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

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FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION; COX COMMUNICATIONS
GULF COAST, LLC, *et al.*

Complainants,

P.A. No. 00-004

v.

GULF POWER COMPANY,

Respondent.

To: Enforcement Bureau

**GULF POWER COMPANY'S REPLY TO COMPLAINANTS'
OPPOSITION TO PETITION FOR RECONSIDERATION**

Dated: August 13, 2003

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SUMMARY

Briefing in this proceeding was closed on August 29, 2000. Over two years later, the Eleventh Circuit issued an Opinion in *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (“*APCo v. FCC*”). The Eleventh Circuit created new just compensation standards for the taking of private property. For the first time in any takings case, the court (1) labeled private property “nonrivalrous,” and (2) imposed a marginal cost measure of compensation, lest a utility demonstrate crowding and “other buyers” with respect to *each pole*. *Id.* at 1370-71. The additional burdens are new. The requirement of a “per pole” showing is not only new, but also contrary to the entire framework under which this case was briefed – employing system wide averages based upon established FCC presumptions. Nonetheless, Complainants characterize *APCo v. FCC* as “consistent with more than 100 years of takings jurisprudence.” (Opposition, p. 11). The new evidentiary standard, applied to Gulf Power in this case without further briefing or evidence, is a “changed circumstance” contemplated by the Commission’s rules regarding petitions for reconsideration. 47 C.F.R. § 1.106(2)(i).

The rule announced in *APCo v. FCC* is not final. *APCo* filed a petition for certiorari review before the Supreme Court on April 4, 2003. The mandate was stayed on February 4, 2003. The Court will likely rule on the petition during the September 2003 conferences. Gulf Power’s Petition for Reconsideration asks the Bureau to take several pragmatic steps: (1) refrain from applying the new “test” articulated by the Eleventh Circuit until it becomes a final rule; and (2) if the new “test” stands, allow Gulf Power an opportunity to meet the new test with additional and more timely evidence. Complainants have articulated no intelligible reason why Gulf Power’s request should be denied.

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OPPOSITION TO PETITION FOR RECONSIDERATION**

Gulf Power Company ("Gulf Power"), pursuant to 47 C.F.R. § 1.106(h), submits this Reply to Complainants' Opposition To The Petition For Reconsideration And Request For Evidentiary Hearing. Complainants' Opposition fails to offer any rational basis for refusing Gulf Power's pragmatic request.

I. THE BUREAU'S ORDER APPLIED A LEGAL STANDARD ARTICULATED FOR THE FIRST TIME AFTER GULF POWER SUBMITTED ITS EVIDENCE IN THIS PROCEEDING.

In the Petition For Reconsideration and Request For Evidentiary Hearing ("Petition"), Gulf Power argued that it was entitled to reconsideration and an evidentiary hearing because the Bureau based its May 13, 2003 Order upon a legal standard articulated for the first time in the Eleventh Circuit's November 2002 opinion in *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th

Cir. 2002) (“*APCo v. FCC*”). Complainants argue throughout their Opposition that (1) the evidentiary standard announced in *APCo v. FCC* was not “new,” and (2) the Bureau did not rely upon *APCo v. FCC*, but instead relied exclusively upon the full Commission’s order in *Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, 16 FCC Rcd. 12209 (2001) (“*ACTA v. APCo*”). On the latter point, Complainants go so far as to say the Eleventh Circuit’s analysis was cited by the Bureau merely as “persuasive observation.” (Opposition, p. 10). Neither of these arguments can survive even the most basic analytical scrutiny.

A. The Evidentiary Standard Announced In The Eleventh Circuit’s *APCo v. FCC* Opinion Is New.

For the first time in the history of just compensation jurisprudence, the *APCo v. FCC* opinion classified tangible private property as “nonrivalrous.” Nonetheless, Complainants argue, “The Eleventh Circuit’s ruling was entirely consistent with well-established just compensation jurisprudence and did not create any ‘new standard.’” (Opposition, p. 12). Beyond establishing a new *class* of property, the Eleventh Circuit also imposed a new *measure* of compensation – marginal cost – lest a utility show with respect to *each pole* (1) crowding, and (2) other buyers “waiting in the wings.” 311 F. 3d at 1370-71. The only case cited by the Eleventh Circuit to support its marginal cost analysis was an inapposite ratemaking case. *See id.* at 1370 (citing *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986)).

