

ORIGINAL

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

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

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**COMPLAINANTS' MOTION TO DISMISS
(REDACTED VERSION)**

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants"), by their attorneys, respectfully move to dismiss

~~OMP~~ _____ all proceedings on Gulf Power Company's ("Gulf Power") claim for compensation above its
~~DOM~~ _____ marginal costs for hosting Complainants' pole attachments. As set forth in more detail below, these
~~JTR~~ _____ proceedings should be dismissed because Gulf Power's responses to Complainants' discovery
~~ECR~~ _____ requests show that it: cannot meet the requirements for a Fifth Amendment takings claim involving
~~ACL~~ _____ utility pole attachments, as set forth in the Eleventh Circuit's decision in *Alabama Power v. FCC*,
~~JPC~~ _____
~~KCA~~ _____
~~ICR~~ _____ 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) ("*Alabama Power*"), and cannot
~~GA~~ _____ substantiate any of the evidentiary allegations in its January 8, 2004 Description of Evidence that
~~EC~~ _____
~~TH~~ _____ were the sole basis for the Bureau's issuance of the hearing Designation Order ("HDO").

DOCUMENT NUMBER-DATE

07635 AUG-8 03

BACKGROUND

This case concerns Gulf Power's claim that it is entitled, under the Fifth Amendment of the United States Constitution, to demand a "just compensation" annual pole attachment rate in excess of the total compensation it already receives from Complainant cable operators in the form of the pole make-ready payments, made prior to attaching, and the annual pole rental it receives under the Federal Communications Commission's ("FCC" or "Commission") Cable Formula, which was established in Section 224(d) of the Communications Act, 47 U.S.C. § 224(d), and calculated pursuant to the Commission's regulations, 47 C.F.R. §§ 1.1401, *et seq.*

Complainants filed their complaint in this matter against Gulf Power on July 10, 2000, alleging that Gulf Power violated section 224 of the Communications Act and the Commission's pole attachment rules by unilaterally terminating its existing pole attachment agreements with Complainant cable operators, forcing the cable operators to execute new pole attachment agreements that contained pole attachment rates several times higher than those allowed under Commission regulations, and refusing to renegotiate new rates in good faith in accordance with the Cable Formula.

On May 13, 2003, the Commission's Enforcement Bureau granted the Complaint, finding, *inter alia*, that the Cable Formula provided Gulf Power with just compensation. The Bureau relied upon the Commission's prior ruling that the Cable Formula, along with the payment of make-ready expenses, provides remuneration that *exceeds* any "just compensation" due to Gulf Power from Complainants' cable attachments. *Florida Cable Telecommunications Ass'n, Inc. et al. v. Gulf Power Co.*, 18 F.C.C.R. 9599 (May 13, 2003) ("Bureau Order"). The Bureau relied on the full Commission's decision in *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*,

Order, 16 F.C.C.R. 12209, 12223-36, ¶¶ 32-61 (2001). The Commission’s ruling was upheld by the United States Court of Appeals for the Eleventh Circuit in *Alabama Power*, 311 F.3d at 1371.

In Alabama Power, the Eleventh Circuit, guided by the bedrock principle that “just compensation is determined by the loss to the person whose property is taken, 311 F.3d at 1369, concluded that, because Alabama Power (a subsidiary, along with Gulf Power, of the Southern Company) had not even alleged, much less shown, that it had incurred an actual loss or a quantifiable lost opportunity cost for the time period at issue in the complaint proceeding, it “had no claim.” *Id.* at 1370. The Eleventh Circuit concluded that, absent such a showing supported by evidence for specific poles, payment of a pole owner’s “marginal costs provides just compensation,” and, notably, the court observed that the Commission’s Cable Formula provides “much *more* than marginal cost.” *Id.* at 1370 and n.23 (emphasis added).

The Eleventh Circuit further held, that, as a constitutional matter:

[B]efore a power company can seek compensation *above* marginal cost, it must show with regard to *each* pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (*which provides for much more than marginal cost*) necessarily provides just compensation.

Id. at 1370-71 (emphasis supplied). The Court explained that “there is no ‘lost opportunity’ foreclosed by the government unless the two factors are present.” *Id.* at 1371

The Eleventh Circuit also rejected Alabama Power’s claim to be entitled to a hearing, noting that when the dispute is “only over the methodology that should be used to calculate the level of just compensation,” this is only a “legal issue that hardly warrants an evidentiary hearing.” *Id.* at 1372. The FCC “was not obliged to engage in detailed analysis of expert testimony concerning the value proxies proffered by [the utility’s] experts, which were irrelevant given the sufficiency of marginal

cost.” *Id.* at 1371. A hearing would be warranted only if a utility were to “identify a material question of fact.” *Id.* at 1372. Because utilities already collect “*much more than* marginal cost” from attachers under the FCC regulations, it seemed unlikely after *Alabama Power* that any just compensation claim could result in a higher rental than is already paid.

Nonetheless, following the Eleventh Circuit’s decision, Gulf Power filed a Petition for Rehearing with the Bureau seeking a “full evidentiary hearing” to allow it “an opportunity to meet the new standard” set forth in *Alabama Power*. See *Gulf Power Company’s Petition for Reconsideration and Request for Evidentiary Hearing* (P.A. No. 00-004, June 23, 2003)(“Pet. for Reconsideration”). Gulf power first challenged the Eleventh Circuit’s “creation of an entirely new legal standard,” and complained that it was never provided the opportunity to “introduce evidence specifically targeted to meet the new standard.” *Pet. for Reconsideration*, i.¹ While Gulf Power did attach some materials to its Petition for Reconsideration, none specifically detailed evidence pertaining to specific poles or whether any poles were at “full capacity.” *Pet. for Reconsideration*, Tabs A-C. Moreover, their claim of full poles is undercut by [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005].² After receiving Complainants’ Opposition to the petition, but before ruling on Gulf Power’s Petition, the Bureau asked Gulf Power to “describe” the evidence that it wished to proffer in response to the Alabama Power standard. See *Letter Ruling* (PA 00-004, Dec. 9, 2003)(Attached hereto as Exhibit C).

¹ Interestingly, Alabama Power, represented by the same counsel as Gulf power here, never asked for such a hearing on its claims. Perhaps Alabama Power felt constrained by the admonition that because it had never made the allegation of “full capacity” or shown any loss that “it had no claim.” Although Gulf Power similarly had made no such allegation or shown any loss, it apparently felt no similar constraint.

² See Gulf Power Doc. Nos. 2181-2206 (Exhibit A) showing an average throughout Gulf Power’s service area of [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005]. Gulf Power Doc. Nos. 2310-2404 (Exhibit B).

On January 8, 2004, Gulf Power filed its “Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit’s Test” (“Description of Evidence”). In its Description of Evidence, Gulf Power indicated that it would proffer certain evidence, including: (1) evidence of pole change-outs to accommodate new attachments of telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an “unregulated rate” for pole space on some poles; (2) evidence of make-ready for telecommunications carriers and different cable operators that have paid for change-outs of unspecified poles over an unspecified period of time; and (3) load studies and business plans addressing the potential impact of third-party attachments and Gulf Power’s changing-out of poles for its own core service needs. Because this was a proffer, it was reasonable to assume that Gulf Power had such evidence in its possession that was capable of being “described” in its submission.

After receiving Gulf Power’s Description of Evidence, the Bureau initiated this proceeding to afford Gulf Power a hearing “to present the evidence delineated in its Description of Evidence.” Hearing Designation Order (Sept. 27, 2004)(“HDO”), ¶ 5.

The Bureau’s HDO specified that the “issue” for the hearing would be: “Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation.” The HDO further stated that Gulf Power “bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation *above marginal cost* with respect to *specific poles*” [emphasis added]. HDO, ¶ 8.

Consistent with *Alabama Power*, because Gulf Power already receives “much more than marginal cost” under the Commission’s Cable Formula rate, 311 F.3d at 1370-71, Gulf Power would have to show an actual loss or specific, quantifiable lost opportunity (that it was “out . . .

more money” as a consequence of Complainants’ attachments, 311 F.3d at 1369) with respect to each pole for which it seeks a constitutional entitlement to an annual rate higher than its existing compensation through both make-ready and the Cable Formula.

In order to discover what evidence, if any, Gulf Power has that would satisfy the strict requirements of *Alabama Power* and the HDO, Complainants served Gulf Power with 48 Interrogatories and 35 Document Requests on February 1, 2005.

Shortly before Gulf Power served its responses on April 18, 2005, the Presiding Judge issued an Order stating that Complainants’ discovery requests “appear on their face to constitute fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent.” April 15, 2005 Status Order (FCC 05M-23), 8.

However, as set forth below, Gulf Power’s Responses to Complainants’ Interrogatories, Exhibit D hereto, make clear that, despite its previous contentions, Gulf Power has no evidence sufficient to meet the requirements of *Alabama Power*, to satisfy the constitutional standard of “loss to the owner,” to substantiate its claims in its Description of Evidence, or to demonstrate the value of any claimed loss at the time of the alleged taking.³

ARGUMENT

I. Gulf Power’s Discovery Responses Show That It Cannot Meet The Requirements Set Forth In *Alabama Power* To Support A Constitutional Claim For Utility Pole Rent In Excess Of Its Marginal Costs

A. Gulf Power Is Unable To Identify Individual Poles At “Full Capacity”

The Eleventh Circuit stated in *Alabama Power* that “before a power company can seek compensation above marginal cost, it must show with regard to *each pole* that (1) the pole is at full capacity.” 311 F.3d at 1370 (emphasis added). By “full capacity,” the court meant that there is no

³ On July 11, 2005, Complainants filed a Motion to Compel with respect to Gulf Power’s responses to Complainants’ Interrogatories and Complainants’ Requests for Production of Documents. As set forth in Gulf Power’s responses, there appear to be no facts, material or otherwise, that support the “Description of Evidence.”

remaining “space that could be occupied by another firm (or put to use by the power company itself).” *Id.* Gulf Power’s discovery responses demonstrate that it cannot meet this requirement.

First, Gulf Power’s responses show that it is unable to make the individualized, pole-by-pole showing of “full capacity” required by *Alabama Power*. In their Interrogatory No. 3, Complainants asked Gulf Power:

For the pole attachments identified in response to Interrogatory No. 1, identify, for each cable operator Complainant for the period from 2000 through the present: the total number of Gulf Power poles that You contend were, are, or have been at “full capacity” within the meaning of the *Alabama Power v. FCC* standard;” *the location and individual pole number of the specific poles You contend were, are, or have been at “full capacity;”* the specific period of time You contend the poles You identified were, are, or have been at “full capacity;” and the specific reason or reasons why You contend such poles were, are, or have been at “full capacity.”

