition for Writ of Certiorari on behalf of Alabama Power seeking to do just what Gulf Power requests of the Bureau. It is for precisely this reason that the Eleventh Circuit, at Alabama Power's request, granted the stay of the mandate. *See APCO v. FCC*, Order (11th Cir., Feb. 4, 2003). Only the Supreme Court – not the Bureau – may now determine the lawfulness of the Eleventh Circuit's determination.

CONCLUSION

During the complaint proceeding, Gulf Power attempted to justify its inflated \$38.06 rate based upon a depreciated replacement cost approach, inclusion of inappropriate FERC accounts, and unsupported average pole height and usable space data. Gulf Power failed to establish any actual loss incurred due to Complainants' attachments. Gulf Power cannot justify a reversal of the Bureau's decision, nor can it claim entitlement to an evidentiary hearing to re-open the

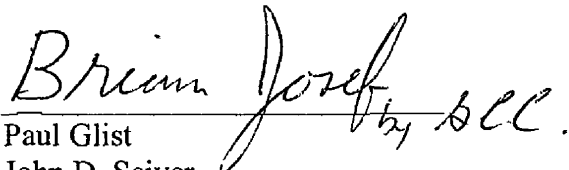
¹² *See APCO v. FCC, reh'g denied*, Order (11th Cir. Jan. 8, 2003).

¹³ Gulf Power's request is particularly ironic in light of its vehement arguments that the *APCO Review Order* divested the Commission of jurisdiction over Gulf's claim and its rush to appeal the case, without standing, in the Eleventh Circuit. *See* Motion of Gulf Power Company to Dismiss Complaint and Complainants' Petition For Temporary Stay For Lack of Jurisdiction (filed July 20, 2000); Gulf Power Petition for Review (11th Cir., filed Sept. 27, 2000).

evidentiary record. Accordingly, the Bureau should deny Gulf Power's Petition and Request for Evidentiary Hearing.

Respectfully submitted,

Michael A. Gross
Vice President,
Regulatory Affairs and Regulatory Counsel
**FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, INC.**
310 North Monroe Street
Tallahassee, FL 32301
(850) 681-1990

By: 
Paul Glist
John D. Seiver
John Davidson Thomas
Brian M. Josef
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 659-9750

Counsel for

**FLORIDA CABLE
TELECOMMUNICATIONS
ASSOCIATION**

**COX COMMUNICATIONS GULF
COAST, L.L.C.**

July 25, 2003

CERTIFICATE OF SERVICE

I, Lena Mosley, a secretary with the law firm of Cole, Raywid & Braverman, LLP, do hereby certify that on this 25th day of July, 2003, have caused a copy of the foregoing "Opposition to Petition for Reconsideration" to be sent via first class mail or hand delivery* to the following:

J. Russell Campbell
Eric B. Langley
Jennifer M. Buettner
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203

Ralph A. Peterson
Beggs & Lane, LLP
501 Commendencia Street
Pensacola, Florida 32591

David H. Solomon*
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Linda Blair*
Deputy Bureau Chief
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

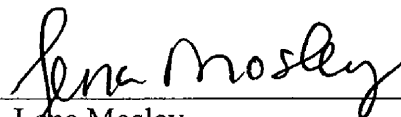
Alexander Starr*
Chief, Market Disputes Resolution Division
Federal Communications Commission
445 12th Street, S.W., Room 5-C812
Washington, D.C. 20554

Alexander Starr*
Chief, Market Disputes Resolution Division
Federal Communications Commission
445 12th Street, S.W., Room 5-C812
Washington, D.C. 20554

Lisa B. Griffin*
Deputy Chief, Market Disputes Resolution
Division
Federal Communications Commission
445 12th Street, S.W., Room 5-C828
Washington, D.C. 20554

Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Federal Energy Regulatory Commission
Docket Room 1A-209
888 First Street, N.E.
Washington, D.C. 20426



Lena Mosley