It is almost disingenuous to suggest that the standard announced in *APCo v. FCC* was *not* new. The “nonrivalrous” classification is new. The use of “marginal cost” in lieu of fair market value (or a recognized proxy) is new. The burden of proving crowding and the existence of other buyers as prerequisites to obtaining compensation in excess of marginal cost is new. The “each pole” burden and the abandonment of the *hypothetical* willing buyer/willing seller are both new. In short, the Eleventh Circuit clearly made new law. Complainants resist denominating the rule

in *APCo v. FCC* as a new standard for a reason: a new evidentiary standard is the quintessential “changed circumstance” contemplated by the Commission’s rules regarding petitions for reconsideration. 47 C.F.R. § 1.106(b)(2)(i).

B. The Bureau Expressly Relied Upon The Eleventh Circuit’s *APCo v. FCC* Opinion.

In addition to arguing that *APCo v. FCC* did not create a new standard, Complainants also argue: “The Bureau did not base its decision on the Eleventh Circuit’s decision, nor was it part of the Bureau Order’s holding.” (Opposition, p. 10). The plain language of the Order establishes otherwise. The Bureau specifically held that Gulf Power was not entitled to any compensation exceeding the Cable Formula because “Gulf Power has submitted no evidence in this proceeding that would satisfy *the test articulated by the Eleventh Circuit.*” (May 13, 2003 Order, ¶ 15) (emphasis added). This is beyond “persuasive observation.” This is application of the new “test articulated by the Eleventh Circuit.”¹

Complainants further argue that the Bureau instead relied upon “the full Commission’s order in [*ACTA v. APCo*] and well-established just compensation principles.” (Opposition, Summary, p. 1). This cannot be the case for three reasons. First, the *only* just compensation case cited in the May 13, 2003 Order was the *APCo v. FCC* opinion. (See May 13, 2003 Order, ¶¶ 11-17). Second, the Bureau did not even *reference* (let alone cite) any of the “well-established just compensation principles” mentioned in Complainants’ Opposition. (See *id.*). In particular, the Bureau Order does not mention the “loss to the owner” standard which Complainants claim the Bureau Order relied upon. (Compare May 13, 2003 Order, ¶¶ 11-17, with Opposition, p. 11: “Both the Bureau and the Eleventh Circuit ruled . . . that just compensation is determined by the

¹ In addition to the language of the Bureau Order, the timing of its release vis-à-vis the *APCo v. FCC* opinion belies Complainants’ assertion.

loss to the person whose property is taken.”). Third, to the extent the Bureau did rely upon the *ACTA v. APCo* order, it did so erroneously in light of the Eleventh Circuit’s condemnation of the full Commission’s analysis. The crux of the *ACTA v. APCo* order focused upon ratemaking cases such as *Hope Natural Gas Co.*, *Duquesne Light Co.*, and *Florida Power Corp.* (See May 25, 2001 Order, ¶¶ 45-61). The Eleventh Circuit found that focus to be “inappropriate.” 311 F.3d at 1367 (“[T]he FCC inappropriately focused on ratemaking cases such as *Duquesne Light*.”). Notably, the Bureau’s Order says nothing of *Duquesne Light Co.*, *Hope Natural Gas Co.*, or *Florida Power Corp.* (See May 13, 2003 Order, ¶¶ 11-17). The Bureau clearly relied upon the “test articulated by the Eleventh Circuit.” (*Id.*, ¶ 15).²