Exhibit D, 4 (emphasis added). Gulf Power’s response stated:

Gulf Power contends that all poles identified in response to interrogatory number 1, at all times, since 2000, were either “crowded” or at “full capacity.” For the purposes of this proceeding, Gulf Power has contracted with Osmose to perform an audit of its poles to ascertain crowding band [sic] on vertical clearances. Following completion of the audit, Gulf Power will supplement this response to identify those poles meeting the definition of “crowded” as used in the Osmose Statement of Work.

Exhibit D, 4.

Instead of identifying “each pole” that Gulf Power contends is at “full capacity,” as required by *Alabama Power*, *see* 311 F.3d at 1370, Gulf Power stubbornly and cavalierly asserts that “all poles” containing Complainants’ attachments “at all times, since 2000 were either ‘crowded’ or at ‘full capacity.’” Gulf Power’s blanket contention is unalterably inconsistent with the individualized pole capacity showing required under *Alabama Power* and implemented by the Presiding Judge. *See* Status Order of April 15, 2005 (FCC 05M-23) and Order of December 15, 2004 (FCC 04M-41)

(“Gulf Power --- bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*”)(emphasis in original).⁴

Second, Gulf Power cannot base a constitutional claim for compensation greater than its marginal costs (let alone the higher amount that it actually receives) upon mere allegations that its utility poles are “crowded.” The HDO established the issue in this case as “Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation.” HDO, ¶ 11. This statement of the issue was in turn based upon the requirements laid down in *Alabama Power* that:

[B]efore a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at *full capacity* and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.

Id. at 1370-71 (emphasis added). As the Presiding Judge has held, Gulf Power must

[b]e more consistent in terminology in describing pole utilization as “full capacity” or “fully utilized.” The term “pole crowding” is ambiguous. The Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is a “full capacity,” which standard of proof was adopted by the Commission.

Status Order (April 15, 2005), 5.

Despite the requirement of proving that specific poles are at “full capacity,” Gulf Power’s answer to Complainants’ Interrogatory No. 3 makes clear that it continues to rely upon the

⁴ Notably, in addition to being unable to meet Alabama Power’s requirement of identifying individual utility poles at “full capacity,” Gulf Power also refuses to accept *Alabama Power*’s statement of what “full capacity” means. As the Eleventh Circuit made clear, “full capacity” connotes a situation on a particular pole where there is no “space that could be occupied by another firm (or put to use by the power company itself).” 311 F.3d at 1370. Yet, when Complainants, in their Interrogatory No. 2 asked Gulf Power for its understanding of the term “full capacity,” Gulf Power purported to define it in a much more limited fashion as “a pole that cannot host further communications attachments” (as opposed to lacking additional space for attachments by any entity, including the pole owner). Exhibit D, 2.

ambiguous term “crowded” and that, even when its consultant, Osmose, has completed its pole survey, it will not be able to identify individual poles at “full capacity.” In particular, while Gulf Power claims it intends to “supplement” its response to Interrogatory No. 3 “to identify those poles meeting the definition of “crowded” as used in the Osmose Statement of Work,” there is no corresponding promise to identify specific poles that are at “full capacity.” The “Statement of Work / Joint Use Audit” dated March 4, 2005 that Gulf Power signed with Osmose, Inc. includes a definition of a “crowded” pole but includes no definition, specifications, or discussion of when a pole is to be deemed to be at “full capacity.” See Gulf Power’s Motion for Extension of Time (March 23, 2005)(attached Statement of Work). It may be that Gulf Power hopes to equate a “crowded” pole with one at “full capacity,” since it says, in the Osmose Statement of Work, that “the primary purpose of this audit [is] a determination of the number of “crowded” or “full-capacity” poles.” *Id.*, Statement of Work, 4. However, as the Presiding Judge has stated in his April 15th Order, the standard of proof for the first prong of the *Alabama Power* test is “full capacity” – nothing less.

Indeed, Gulf Power’s discovery response makes clear that the Osmose Survey will not withstand review. Gulf Power has already conceded that it had no evidence at the time it filed its Description of Evidence. As the Presiding Judge noted, “Gulf Power represent[ed] that it cannot identify specific poles it contends are ‘crowded’ or at ‘full capacity’” without a survey. Status Order (April 15, 2005) 1. But now, Gulf Power’s answer to Interrogatory No. 3 also makes clear that it cannot identify, even at the present time, any full poles. This should be enough to dismiss the case immediately, because the inability to identify specific poles contradicts the “Description of Evidence” that Gulf Power filed with the Bureau in 2004 and that formed the sole basis for commencing this proceeding. The Bureau’s HDO allowed Gulf Power to submit the evidence that

had been described in its Description of Evidence, not create new evidence or otherwise avoid the consequence of having no evidence that meets the requirements for claiming additional compensation.⁵

In conclusion, Gulf Power's response to Complainants' Interrogatory No. 3, by failing to meet (or even to commit to meet in the future) the requirements of proof for individual utility poles and of showing, for each such pole, "full capacity" (as opposed to the undefined and much more ambiguous "crowding"), makes clear that Gulf Power cannot meet the first part of the *Alabama Power* standard. This proceeding should be dismissed on this ground alone.

B. Gulf Power's Discovery Responses Also Show That It Cannot Meet The Second Part Of The Alabama Power Test – A Showing That It Lost An Opportunity To Either Lease Pole Space To A Third-Party Willing To Pay More Than Complainants Or To Put Space Occupied By Complainants To An Actual "Higher Valued Use"

The second prong of the *Alabama Power* test requires a showing that the pole owner lost an actual opportunity to use the pole space occupied by Complainants' attachments for a "higher valued use." Gulf Power's answers to Complainants' discovery requests fail to demonstrate any actual instance that would meet this part of the *Alabama Power* standard.

In addition to setting out the predicate requirement of a showing of particular poles at "full capacity," the Eleventh Circuit in *Alabama Power* stated that a pole owner making a constitutional claim for compensation above marginal costs must also demonstrate:

that (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

⁵ At the hearing in March the Court deferred Complainants' suggestion that the matter should be dismissed and instead authorized a six-month survey. See Transcript of March 30, 2005 Prehearing Conference at 180-83 (exchange between Counsel for Complainants and the Court). As noted in Complainants' Response to Gulf Power Company's June 2005 Status Report on Pole Survey, filed July 6, 2005, there have been significant delays in completing the survey. Gulf Power's July Status Report (filed July 29, 2005) shows an even greater likelihood of non-completion because no new poles were surveyed in June or July. Gulf Power also notes that "the full survey may include less than Gulf Power's entire service territory" but then improbably states that the survey "will be completed within the time frame allowed." That depends on what "completed" means.

311 F.3d at 1370. Consistent with the constitutional requirement of measuring “just compensation” by the “loss to the owner,” the Eleventh Circuit explained that pole owner would have to show that, either with respect to a third party’s offer or its own use, it had actually “incur[red]” a “lost opportunity or [some] other burden.” Id. at 1369.

However, Gulf Power’s answers to Complainants’ interrogatories establish that Gulf Power cannot meet these standards. In Interrogatory No. 4, Complainants asked:

For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at “full capacity,” identify, for each year from 2000 through the present and for each cable operator Complainant, the number of such poles for which You contend that Gulf Power had or has “waiting in the wings” “another buyer of the space” occupied by Complainants’ attachments or some other space on Gulf Power poles; identify all such “buyers;” identify the period of time when they were, are, or have been “waiting in the wings” and explain Gulf Power’s understanding of the term “waiting in the wings;” identify what rate or compensation such other buyer was, is, or has been ready, willing, and able to pay to Gulf Power for access to the space occupied by Complainants’ attachments or some other space on Gulf Power poles; identify whether such other buyer has obtained an attachment to Gulf Power poles and, if so, how such attachment was accomplished; and whether the pole you assert was at “full capacity” was or was not replaced or substituted and the reasons therefore.

Exhibit D, 4. Gulf Power’s Response stated that:

Gulf Power understands the phrase “waiting in the wings” (as used in *APCO v. FCC*) to be figurative, insofar as requiring identification of an actual buyer would completely reject the hypothetical “willing buyer” standard and thus be at odds with more than 100 years of United States Supreme Court jurisprudence. In each instance where Gulf Power has changed-out a pole for capacity reasons to accommodate a new attacher, a “buyer” had been “waiting in the wings” for space on a “crowded” or “full capacity” pole. Sometimes those buyers have been ready, willing and able to pay the Cable Rate; sometimes the Telecom Rate; and sometimes a market rate. The most prominent instance of such occurrence is in the context of

major build-outs. (See Gulf Power's January 8, 2004 Description of Evidence).

Exhibit D, 4-5.

In its response to Interrogatory No. 4, Gulf Power fails to identify a single specific instance in which it actually had another buyer for pole space "waiting in the wings" that could not be accommodated on poles that were at "full capacity." Instead, it advances the legal argument that the Eleventh Circuit's use of the term "another buyer of the space is waiting in the wings" is "figurative" and "hypothetical." This is plainly wrong. There is nothing "figurative" or "hypothetical" about the Eleventh Circuit's test. The test specifically states that Gulf Power must "show" "with regard to each pole" that "another buyer of the space" was or is "waiting in the wings." 311 F.3d at 1370. In other words, Gulf Power must have incurred a "missed opportunity" "to sell space to another bidding firm" *before* it can proceed to determine what its purported loss is. *Id.*

While there has often been reference to hypothetical buyers when establishing value, here the Eleventh Circuit dispensed with hypotheticals and required that there be an actual existing buyer present – not some hypothetical unidentified buyer who may appear only "figuratively" – in order for a pole owner to assert a claim for additional compensation. Perhaps Gulf Power's syntactic error is the basis for its claim that all its poles are full because there are only hypothetical buyers, not real buyers. Indeed, Gulf Power only alleges, in broad brush, that third parties were "waiting in the wings" in connection with pole change-outs that it performed and fails to identify any parties that it was unable to supply attachment space to, fails to identify individual poles, and, most importantly, fails to explain how pole change-outs paid for by new attachers create any "lost opportunity" or "missed opportunity" for Gulf Power. Indeed, when Gulf Power refers in its answer to Interrogatory No. 4 to "major build outs," it refers to instances where it accommodated additional

attachers – not to any instances where it “missed out,” because of Complainants’ attachments, on the opportunity to charge a third party any particular rate, let alone a rate higher than that already paid by Complainants. The bottom line is that Gulf Power has failed to prove that it lost a single opportunity to lease space on utility poles containing Complainants’ attachments to other parties willing to pay more than Complainants.