II. COMPLAINANTS OBFUSCATE THE FOCUS OF GULF POWER’S PETITION AND ATTEMPT TO CREATE “INCONSISTENCIES” WHERE NONE EXIST.

A. The Relief Sought By Gulf Power Is Not Inconsistent With APCo’s Petition For Certiorari Review.

Complainants argue that it is “internally inconsistent” for Gulf Power to seek an opportunity to meet the Eleventh Circuit’s new standard while, at the same time, its sister company seeks certiorari review of the *APCo v. FCC* decision. This argument is hard to understand. To be clear, Gulf Power strenuously objects to the *APCo v. FCC* decision. However, Gulf Power’s Petition requests the opportunity to meet the Eleventh Circuit standard *should it ultimately stand as binding precedent.* (See Petition, p. 1: “the FCC should wait for it

² Complainants devote two lengthy footnotes to addressing the Spulber and Yoo law review article cited by Gulf Power. (Opposition, pp. 11 n.6 & 12 n.7). Only the first half of the first footnote even purports to address the substance of the analysis advocated by the article. (Opposition, p. 11 n.6). The remainder of Complainants’ criticism of the article can best be categorized as petty attacks on one of the authors’ credibility. Substantively, though, the only point made by Complainants is that the article “improperly focuses on value to the buyer rather than loss to the seller.” (Opposition, p. 11 n.6). This is inaccurate. Spulber and Yoo advocate “market value” (the benchmark for just compensation), which necessarily accounts for both the hypothetical willing seller *and* willing buyer.

to become a final rule;” “In the event it becomes a final rule, Gulf Power should be given the opportunity to meet the new standard.”). Complainants just ignore the plain language of Gulf Power’s Petition.

Further, any procedural oddity that may result from the Bureau’s parallel consideration of Gulf Power’s Petition and the proceedings before the Supreme Court is the direct result of Complainants’ failure to cooperate. On March 11, 2003, the Bureau advised the parties that it was going to enter an Order in this proceeding. During a March 12, 2003, conference call amongst counsel for the parties and Ms. Lisa Griffin of the Bureau, undersigned counsel made clear that APCo was likely to petition for certiorari review of the *APCo v. FCC* decision. Undersigned counsel also suggested that this proceeding be stayed pending resolution of APCo’s imminent petition. Ms. Griffin explained that the Bureau would consider favorably Gulf Power’s request for a stay in this case if Complainants would agree. Complainants refused to agree. The Bureau entered its Order shortly thereafter. Gulf Power is not using “the stay of the mandate to its advantage,” as suggested by Complainants. (Opposition, p. 13). It is merely reacting to the reality that Complainants would not agree to stay this proceeding.³

Finally, Complainants contrive an inconsistency between (1) Gulf Power’s previous statement that the final result in *APCo v. FCC* would be dispositive of this proceeding, and (2) Gulf Power’s sister company’s efforts to overturn the Eleventh Circuit decision. There is nothing inconsistent about these positions. Once the rule in *APCo v. FCC* becomes final, either through denial of certiorari review or an ultimate ruling on the merits by the Supreme Court, it

³ In light of the position taken by Complainants in their Opposition, the Bureau certainly could decide now that a stay is warranted. 47 C.F.R. § 1.1415

will be binding upon the FCC - - it will set the standard. Until APCo's petition for certiorari review is resolved, however, we do not know what the future holds.

The relief Gulf Power seeks here is pragmatic. Gulf Power asks the Bureau to wait to hear from the nation's highest court or, if it refuses to wait, to allow Gulf Power an opportunity to meet the new "test articulated by the Eleventh Circuit."

B. Complainants' Arguments Regarding The FCC Presumptions Are Misplaced And Misleading.

Gulf Power's assertion concerning the FCC presumptions is very simple: if the Eleventh Circuit's "test" holds, the FCC presumptions demonstrate that the first prong of the test (pole crowding) is satisfied. Complainants, however, argue that Gulf Power not only "abandons and waives" its position vis-à-vis the pole height presumption, but also that Gulf Power's math is wrong. Complainants miss the target on both shots.