Similarly, Gulf Power has failed to present proof of a single, specific instance in which it actually incurred a “lost opportunity” to put space occupied by Complainants to a higher valued use of its own. In Interrogatory No. 5, Complainants asked:

For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at “full capacity” and for which You have not had “another buyer of the space” “waiting in the wings” as specified in response to Interrogatory No. 4, identify, for each year from 2000 through the present, and for each cable operator Complainant, all poles, by total number, and individual pole number and location, for which You contend Gulf Power was, is, or has been willing, during the period from 2000 through the present, to put the space occupied by Complainants to a “higher valued use with its own operations;” identify what that “higher valued use” was, is, or has been; identify how and why such use is of a “higher value” than the make-ready and annual per-pole compensation received by Gulf Power from Complainants; and quantify the difference between the make-ready and annual per-pole compensation paid by Complainants to Gulf Power and the “higher value” that You claim. Provide any applicable citation to economic or regulatory literature that supports your response.

Exhibit D, 5. Gulf Power’s response stated:

Gulf Power objects to the first half of the question on the grounds that it is vague, ambiguous, and impossible to understand. Subject to and without waiving this objection, Gulf Power believes that any space occupied by a cable company can be put to a “higher valued use.” The space can be reserved for sale to players in the burgeoning Telecom market; the space can be reserved for non-regulated communications attachers; the space can be used for Gulf Power’s own communications use (or that of its affiliates). From Gulf Power’s perspective, merely forcing the cable companies to develop their own infrastructure, rather than freeload

on Gulf Power's facilities, is itself a "higher valued use." This is especially true in light of the Enforcement Bureau's trend towards operational micro-management and evisceration of conventional commercial contract protections (See, e.g., CTAG).

Exhibit D, 5.

As the Presiding Judge noted in the April 15, 2005 Order, Interrogatories 4 and 5 are "fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent." But once again, Gulf Power avoids the obvious answer that it has no such evidence. Gulf Power merely offers legal argument and hypotheticals instead of the "proof" of any actual "missed opportunity" to put pole space occupied by Complainants to a "higher valued use." Gulf Power asserts that it "believes that any space occupied by a cable company can be put to a 'higher valued use.'" This mere assertion about what "can" or could be done utterly fails to meet the *Alabama Power* test, which requires a specific showing, for "each pole," of an *actual* – not hypothetical – "lost opportunity." 311 F.3d at 1369-70.

Moreover, Gulf Power cannot claim that any reservation of space for itself is a higher valued use. Such reservations are narrowly limited by applicable judicial precedent. In *Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (2002), the Eleventh Circuit upheld both an FCC guideline limiting utilities' reservation of pole space to reservations done pursuant to a bona fide development plan to use the space in core utility service, and another guideline requiring utilities to permit attachers to use reserved space until the utility demonstrates an actual need for the space. Therefore, whether or not space "can" be reserved is irrelevant as a "hypothetical" future use would be insufficient. Under *Alabama Power* and *Southern Co.*, a pole owner must show "proof" that, because of Complainants' attachments, it lost an opportunity, on specific poles, to put that space to an actual, quantifiable, higher-valued use. 311 F.3d at 1370; 293 F.3d at 1348-49. Gulf Power's answer, by simply listing possible uses that it subjectively deems generally to

be of greater value, without substantiating whether a higher valued use actually existed for a particular pole at a particular time, and without identifying and quantifying such uses for “each pole,” does not meet the *Alabama Power* requirements.

Gulf Power’s utter failure to satisfy the second prong of *Alabama Power* is made further manifest by its attempt to recycle an argument that it has already lost: that “forcing the cable companies to develop their own infrastructure, rather than freeload on Gulf Power’s facilities, is itself a ‘higher valued use.’” This contention, by suggesting that Gulf Power should be compensated by the benefit to Complainant cable operators (according to Gulf Power’s “perspective,” Complainants benefit by not having to “develop their own” pole system) is another attempt to impose a “gain to the taker” standard of just compensation. But the Eleventh Circuit firmly rejected Gulf Power’s legal theory in *Alabama Power*, explaining that

The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, ‘the question is, What has the owner lost? not, What has the taker gained?’

311 F.3d at 1369. Therefore, Gulf Power’s legal posturing, and its self-serving criticism of what it calls “the Enforcement Bureau’s trend towards operational micro-management and evisceration of conventional commercial contract protections” cannot substitute for actual proof of a lost opportunity to put space occupied by Complainants’ attachments to a higher valued use.

II. Gulf Power’s Discovery Responses Also Demonstrate That, In Addition To Not Being Able To Identify Specific Poles At “Full Capacity” And Not Being Able To Articulate Actual “Missed Opportunities” To Implement A “Higher Valued Use,” It Cannot Show The Underlying Proof Of Loss That Is A Constitutional Requisite To Establish A Right To Compensation Greater Than Its Marginal Costs

Gulf Power’s claim in this proceeding should be dismissed not only because it fails to meet the two-pronged test set forth in *Alabama Power* but also because its discovery responses show that it cannot satisfy the constitutional standard *underlying* a just compensation claim. As

discussed in the previous section, that standard is that just compensation is “determined by the loss to the person whose property is taken.” *Id.* As the Eleventh Circuit explained, in the pole attachment context, absent proof of a specific, quantifiable loss, whether an actual, out of pocket cost, or a demonstrable, quantifiable lost opportunity, “so long as marginal cost is paid, the power company incurs no lost opportunity or any other burden.” *Id.* Gulf Power’s answers to Complainants’ interrogatories show that it cannot produce evidence of either actual, unreimbursed, out-of-pocket costs or specific, quantifiable lost opportunities, and therefore, as a matter of law, Gulf Power is not entitled to compensation above its marginal costs for any attachments to poles containing Complainants’ attachments.

Gulf Power fails to provide any specific evidence of either an actual, out-of-pocket loss, or a specific, quantifiable lost opportunity to earn greater revenue than what Complainants already pay for the space on Gulf Power’s poles. In Interrogatory No. 9, Complainants asked:

Identify, quantify, and explain the basis of any actual loss (income or other revenue) that Gulf Power contends that it has experienced from 2000 to the present, which it alleges was caused by attachments of cable operator Complainants (and explain in your answer how the alleged actual losses are or will be proved, including any reliance upon Gulf Power’s specifications, accounting records, engineering documents, or testimony).

Exhibit D, 6. Gulf Power’s response stated that

From 2000 to the present, Gulf Power’s actual loss is measured by the difference between the rate paid by complainants and just compensation, plus interest at the maximum allowable legal rate. Gulf Power is not claiming as damages any actual loss other than the difference in rates, plus interest.

Exhibit D, 6-7. Gulf Power’s answer is nothing more than legal argument.

Instead of identifying any actual losses, Gulf Power simply trots out another argument that it already lost before the Eleventh Circuit – that it deems its actual loss to be “measured by

the difference between the rate paid by the Complainants and just compensation, plus interest” In *Alabama Power*, the court noted that “it would not make sense” for Gulf Power to say that “even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell [attachment space] at what we deem the ‘full market price’ of this pole space.” 311 F.3d at 1369. Gulf Power’s answer to Interrogatory No. 9 is therefore inconsistent, as a matter of law, with the precedent established in *Alabama Power*. Gulf Power cannot assume that it is entitled to a much higher “just compensation” rate and then subjectively define its “loss” as the difference between what it already receives and what it, as a monopoly pole owner, would like to demand, without providing any proof of any actual “lost opportunity,” let alone losses tied to specific poles.

Under established legal principles, a property owner such as Gulf Power, with monopoly control over access to utility poles, cannot claim monopoly rent or lost monopoly profits as just compensation. See *Lord Manufacturing Co. v. United States*, 84 F.Supp. 748 (1949)(not permissible “to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation”). Instead, Gulf Power must prove a real and actual loss in order to be entitled to just compensation. See *United States v. Felin*, 334 U.S. 624 (1948)(plaintiff seeking just compensation has burden “of proving actual damage”; evidence merely of bookkeeping losses is insufficient; further, need to show “by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government”); *United States v. Commodities Trading*, 339 U.S. 121 (1950)(holding that governmentally-set ceiling price was the maximum measure of just compensation “unless [the plaintiff] has sustained the burden of proving special conditions and hardships peculiarly applicable to it”); see also *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003)(no

recovery when there is no “net loss”); *United States v. 38,994 Net Usable Square Feet of Space*, 1989 U.S. Dist. LEXIS 14152 (N.D. Ill. 1989)(property owner to be compensated “to the extent of his loss” and therefore evidence of actual costs incurred is relevant); *Thompson v. Tualatin Hills Park and Recreation District*, 496 F.Supp. 530 (D. Oregon)(the just compensation requirement means “that owners have a right to recover for real and actual losses resulting from governmental action . . .”). Accordingly, because Gulf Power is not entitled to monopoly rents under the guise of “just compensation,” its admission, in its answer to Interrogatory No. 9, that it “is not claiming as damages any actual loss other than the difference in rates [between what it receives and what it demands]” makes it manifest that Gulf Power has no case.

Gulf Power’s failure to show that it has experienced any actual losses due to Complainants’ attachments is also reflected in its answer to Interrogatories 29 and 30.

In Interrogatory No. 29, Complainants asked:

Gulf Power represents that it will seek to present evidence of instances in which it has changed-out poles “due to lack of capacity.” Describe and explain the circumstances in which a Gulf Power pole, according to You, had and/or has a “lack of capacity” and state where (by pole number and location) and when, if at all, any such determination of “lack of capacity” was made with respect to Gulf Power poles containing any of Complainants’ attachments.

Exhibit D, 17. Gulf Power’s response stated:

A pole has a “lack of capacity” when another attachment cannot be made. (See response to interrogatory number 2 above). The determination of which poles lack capacity is made by field employees while riding the line to determine the feasibility of an attachment request. Such decisions are made almost everyday in the field and *there is no way of identifying each instance where this has occurred*. Complainants had attachments on poles changed-out in the build-outs referenced in Gulf Power’s January 8, 2004 Description of Evidence.

Exhibit D, 17 (emphasis added). Gulf Power's answer indicates that it has no evidence of a lost opportunity (due to insufficient pole capacity) in connection with a pole change-out. It says decisions about pole change-outs "are made almost everyday in the field and there is *no way of identifying* each instance where this has occurred" (emphasis added). Thus, although Gulf Power alludes to Complainants' allegedly being attached to poles that have, at some time been changed out, its answer indicates that it has no record that Complainants' attachments have necessitated pole change outs or that Gulf Power has suffered any loss as a result of any change out.

Similarly, in Interrogatory No. 30, Complainants asked:

Identify and explain every instance in which Gulf Power has changed-out a pole containing one or more of Complainants' attachments at Gulf Power's own expense (*i.e.*, un-reimbursed) as a result of a need to accommodate an electric transformer or other Gulf Power equipment or facility.

Exhibit D, 17. Gulf Power's response stated:

It is not possible to identify each such instance, but Gulf Power changes-out poles at its own expense almost everyday in the field. If Gulf Power sees a pole that needs to be changed-out to serve a customer, Gulf Power changes-out the pole and serves its customer as fast as possible.

Exhibit D, 17. What is striking about this answer is that, while Gulf Power broadly asserts that it changes out poles "at its own expense," it fails to identify a single instance in which it has had un-reimbursed expenses due to its own need to change-out a pole containing Complainants' attachments for a bigger pole. Indeed, it claims "*it is not possible*" to do so. If it is not possible to identify any particular "full" pole that was changed out for a Complainant without reimbursement, then it is not possible to obtain additional compensation. Like the response to Interrogatory No. 9, Gulf Power's responses to Interrogatory Nos. 29 and 30 make it manifest

that Gulf Power cannot meet the constitutional requirement of showing an actual “lost opportunity” that might permit it to seek compensation above its marginal costs.⁶

III. Gulf Power’s Claim Should Also Be Dismissed Because Its Discovery Responses Reveal That The “Evidence” That It Claimed To Have In Its “Description Of Evidence” Is Either Non-Existent Or Irrelevant To Its Constitutional Claim For A Substantially Higher Annual Pole Rent

In asking for this adjudicatory proceeding, Gulf Power relied upon “evidence” it claimed to possess regarding expenses relating to pole change outs. In particular, in its January 8, 2004 “Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit’s Test,” Gulf Power claimed that it had evidence of “pole change-outs due to full capacity” and evidence of “the number of occasions . . . in which it was required to change-out a pole [at “its own expense”], for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments.” *See* Description of Evidence, 3-6 and n.13. But, when Complainants’ Interrogatories asked several questions concerning pole change outs and whether Gulf Power could identify any un-reimbursed expenses, Gulf Power refused to answer, alleging that such issues are “not relevant to the hearing issues.” These answers make plain that, whether Gulf Power never had such evidence, or had it and now thinks it is irrelevant, Gulf Power did not have the right to seek commencement of these hearing proceedings, and they should be immediately dismissed.

In Interrogatories 20 through 26, Complainants asked a series of questions designed, as the Presiding Judge fairly stated, to “flush out the proof” Gulf Power proffered in its Description of Evidence concerning pole change outs. In particular, Complainants asked:

⁶ Gulf Power also wrongly seeks to equate “marginal costs” of pole attachments with the annual cable rents it receives under FCC regulations. *See* Gulf Power’s responses to Interrogatory No. 7 (“Gulf Power contends that its marginal costs for each CATV attachment are equal to what the cable formula (plus a charge for grounds and arrestors) yields”). In fact, the Eleventh Circuit explained in *Alabama Power* that utilities, under the FCC Cable Rate, receive “much more than marginal cost.” 311 F.3d at 1369. That finding is not subject to challenge here.

Interrogatory No. 20:

Identify and describe, for each cable operator Complainant, the number of Gulf Power poles that have been changed out from 1998 to the present in order to accommodate attachments of Complainants, the location of any such change-outs, the reasons for each change-out, and identify any and each instance in which Gulf Power was not reimbursed by Complainants for the costs of such change-outs.

Interrogatory No. 21:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a communications attacher's request (other than Complainants) and the circumstances surrounding such replacement or substitution (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Interrogatory No. 22:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a non-communications attacher's request and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Interrogatory No. 23:

Identify and describe the number of Gulf Power poles that have been changed-out on account of Gulf Power's core electricity service requirements and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party who paid for the costs associated with the change-out).

Interrogatory No. 24:

Identify and describe the occasions on which Gulf Power has refused to change-out a pole. Your response should include, but not be limited to, a description of the circumstances surrounding the refusal, the identification of the entity requesting the pole replacement, and an explanation of the reasons for Gulf Power's refusal and any alternate arrangement employed.

Interrogatory No. 25:

Describe and explain the steps and procedures involved in changing-out a pole, from a prospective attacher's request (or Gulf Power's own core electricity need) to completion (*i.e.*, including processing, procurement, placement and transfer or existing facilities and equipment, including estimated time periods).

Interrogatory No. 26:

Identify all persons involved in developing Gulf Power's pole make-ready and change-out procedures, their titles and responsibilities, and a description of their roles in formulating the procedures, and identify the specific persons, whether or not employed by Gulf Power, that You rely upon to determine whether make-ready or a change-out is needed, or whether a Gulf Power pole is at "full capacity," "crowded," or has a "lack of capacity."

Exhibit D, 13-14. In response to each of these seven Interrogatories, Gulf Power asserted that they sought information "not relevant to the hearing issues." Exhibit D, 13-14. In other words, Gulf Power now refuses to answer discovery requests about pole change outs.

Gulf Power's refusal to answer these interrogatories is nothing less than outrageous, given that it was granted the right to pursue these evidentiary proceedings in significant part upon its claims relating to pole change outs. It even went so far as to claim in its Description of Evidence that it "intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments." *See* Description of Evidence, 6 n.13.

Gulf Power also claimed that it had evidence that on a number of occasions, it had been "forced to change out the pole (to accommodate a transformer) at its own expense" because of Complainants attachments and that it could "prove this point." *See* Description of Evidence, 6. Complainants' Interrogatories reasonably sought to explore the question of whether Gulf Power incurred an un-reimbursed expense in changing out an entire pole *and* whether such an expense was caused by Complainants' attachments, because the federal statutes governing pole attachments bar a pole owner from collecting the costs of rearranging or replacing existing parties' attachments when they modify a pole to accommodate new attachments either of their

own or of third parties. 47 U.S.C. § 224(i). Yet Gulf Power now calls the subject “irrelevant” and refuses to answer.

Section 224(i) is highly relevant here for evaluating Gulf Power’s claims. Although the Eleventh Circuit found there could be an instance where a pole owner may be entitled to more than marginal costs, that additional recovery may only be had from a new attacher. Federal law and implementing rules provide that the costs associated with a utility accommodating a *new* attacher may not be passed on to *existing* attachers unless the existing attacher makes its own beneficial modification at the same time. Section 224(i) provides:

(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of- way).

47 U.S.C. § 224(i). The FCC’s rules also make this clear that unless the existing party “benefits” from the accommodation a new attacher, additional costs may not be passed through to the existing attachers:

A party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party.

47 C.F.R. § 1.1416(b). The FCC explained its rule as follows:

With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user’s modification affects the attachments of others who do not initiate or request the modification, such as the

movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.⁷

Neither Section 224(i) nor the FCC's rules were found to be unconstitutional or inapplicable as part of the analysis in the *Alabama Power* decision. Accordingly Gulf Power is prohibited from recovering *any* additional costs from existing attachers (*e.g.*, more than the marginal costs and rent paid by existing attachers) when a pole is modified or replaced to accommodate someone else's attachment. The questions as to identifying which poles Gulf Power changed out for Complainants, third parties, or itself, whether Gulf Power was reimbursed for such change-outs, and whether any such change-outs were actually performed "for the specific benefit of" Complainants are relevant, and the willful failure to answer merits dismissal.

Moreover, in Interrogatory No. 30, Complainants even asked point blank for the identification of "every instance in which Gulf Power has change-out a pole containing one or more of Complainants' attachments at Gulf Power's own expense (*i.e.*, un-reimbursed) as a result of a need to accommodate an electric transformer or other Gulf Power equipment or facility." Exhibit D, 17. But again, Gulf Power couldn't provide a single instance. Instead, it merely said:

It is not possible to identify each such instance, but Gulf Power changes-out poles at its own expense almost everyday in the field. If Gulf Power sees a pole that needs to be changed-out to serve a customer, Gulf Power changes-out the pole and serves its customer as fast as possible.

Exhibit D, 17. Gulf Power's refusal to provide specifics and its statement that "it is not possible" to do so is telling – either it never had any such evidence or it now thinks that what it thought it had is in fact "irrelevant." The few documents produced by Gulf Power that pertain to

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶ 1211 (1996), *aff'd in part and vacated in part, Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, *aff'd in part and reversed in part, AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

make-ready show that [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005].⁸ Either way, Gulf Power has shown that it has gamed the system. Accordingly, these proceedings should immediately be dismissed with prejudice.

IV. Finally, Gulf Power's Claim Should Be Dismissed Because Its Discovery Responses Make Clear That It Has No Evidence of Utility Pole Capacities, "Higher Valued Uses," Or Lost Opportunities At The Relevant Times of The Alleged "Taking"

To the extent Gulf Power claims it can satisfy the *Alabama Power* test for obtaining more than marginal costs, it must produce evidence of its pole capacities at the time of the alleged taking. Gulf Power claims a taking occurred by virtue of 47 U.S.C. § 224(f). Section 224(f) became effective in 1996. But Gulf Power did not purport to terminate the then-existing, negotiated, pole attachment contracts it had with Complainants until July 2000. *See* Complainants' Complaint in PA No. 00-004 (July 10, 2000). Accordingly, even assuming that Gulf Power's notices of termination issued in mid-2000 were valid, Complainants cannot be said to have relied upon section 224(f) until July of 2000. If there were a *per se* taking of a portion of Gulf Power's poles, it happened at that time, and accordingly any determination of an entitlement to more than marginal costs must be supported by proof of a loss to Gulf Power, and quantification of that loss, as of mid-2000, the date of the alleged uncompensated taking. *See generally United States v. Clarke*, 445 U.S. 253 (1980) ("value of property taken by a governmental body is to be ascertained as of the date of taking" and "[w]hen a taking occurs by physical invasion, . . . the usual rule is that the time of the invasion constitutes the act of taking"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ("the amount of the award is measured by the value of the property at the time of taking, not the value at some later date");

⁸ *See, e.g.*, Gulf Power documents Nos. 2310-2404, attached as Exhibit B.