First, though Gulf Power argued below for a 40 foot pole height presumption, it consistently has lost that argument before the Commission. The Bureau noted: "we find no merit in Gulf Power's objection to specific aspects of the Cable Formula [including pole height] which the utility has asserted time and again." (May 13, 2003 Order, ¶ 16). As such, Gulf Power recognizes its audience and notes that, applying the *established* presumptions, Gulf Power's poles are crowded (and full with the very next attacher). Gulf Power concedes nothing here, but merely says "because 37.5 feet is the presumption, here is the math."

Second, Complainants spin the math by arguing that under the FCC presumptions, there is room for "two additional communications attachers." (Opposition, p. 15). Complainants' math entirely neglects the presumption of one attaching cable company, plus one attaching CLEC. Here is the math:

13.5 feet (usable space)
-7.5 feet (reserved for electric utility)
-3.0 feet (ILEC space per joint use agreements)
-1.0 foot (presumed CLEC)
-1.0 foot (presumed cable)

1.0 foot (remaining space)

The remaining space (1.0 foot) leaves room for only one additional attachment.⁴

C. Gulf Power Is Not Asking The Enforcement Bureau to Overturn The *APCo v. FCC* Decision.

Complainants argue, “Gulf Power appeals to the Bureau to overrule the Eleventh Circuit’s non-final *APCo v. FCC* ruling.” (Opposition, p.16). Those words appear nowhere in Gulf Power’s Petition. Instead, Gulf Power points-out the injustice in retroactively applying a pole-by-pole analysis to a complaint proceeding that was briefed three years ago in a regime employing system wide presumptions. All Gulf Power asks is that the Bureau wait until the legal standard is finally set, and then give Gulf Power a chance to address that standard.

III. COMPLAINANTS’ OPPOSITION MISSES THE POINT OF GULF POWER’S EVIDENTIARY PROFFER.

Gulf Power enumerated five categories of evidence it seeks to present if given the fair opportunity to respond to the “test articulated by the Eleventh Circuit.” (Petition, pp. 11-12). These categories are expansive, and cover both documentary and testimonial evidence. (*Id.*). Complainants, however, address only one of these five categories: attachment agreements. Even in addressing this sole category of evidence, Complainants miss the point.

For instance, Complainants argue that the attachment agreements include “agreements with other attachers executed *prior to* the filing of the Complaint or Gulf Power’s Response due

⁴ This crowding under the FCC presumptions demonstrates the “lost opportunity” underpinning the Eleventh Circuit’s analysis.

date. . . .” (Opposition, p. 7). The point of this evidence, though, is not the substance of the underlying agreements (or the date of execution), but the actual payment of a higher price – over what is now an extended period of time – by several attaching entities. Such evidence is relevant to show not only a “market” (however limited the Complainants seek to make it), but also to show the growing number of other potential buyers.

Complainants further argue that such agreements are insufficient to establish a market “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. . . .” (Opposition, p. 8).⁵ This argument, however, completely ignores both the R.L. Singletary, Inc. and Crest Corporation of Panama City Beach attachment agreements, both of which carry “an annual charge of \$40 per pole, or a minimum of \$200 per year.” (Petition, Tab B).

Gulf Power’s proffer covers (1) a vast amount of evidence made necessary only after the Eleventh Circuit’s new standard, and (2) a significant span of time between the close of briefing in this case and articulation of the new “test.” Complainants quarrel with very little from the list, and miss the mark where they do. Gulf Power could not have briefed (in 2001), events occurring in 2002 and 2003, and could not have foreseen the new “test articulated by the Eleventh Circuit.” Fairness mandates that Gulf Power be given the opportunity to present this evidence once the law is settled.

⁵ Complainants conveniently omit discussion of the attachment agreement with KMC II, Inc. covering 782 attachments (as of July 1, 2001). (*Compare* Opposition, pp. 7-8, *with* Petition, Tab B).

CONCLUSION

For all of the reasons set forth in the Petition, as well as the reasons set forth in this Reply, Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing should be granted.

Respectfully submitted,

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