Danforth v. United States, 308 U.S. 271 (1939)(“just compensation is value at the time of the taking” and this rule applies when a taking has “occurred previously in actuality or by a statutory provision”).

However, Gulf Power’s answers to Complainants’ Interrogatories show that it has no evidence sufficient to meet the *Alabama Power* requirements for demonstrating an entitlement to compensation greater than the utility’s marginal costs as of July 2000 or even approximately as of that time. For example, as discussed above,⁹ when Complainants’ asked in Interrogatory No. 3 for identification of poles that Gulf Power contends were at “full capacity,” Gulf Power did not answer and instead responded only that it would, in the future, provide an answer identifying poles it deems to be “crowded” based upon the examination of poles by its contractor, Osmose, done this year. Exhibit D, 4. This answer, which does not even address “full capacity,” relies upon a physical inspection done some five years *after* the alleged taking and could not support any finding that, as a factual matter, any specific pole was “full” at an earlier time. Such evidence clearly does not comport with the established legal rule that, in a constitutionally based “takings” claim, the value of the property alleged to have been taken must be ascertained as of the date of the taking. Indeed, as set forth previously, the vast majority of documents showing permits for new attachments made after 2000 (but not indicating which specific pole or who the existing attachers were) were accompanied by entries indicating that [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005].¹⁰ Accordingly, even Gulf Power’s own documents refute any claim that, as of the date that is relevant here, any pole was “full.”

⁹ See, *supra*, pp. 7-9.

¹⁰ See note 8, *supra*.

This principle of constitutional law – requiring evidence of the value taken at the time of the claimed taking – clearly makes sense in the context of pole attachments, where, during the space of the last five years, numerous additional pole attachments may have been made, and many external events affecting pole capacity, including such things as government safety measures and even pole strengthening and replacements related to hurricanes, may have altered utility pole capacity. Gulf Power cannot meet the required test as to time on any of the key points in this proceeding. Not only is Gulf Power unable to provide an answer as to its individual poles’ capacities as of the middle of the year 2000; it is also unable to provide any answer that would identify a “higher valued use” or an actual loss or quantifiable lost opportunity that it had as of the date of the alleged taking. *See* Gulf Power’s answers to Interrogatory Nos. 4, 5, and 9, Exhibit D, 4-7.

In sum, Gulf Power’s utter failure to produce evidence of the condition of the pole space it claims to have been taken as of the year 2000 and of any actual loss that it incurred as a result as of that date means that this proceeding should be dismissed.

CONCLUSION

Gulf Power has shown (1) that it cannot meet the “full capacity” and “higher valued use” standards set forth in *Alabama Power*; (2) that it cannot identify any actual, out-of-pocket loss or specific, quantifiable “lost opportunity” caused by Complainants’ attachments; (3) that it cannot, or will not, produce much of the evidence upon which it relied in its Description of Evidence; and (4) that it has no evidence of the value of any property “taken” as of the time of the alleged “taking.” For these reasons, Complainants respectfully submit that these proceedings should be dismissed with prejudice.

Respectfully submitted,



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Michael A. Gross
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August 1, 2005

Exhibit A

**CONFIDENTIAL MATERIALS –
REDACTED**

**Pursuant to Protective Conditions in EB Docket No. 04-381
Before the Federal Communications Commission**

Exhibit B

**CONFIDENTIAL MATERIALS –
REDACTED**

**Pursuant to Protective Conditions in EB Docket No. 04-381
Before the Federal Communications Commission**

Exhibit C

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

December 9, 2003

VIA FACSIMILE AND U.S. MAIL

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Re: *Florida Cable Telecommunication Ass'n Inc. v. Gulf Power Co.*,
File No. PA 00-004

Dear Counsel:

This letter memorializes the rulings made in the above-captioned matter during a telephone conference on December 8, 2003. Pursuant to 47 C.F.R. § 1.106(k)(1) and (2), the Enforcement Bureau grants in part the Petition for Reconsideration that Gulf Power Company ("Gulf Power") filed on June 23, 2003.¹ Specifically, the Bureau orders further proceedings as detailed in this letter ruling, and otherwise defers ruling on the merits of the Petition for Reconsideration pending completion of those proceedings. *See* 47 C.F.R. § 1.106(k)(1) and (2).

By the close of business on December 29, 2003, Gulf Power will file and serve a submission describing with particularity the evidence it wishes to proffer in an effort to satisfy the standard articulated by the United States Court of Appeals for the Eleventh Circuit relating to "compensation above marginal cost." *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003). Gulf Power's submission further should explain, with respect to each category of evidence, the pertinence of that information to the Eleventh Circuit's standard. By the close of business on January 19, 2004, Florida Cable Telecommunications Association will file and serve a response to Gulf Power's submission.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 224, section 1.106 of the Commission's

¹ *See* Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, File No. PA 00-004 (filed June 23, 2003) ("Petition for Reconsideration").

rules, 47 C.F.R. § 1.106, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa B. Griffin", with a stylized flourish extending to the right.

Lisa B. Griffin
Deputy Chief, MDRD
Enforcement Bureau
lisa.griffin@fcc.gov

Exhibit D

**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.

E.B. Docket No. 04-381

To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**GULF POWER'S RESPONSES TO COMPLAINANTS'
FIRST SET OF INTERROGATORIES TO RESPONDENT**

Gulf Power Company ("Gulf Power") responds to Complainants' First Set of Interrogatories as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Gulf Power object to each and every interrogatory to the extent it seeks information protected by the attorney-client privilege or work-product doctrine.
2. Gulf Power objects to the interrogatories, generally, in that they far exceed the discovery limitations imposed by the Presiding Judge's December 17, 2004 Order ("not to exceed 50 without subparts").
3. Gulf Power objects to each and every interrogatory to the extent complainants' purpose in propounding such interrogatory is to subject Gulf Power to annoyance, expense, embarrassment, or oppression.
4. By responding to any particular interrogatory, Gulf Power does not waive its objections.

5. Gulf Power reserves the right the supplement and/or amend these responses and objections. In particular, a number of Gulf Power's responses will require supplementation after completion of the audit being performed by Osmose Utilities Services, Inc. ("Osmose").

SPECIFIC RESPONSES AND OBJECTIONS

1. Identify the total annual number of Gulf Power poles, for each year from 2000 through the present, on which you contend that cable operator Complainants have been attached, and identify the specific annual number of pole attachments for each cable operator Complainants for each year during this period of time.

RESPONSE:

	2000	**2001 July	2002	2003	2004	2005
Cox Communications Gulf Coast, L.L.C.	61,655	64,862	65,107	65,715	66,169	66,727
Comcast Cablevision of Panama City, Inc.	13,392	14,597	14,597	14,659	14,728	14,824
Comcast JOIN Holding, Inc.	7,060	7,679	7,679	7,679	7679	7,679
Mediacom Southeast, L.L.C.	11,622	14,054	14,054	14,266	14,519	17,059
*Bright House Networks, L.L.C.						
Time Warner Entertainment Company L.P. (Chipley)	4,905	5,241	5,356	5,356	5,404	5,404
Time Warner Entertainment-Advance/ Newhouse (Cantonment)	8,435	8,807	8,807	8,948	8,959	8,991

* Time Warner became Bright House Networks, L.L.C. January 2003.

** Numbers are from the 2001 Joint (Bellsouth and CATV companies) Pole Count.

2. Identify your definition or understanding of the phrase "full capacity" within the meaning of the Alabama Power v. FCC standard, and identify and define any differences between your use or understanding of "full capacity" and the terms "crowded" or "lack of capacity." In addition, identify with specificity the basis upon which you propose to quantify or measure "full capacity" for an individual pole. Provide any applicable citation to safety codes, specifications, agreements or economic or regulatory literature that supports your response.

RESPONSE: Gulf Power understands the phrase "full capacity" (as used in APCo v. FCC) to mean a pole that cannot host further communications attachments, consistent with Gulf Power's own core use, the NESC, existing contractual obligation, and sound engineering practice, without expansion or addition of facilities (including cross-arms, guy wires, etc.). Gulf Power understands the term "crowded" to mean a pole that is close to being at "full capacity" – in other words, a pole with room for only one additional communications attachment. For the purposes of this

proceeding only, Gulf Power proposes to measure the visually identifiable, physical "crowding" or "full capacity" as set forth in the Osmose Statement of Work.

The safety code provisions and specifications which support this definition of "crowding" or "full capacity" include the following:

- a. Vertical clearance between the bottom of electric utility transformers (30") and telecommunication/CATV cable attachment.
[NESC, Rule 238 Table 238-1 page 148 in the code].
- b. Vertical clearance between electric utility transformer bus conductors (40") and telecommunication/CATV cable attachment.
[NESC, Rule 235C1 Table 235-5 page 126, 131].
- c. Vertical clearance between electric utility neutral conductor (40") and telecommunication/CATV cable attachment.
[NESC, Rule 235C1 Table 235-5 page 126, 131].
- d. Vertical clearance between electric utility riser (40") and telecommunication/CATV cable attachment.
[NESC, Rule 235C1 Table 235-5 page 126, 131].
- e. Vertical clearance between electric utility outdoor lighting (12") and telecommunication/CATV cable attachment.
[NESC, Rule 238D page 147].
- f. Vertical clearance between electric utility mid-span spacing (30") and telecommunication/CATV cable attachments.
[NESC Rule 235C1 or 235C2 (depending on which supply conductor) for neutral TPX use 235C1 exception 3 for svc drops. For midspan neutrals use 235C2b1a this implies 12" is OK midspan as long as 30" is maintained at the structures].
- g. Vertical clearance between telecommunication/CATV mid-span spacing (4") and other telecommunication/CATV cable attachments.
[NESC Rule 235H].
- h. Telecommunication/CATV cable attachments clearances over roads (15.5' and over DOT roads 18') and pedestrian accessible areas (9.5").
[NESC Rule 232B1 Table 232-1 page 72, 78].
- i. Attachers with vertical ground on poles must bond to electric utility ground.
[NESC Rule 097G page 26].

- j. Attachers down guys on Gulf Powers poles must have less than (4') separation between their down guys and ours.
[Gulf Power requirement via spec plates].

The "agreements" which support this definition of "crowding" or "full capacity" include Gulf Power's joint use agreements with BellSouth, Sprint and GTC. (See Bates labeled documents Gulf Power 2098 through 2148).

3. For the pole attachments identified in response to Interrogatory No. 1, identify, for each cable operator Complainant for the period from 2000 through the present: the total number of Gulf Power poles that you contend were, are, or have been at "full capacity" within the meaning of the Alabama Power v. FCC standard;" the location and individual pole number of the specific poles you contend were, are, or have been at "full capacity;" the specific period of time you contend the poles you identified were, are, or have been at "full capacity;" and the specific reason or reasons why you contend such poles were, are, or have been at "full capacity."

RESPONSE: Gulf Power contends that all poles identified in response to interrogatory number 1, at all times since 2000, were either "crowded" or at "full capacity." For the purposes of this proceeding, Gulf Power has contracted with Osmose to perform an audit of its poles to ascertain crowding band on vertical clearances. Following completion of the audit, Gulf Power will supplement this response to identify those poles meeting the definition of "crowded" as used in the Osmose Statement of Work.

4. For the poles identified in response to Interrogatory No. 3 which you contend were, are, or have been at "full capacity," identify, for each year from 2000 through the present and for each cable operator Complainant, the number of such poles for which you contend that Gulf Power had or has "waiting in the wings" "another buyer of the space" occupied by Complainants' attachments or some other space on Gulf Power poles; identify all such "buyers;" identify the period of time when they were, are, or have been "waiting in the wings" and explain Gulf Power's understanding of the term "waiting in the wings;" identify what rate or compensation such other buyer was, is, or has been ready, willing, and able to pay to Gulf Power for access to the space occupied by Complainants' attachments or some other space on Gulf Power poles; identify whether such other buys has obtained an attachment to Gulf Power poles and, if so, how such attachment was accomplished; and whether the pole you assert was at "full capacity" was or was not replaced or substituted and the reasons therefore.

RESPONSE: Gulf Power understands the phrase "waiting in the wings" (as used in APCo v. FCC) to be figurative, insofar as requiring identification of an actual buyer would completely reject the hypothetical "willing buyer" standard and thus be at odds

with more than 100 years of United States Supreme Court jurisprudence. In each instance where Gulf Power has changed-out a pole for capacity reasons to accommodate a new attacher, a "buyer" had been "waiting in the wings" for space on a "crowded" or "full capacity" pole. Sometimes those buyers have been ready, willing and able to pay the Cable Rate; sometimes the Telecom Rate; and sometimes a market rate. The most prominent instance of such occurrence is in the context of major build-outs. (See Gulf Power's January 8, 2004 Description of Evidence).

5. For the poles identified in response to Interrogatory No. 3 which you contend were, are, or have been at "full capacity" and for which you have not had "another buyer of the space" "waiting in the wings" as specified in response to Interrogatory No. 4, identify, for each year from 2000 through the present, and for each cable operator Complainant, all poles, by total number, and individual pole number and location, for which you contend Gulf Power was, is, or has been willing, during the period from 2000 through the present, to put the space occupied by Complainants to a "higher valued use with its own operations;" identify what that "higher value used" was, is, or has been; identify how and why such use is of a "higher value" than the make-ready and annual per-pole compensation received by Gulf Power from Complainants; and quantify the difference between the make-ready and annual per-pole compensation paid by Complainants to Gulf Power and the "higher value" that you claim. Provide any applicable citation to economic or regulatory literature that supports your response.

RESPONSE: Gulf Power objects to the first half of the question on the grounds that it is vague, ambiguous, and impossible to understand. Subject to and without waiving this objection, Gulf Power believes that any space occupied by a cable company can be put to a "higher valued use." The space can be reserved for sale to players in the burgeoning Telecom market; the space can be reserved for non-regulated communications attachers; the space can be used for Gulf Power's own communications use (or that of its affiliates). From Gulf Power's perspective, merely forcing the cable companies to develop their own infrastructure, rather than freeload on Gulf Power's facilities, is itself a "higher valued use." This is especially true in light of the Enforcement Bureau's trend towards operational micro-management and evisceration of conventional commercial contract protections (See, e.g., CTAG).

6. For all of the poles that you identified in response to Interrogatories 4 and 5, identify, for each year from 2000 through the present, the annual per-pole compensation received by Gulf Power from each cable operator Complainant.

RESPONSE:

	2000	2001	2002	2003	2004	2005
Cox Communications Gulf Coast, L.L.C.	\$6.20	\$6.20	\$6.20	\$6.20	\$6.20	\$6.20
Comcast Cablevision of Panama City, Inc.	\$5.65	\$5.65	\$5.65	\$5.65	\$5.65	\$5.65
Comcast JOIN Holding, Inc.	\$6.25	\$6.25	\$6.25	\$6.25	\$6.25	\$6.25
Mediacom Southeast, L.L.C.	\$5.98	\$5.98	\$5.98	\$5.98	\$5.98	\$5.98
Bright House Networks, L.L.C.						
Time Warner Entertainment Company L.P. (Chipley)	\$6.30	\$6.30	\$6.30	\$6.30	\$6.30	\$6.30
Time Warner Entertainment-Advance/Newhouse (Cantonment)	\$6.30	\$6.30	\$6.30	\$6.30	\$6.30	\$6.30

7. For all of the poles that you identified in response to Interrogatories 4 and 5, identify the marginal costs to Gulf Power of each of cable operator Complainants' attachments for which you claim a right to compensation at a rate greater than that under the FCC formula plus make-ready.

RESPONSE: Gulf Power contends that its marginal costs for each CATV attachment are equal to what the cable formula (plus a charge for grounds and arrestors) yields.

8. For all of the poles that you identified in response to Interrogatories 4 and 5, identify every attaching entity other than Complainants attached to each such pole; describe how many attachments on each such pole those other attaching entities have had or have, when such attachments commenced, and where those attachments are located on each pole; and state the make-ready and annual per-pole compensation received by Gulf Power from each attaching entity other than Complainants (including any Gulf Power affiliates). Specifically identify the number of attaching entities paying Gulf Power annual compensation under the FCC's telecommunications rate formula (47 U.S.C. § 224(e) and implementing regulations).

RESPONSE: Gulf Power will supplement this response upon completion of the Osmose audit.

9. Identify, quantify, and explain the basis of any actual loss (income or other revenue) that Gulf Power contends that it has experienced from 2000 to the present, which it alleges was caused by attachments of cable operator Complainants (and explain in your answer how the alleged actual losses are or will be proved, including any reliance upon Gulf Power's specifications, accounting records, engineering documents, or testimony).

RESPONSE: From 2000 to the present, Gulf Power's actual loss is measured by the difference between the rate paid by complainants and just compensation, plus interest at the

maximum allowable legal rate. Gulf Power is not claiming as damages any actual loss other than the difference in rates, plus interest.

10. For all of the poles that you identified in response to Interrogatories 4 and 5, identify the precise rate (i.e., in dollars and cents) that you contend constitutes a "just compensation" annual pole attachment rental rate for Complainants' attachments and specify the poles, by number and location, for which you are seeking that rate and the basis and method of calculating that rate.

RESPONSE: Gulf Power contends, and has contended since 2000, that \$40.60 is the annual just compensation rate. Gulf Power is considering seeking other alternative rates based on the calculations of its valuation experts. Gulf Power expects each of these alternative rates to be less than \$40.60. Gulf Power will identify the precise and methodology upon disclosure of its valuation experts according the December 17, 2004 Order. Gulf Power will identify the specific poles for which it seeks a higher rate after completion of the Osmoste audit.

11. Identify all persons, whether or not employed by Gulf Power, who have knowledge or information referring to, relating to, or regarding Gulf Power's factual and legal contentions in FCC Docket Numbers: P.A. No. 00-004 or E.B. No. 04-381, including Gulf Power's contentions in its January 2004 "Description of Evidence" and its December 2004 "Preliminary Statement on Alternative Cost Methodology."

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is overly broad and unduly burdensome. Subject to and without waiving these objections, Gulf Power list the following:

	Name	Employment
1.	Ben Bowen	Gulf Power Co.
2.	Andy McQuagge	Gulf Power Co.
3.	Doug Stuckey	Gulf Power Co.
4.	Terry Davis	Gulf Power Co.
5.	Tom Park	Southern Company
6.	Tommy Forbes	Gulf Power Co.
7.	Representative of Opposing Parties	
8.	Mike Dunn	GPC, Retired
9.	Robert Calhoun	Knology
10.	Bret McCants	Knology
11.	Wayne Singleton	Knology
12.	Rex Brooks	Gulf Power Co., Retired
13.	Mike Dunn	Gulf Power Co., retired

This list excludes counsel for Gulf Power and other parties. This list also excludes Gulf Power's experts and the personnel of its pole audit contractor.

12. Identify all persons who provided assistance or information used in answering these interrogatories and list the corresponding interrogatory numbers for which they provided the assistance or information.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is unduly burdensome and vague. Subject to and without waiving these objections, Gulf Power lists the following:

	Name	Employment	Misc.
1.	Ben Bowen	Gulf Power Co.	
2.	Andy McQuagge	Gulf Power Co.	
3.	Doug Stuckey	Gulf Power Co.	
4.	Rex Brooks	Gulf Power Co., Retired	
5.	Keith L. Reese, PE	Georgia Power Co.	NESC expert
6.	Terry Davis	Gulf Power Co.	
7.	Tom Park	Southern Company	

13. Identify each individual whom you may call as a witness at any hearing in this Action, or who may provide written testimony, and state the subject matter on which each witness is expected to testify. If the witness is an expert witness, state the substance of the findings and the opinion(s) to which the witness is expected to testify, and the grounds and basis for each finding and opinion.

RESPONSE: Gulf Power will provide this information in accordance with the Presiding Judge's March 30, 2005 Order.

14. If you contend that Complainants, or any officer, director, agent, employee acting on behalf of Complainants, have made any admission, or taken or failed to take any action, that would preclude or tend to preclude Complainants from recovering under the claims they have submitted in this Action, identify and describe the substance of each such admission, action or omission, the person who made that admission or took or failed to take such action, and the person to whom such admission was made.

RESPONSE: Gulf Power does not understand complainants to be seeking recovery "under [any] claims they have submitted in this Action."

15. Identify and describe every communication, whether oral, written or otherwise, between you and any of your agents or employees, and any other person,

including, but not limited to, Complainants, other cable operators, other telecommunications carriers, or any other entity attached to poles owned or controlled by you, relating to annual pole rental charges or the performance of or payment for make-ready work from 1998 through to the present on poles owned or controlled by Gulf Power.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Gulf Power further objects on the grounds that this interrogatory is intended for purposes annoyance or oppression.

16. Identify and describe all entities (including non-communications attachers) that are, or have been, attached to poles owned or controlled by Gulf Power since 1998.

RESPONSE:

Name	
1. Americable International, Inc.	
2. B&L Cable Communications, Inc.	
3. Knology Inc.	
4. CableSouth, Inc.	
5. Cablevision Systems, Inc.	
6. Comcast Cablevision Corp.	
7. Comcast Cablevision of Panama City, Inc.	
8. Comcast JOIN Holding, Inc.	
9. Community Cable Corp.	
10. Cox Communications Pensacola, Inc.	
11. Cox Communications Gulf Coast LLC	
12. Torrence Cablevision USA	
13. Jones Intercable, Ltd.	
14. Springfield Cable Vision	
15. TCI Cablevision of Florida, Inc.	
16. TCI TKR of the Gulf Plains, Inc.	
17. Time Warner Entertainment Advance/Newhouse Partnership	
18. Time Warner Entertainment Company, L.P.	
19. Bright House Networks, LLC	
20. Emerald Coast Cablevision of Florida, Inc.	
21. Mediacom Southeast LLC	
22. Washington Cable TV, Inc.	
23. City of Valparaiso	
24. Campbellton Cable TV	
25. Peoples First Financial S & L	
26. Frangista Beach Inn	

27.	The Crest Corporation	
28.	R. L. Singletary, Inc.	
29.	Mallard Cablevision, LLC	
30.	DCA Services Division NAF Contracting	
31.	Walton County	
32.	Adelphia Business Solutions	
33.	KMC Telecom II, Inc.	
34.	Madison River Communications, LLC	
35.	Southern Light, LLC	
36.	BellSouth Telecommunications, Inc.	
37.	Sprint Florida, Inc.	
38.	GTC, Inc.	
39.	Town of Cinco Bayou	
40.	City of Crestview	
41.	City of Defuniak Springs	
42.	City of Ponce De Leon	
43.	City of Destin	
44.	City of Fort Walton Beach	
45.	City of Mary Esther	
46.	Town of Shalimar	
47.	City of Valparaiso	
48.	City of Bonifay	
49.	Town of Caryville	
50.	City of Chipley	
51.	City of Graceville	
52.	City of Lynn Haven	
53.	City of Panama City	
54.	City of Panama City Beach	
55.	City of Vernon	
56.	Town of Century	
57.	City of Gulf Breeze	
58.	City of Milton	
59.	Santa Rosa County	
60.	DOT	
61.	MCI Telecommunications	
62.	Bay County Traffic	
63.	Perdue Farms	
64.	Walton County	
65.	City of Pensacola	
66.	School District of Escambia County	
67.	Gulf Coast Building Products, Inc.	

17. Identify and describe any surveys, audits or pole counts conducted by Gulf Power, its agents or any other person from 1996 through the present. Please specify in

your answer the dates or time periods of these surveys, audits or pole counts, an explanation of their methodologies and all categories of information collected concerning attaching facilities and their ownership on the poles. In addition, please identify the names, titles and employers of all persons involved in the surveys, audits or pole counts.

RESPONSE: Gulf Power has conducted two pole counts from 1996 to the present day; they were done in 1996 and 2001. The 1996 count was done from approximately April 1, 1996 to November 2, 1996. The 2001 pole count was conducted from approximately February 5, 2001 to April 27, 2001.

Both pole counts were conducted with the same methodologies and collected the same information. Gulf Power, with the appropriate telephone company, conducted a total joint use pole count over Gulf Power's entire service territory. The pole counts were done with teams of one Gulf Power representative accompanied by one telephone company representative, either BellSouth or Sprint (The one exception to this system was in the 2001 count where BellSouth contracted Gulf Power to count the Bellsouth areas). Teams would count by Gulf Power grid maps in each of the telephone company's respective service areas that overlap Gulf Power's service area. Each team is tasked with the (a) location and ownership of all joint use poles on the map, (b) assigning a sequential number to each pole for identification and counting, (c) and lastly, to identify each CATV or telecom attachment, if any, that is on each joint use pole identified on the grid maps. This process was followed until all the grid maps were counted.

Reports would then be produced that would show (1) the number of Gulf Power attachments on telephone poles, (2) the number of telephone attachments on Gulf Power poles and, (3) the number and company name of all CATV and telecommunication attachments made to both Gulf Power poles and each telephone company.

Below is a list of names of persons that worked for Gulf Power on each of the two pole counts.

1996 Pole Count		
	Name	
1	Alan Barton	
2	Ben Bowen	
3	Mark Serafin	
4	R. Payne	
5	Robert T. Sanders Sr.	
6	David Lee	
7	Rex Brooks	

2001 Pole Count		
	Name	
1	Ben Bowen	
2	Rex Brooks	
3	Carolyn Sirmon	
4	Keith Johnson	
5	Dave Hill	
6	Pat Bolster	
	Jason Poe	
8	Larry Arant	
9	Larry Little	
10	Steve Rhodes	
11	Curtis Brown	
12	Joe Marshall	
13	Stephanie Cobb	
14	Donnie Bell	
15	Brian Evans	
16	Raquel Morgan	
17	Kenny Barron	
18	Bill Weinritt	
19	Ernest Robinson	
20	Glenn Crutchfield	
21	Bruce Guernsey	
22	Bill Stinson	
23	Bill Cassenti	
24	Louis Dodd	

18. Identify the total number of poles owned or controlled by Gulf Power that utilize cross-arms, extension arms, or boxing arrangements and describe those arrangements, the parties who attachments use such arrangements, and the reasons for utilizing them.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

19. Of the total number of poles owned or controlled by Gulf Power that utilize cross-arms, extension arms, or boxing arrangements, identify and describe those individual poles to which Complainants are attached that use such arrangements and the reasons for utilizing these arrangements.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

20. Identify and describe, for each cable operator Complainants, the number of Gulf Power poles that have been changed out from 1998 to the present in order to accommodate attachments of Complainants, the location of any such change-outs, the reasons for each change-out, and identify any and each instance in which Gulf Power was not reimbursed by Complainants for the costs of such change-outs.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory responses and Gulf Power's responses to complainants' request for production.

21. Identify and describe the number of Gulf Power poles that have been changed-out on account of a communications attacher's request (other than Complainants) and the circumstances surrounding such replacement or substitution (i.e., specify the reason for the change-out and the party whose action or request necessitated it).

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory responses and Gulf Power's responses to complainants' request for production.

22. Identify and describe the number of Gulf Power poles that have been changed-out on account of a non-communications attacher's request and the circumstances surrounding such change-out (i.e., specify the reason for the change-out and the party whose action or request necessitated it).

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory responses and Gulf Power's responses to complainants' request for production.

23. Identify and describe the number of Gulf Power poles that have been changed-out on account of Gulf Power's core electricity service requirements and the circumstances surrounding such change-out (i.e., specify the reason for the change-out and the party whose action or request necessitated it).

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory responses and Gulf Power's responses to complainants' request for production.

24. Identify and describe the occasions on which Gulf Power has refused to change-out a pole. Your response should include, but not be limited to, a description of the circumstances surrounding the refusal, the identification of the entity requesting the pole replacement, and an explanation of the reasons for Gulf Power's refusal and any alternate arrangement employed.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

25. Describe and explain the steps and procedures involved in changing-out a pole, from a prospective attacher's request (or Gulf Power's own core electricity need) to completion (i.e., including processing, procurement, placement and transfer of existing facilities and equipment, including estimated time periods).

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

26. Identify all persons involved in developing Gulf Power's pole make-ready and change-out procedures, their titles and responsibilities, and a description of their roles in formulating the procedures, and identify the specific persons, whether or not employed by Gulf Power, that You rely upon to determine whether make-ready or a change-out is needed, or whether a Gulf Power pole is at "full capacity," "crowded," or has a "lack of capacity."

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

27. Identify and describe the number, type, and size (in feet and diameter) of poles in Gulf Power's inventory annually between 1998 and the present.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is vague and ambiguous. To the extent this interrogatory seeks information regarding Gulf

Power's in-service pole inventory, Gulf Power responds as follows (Pole data for 2004 will not be available until mid-summer 2005. 2005 pole date will not be available until mid-summer 2006):

Number and height of Poles as of December 31, 1998		Number and height of Poles as of December 31, 1999	
Wood Poles	Number	Wood Poles	Number
30 ft.	51,166	30 ft.	50,971
35 ft.	73,268	35 ft.	75,225
40 ft.	65,445	40 ft.	67,005
45 ft.	22,142	45 ft.	23,038
50 ft.	5,646	50 ft.	6,039
55 ft.	1,375	55 ft.	1,449
60 ft.	390	60 ft.	403
65 ft.	115	65 ft.	126
70 ft.	37	70 ft.	37
75 ft.	17	75 ft.	17
80 ft.	25	80 ft.	25
85 ft.	8	85 ft.	8
95 ft.	4	95 ft.	4
100 ft.	6	100 ft.	6
Concrete Poles	Number	Concrete Poles	Number
35 ft.	3	35 ft.	3
40 ft.	15	40 ft.	15
45 ft.	43	45 ft.	44
50 ft.	8	50 ft.	14
55 ft.	1	55 ft.	1
60 ft.	0	60 ft.	0
65 ft.	98	65 ft.	100
70 ft.	20	70 ft.	20
75 ft.	5	75 ft.	5

Number and height of Poles as of December 31, 2000		Number and height of Poles as of December 31, 2001	
Wood Poles	Number	Wood Poles	Number
30 ft.	50,845	30 ft.	50,604
35 ft.	76,350	35 ft.	76,729
40 ft.	68,101	40 ft.	68,101
45 ft.	23,797	45 ft.	24,126
50 ft.	6,390	50 ft.	6,687
55 ft.	1,511	55 ft.	1,620
60 ft.	408	60 ft.	418
65 ft.	124	65 ft.	115
70 ft.	40	70 ft.	40
75 ft.	17	75 ft.	20
80 ft.	25	80 ft.	25
85 ft.	8	85 ft.	8
95 ft.	4	95 ft.	4
100 ft.	6	100 ft.	6

Concrete poles	Number	Concrete poles	Number
35 ft.	3	35 ft.	9
40 ft.	15	40 ft.	15
45 ft.	44	45 ft.	57
50 ft.	15	50 ft.	26
55 ft.	1	55 ft.	15
60 ft.	0	60 ft.	0
65 ft.	100	65 ft.	101
70 ft.	20	70 ft.	20
75 ft.	5	75 ft.	5
		125 ft.	4

Number and height of Poles as of December 31, 2002		Number and height of Poles as of December 31, 2003	
Wood Poles	Number	Wood Poles	Number
30 ft.	50,317	30 ft.	50,089
35 ft.	78,988	35 ft.	79,968
40 ft.	69,856	40 ft.	70,493
45 ft.	25,148	45 ft.	25,627
50 ft.	7,235	50 ft.	7,357
55 ft.	1,794	55 ft.	1,822
60 ft.	446	60 ft.	447
65 ft.	124	65 ft.	117
70 ft.	40	70 ft.	43
75 ft.	20	75 ft.	20
80 ft.	25	80 ft.	25
85 ft.	8	85 ft.	8
95 ft.	4	95 ft.	4
100 ft.	6	100 ft.	6
Concrete poles	Number	Concrete poles	Number
35 ft.	10	35 ft.	9
40 ft.	15	40 ft.	15
45 ft.	60	45 ft.	61
50 ft.	39	50 ft.	45
55 ft.	72	55 ft.	73
60 ft.	12	60 ft.	12
65 ft.	101	65 ft.	101
70 ft.	20	70 ft.	20
75 ft.	5	75 ft.	5
125 ft.	4	125 ft.	4

28. Does Gulf Power share, pool, or otherwise utilize an inventory of poles owned or controlled by affiliated corporations, parents, subsidiaries, and other organizations or operating units, and, if so, indicate and explain in detail the manner in which Gulf Power shares, pools, or otherwise utilizes such inventory.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving this objection, Gulf Power shares some in-service poles with Bellsouth, GTC and Sprint pursuant to joint use agreements.

29. Gulf Power represents that it will seek to present evidence of instances in which it has changed-out poles "due to lack of capacity." Describe and explain the circumstances in which a Gulf Power pole, according to You, had and/or has a "lack of capacity" and state where (by pole number and location) and when, if at all, any such determination of "lack of capacity" was made with respect to Gulf Power poles containing any of Complainants' attachments.

RESPONSE: A pole has a "lack of capacity" when another attachment cannot be made. (See response to interrogatory number 2 above). The determination of which poles lack capacity is made by field employees while riding the line to determine the feasibility of an attachment request. Such decisions are made almost everyday in the field and there is no way of identifying each instance where this has occurred. Complainants had attachments on poles changed-out in the build-outs referenced in Gulf Power's January 8, 2004 Description of Evidence

30. Identify and explain every instance in which Gulf Power has changed-out a pole containing one or more of Complainants' attachments at Gulf Power's own expense (i.e., unreimbursed) as a result of a need to accommodate an electric transformer or other Gulf Power equipment or facility.

RESPONSE: It is not possible to identify each such instance, but Gulf Power changes-out poles at its own expense almost everyday in the field. If Gulf Power sees a pole that needs to be changed-out to serve a customer, Gulf Power changes-out the pole and serves its customer as fast as possible.

31. From the "Recommendations" proposed in Gulf Power's Distribution Studies and load planning documents furnished to Complainants on January 11, 2005, identify and describe those "Recommendations" that Gulf Power actually implemented, the specific numbers and locations of poles affected, whether additional pole capacity on those was actually utilized by Gulf Power, measurements indicating how much space was required, and if any Recommendation was not implemented, the reasons therefore.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is vague, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information irrelevant to the hearing issues.

32. In its January 8, 2004 Description of Evidence, Gulf Power represents that it will seek to present evidence of the 40-inch safety zone requirement and its impact on Gulf Power's provision of core electricity operations. Describe and explain with specificity Gulf Power's implementation of the safety zone requirement and how it relates to Gulf Power's determination of "full capacity," "crowding," "lack of capacity" or "insufficient capacity" on a pole; Gulf Power's reservation of pole

space for future use; or any higher-valued use under the *Alabama Power v. FCC* standard.

RESPONSE: There must be 40" of vertical separation between the lowest electrical equipment and the highest communications equipment. The presence of communications attachers requires 40" of "dead" space on a pole and thus severely limits already-limited usable space on a pole.

33. Does Gulf Power develop and maintain a bona fide development plan that reasonably and specifically projects a need for pole space in the provision of its core utility service, and if so, identify and describe such plans (including the dates and authors of those plans) that applied or apply since 1998.

RESPONSE: Yes. See Gulf Power 00005 -- 00809.

34. Does Gulf Power routinely inform prospective and existing attachers when it reserves pole space for future use for its core electricity operations, and if so, identify and describe all such reservations and notifications to attachers, including Complainants, since 1998.

RESPONSE: Yes. Prospective attachers are shown and/or given a copy of Gulf Power's "spec plate" prior to attaching.

35. Does Gulf Power contend that it requires the use of reserved pole space currently occupied by Complainants, and if so, identify all such pole space, the specific poles at issue by number and location, and describe Gulf Power's and the electric industry's practice concerning whether attachers, including Complainants, are given the opportunity to pay for the cost of any modifications needed to rearrange or change-out the poles and to continue to maintain their attachments.

RESPONSE:

36. Does Gulf Power contend that it may charge Complainants that are already attached to its poles the rearrangement or change-out costs of modifications required as a result of an additional attachment or the modification of an existing attachment sought by any other attachers, including Gulf Power? Explain the basis for your answer.

RESPONSE: Gulf Power Company's contention and position on charges to complainants for "rearrangement or change-out costs of modifications" is the same as, based upon, and as required by 47 U.S.C. § 224(h)-(i), which provides as follows:

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

37. Does Gulf Power contend that payment of make-ready expenses by an attacher is insufficient to reimburse Gulf Power for its marginal costs, and if so, explain the basis of any such contention.

RESPONSE: Yes. See response to interrogatory number 7 above. The APCo v. FCC decision uses the term "marginal costs" interchangeably with the Cable Rate.

38. Identify and describe all facts, documents, data and other information that support Gulf Power's claim for a pole attachment rental rate from any cable operator Complainants in excess of marginal cost.

RESPONSE: Gulf Power objects to this interrogatory on the grounds that it is overly broad and unduly burdensome insofar as it seeks a reiteration of all legal principles, facts and documents addressed since the outset of this proceeding and the proceeding leading to the APCo v. FCC opinion.

39. Identify and explain the methodologies, formulae, cost accounts, data and/or other bases, if any, used by Gulf Power in calculating or formulating the pole attachment rental rate in excess of marginal cost and identify all persons, whether or not employed by Gulf Power, involved in any way in the determination of such methodologies, formulae, cost accounts, data and/or other bases.

RESPONSE: Gulf Power will disclose this information in accordance with the Presiding Judge's March 30, 2005 Order.

40. Identify all documents that reflect or refer to negotiations between communications attachers (including Complainants) and Gulf Power involving pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

RESPONSE: See documents within Bates range Gulf Power 00826 -- 2309.

41. Identify all documents that reflect or refer to negotiations between joint users of a pole (i.e., an incumbent local exchange carrier) and Gulf Power involving pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

RESPONSE: See documents Bates labeled as Gulf Power 2089 -- 2148.

42. Identify all documents that reflect or refer to negotiations between non-Section 224, non-joint user attachers (e.g., R. L. Singletary, Inc. and Crest Corporation) and Gulf Power involving pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

RESPONSE: See documents within Bates range Gulf Power 00826 -- 2309.

43. Does Gulf rely on, or intend to rely on, any cost methodologies, or concepts from or portions of cost methodologies, other than the Sales Comparison Approach, Current Replacement Cost Approach and the Federal Concessions Leasing Model? If so, please identify and describe with specificity these additional cost methodologies and/or concepts, and explain why Gulf Power contends they are applicable to Gulf Power's claims for additional compensation from Complainants.

RESPONSE: Not presently. Gulf Power reserves the right to employ different methodologies. If it does so, those methodologies will be disclosed in accordance with the Presiding Judge's March 30, 2005 Order.

Gulf Power does not currently pay rental rates to any other joint user pole owners due to being the majority pole owner in all joint use pole relationships.

44. Describe and explain Gulf Power's understanding of the Sales Comparison Approach as highlighted in Gulf Power's December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," and explain Gulf Power's application of this approach to calculating pole attachment rental rates.

RESPONSE: The Sales Comparison Approach looks to other sales of identical property (free of government regulation). Gulf Power will explain its application of the Sales Comparison Approach when it discloses its experts in accordance with the Presiding Judge's December 17, 2004 Order.

45. Identify the pole attachment rental rates paid to Gulf Power by joint users, the specific amount of pole space leased by such joint users, and explain the methodologies, if any, used to calculate these rates.

RESPONSE:

ILEC Rate Information						
Company:	2000	2001	2002	2003	2004	2005
BellSouth Telecommunications Inc.	\$58.84	\$60.72	\$66.00	\$67.51	\$69.08	\$70.82
Sprint-Florida, Inc.	\$23.96	\$23.96	\$26.50	\$26.50	\$26.50	\$26.50
GTC, Inc.	\$21.97	\$22.68	\$27.04	\$27.04	\$27.04	\$27.04

ILEC Space Leased from Gulf Power Company			
Company:	30 Poles	35 Poles	All poles
BellSouth Telecommunications Inc.	2'-0"	2'-6"	3'-0"
Sprint-Florida, Inc.	Not specified	2'-6"	3'-0"
GTC, Inc.	Not specified	2'-6"	3'-0"

BellSouth, Sprint-Florida, Inc. and GTC, Inc.: Rate Calculation

$$\text{Rate} = \text{Investment} \times \text{Annual Charge} \times \text{Space Allocation}$$

46. Identify the pole attachment rental rates paid by Gulf Power to other joint users pole owners, the specific amount of pole space leased by Gulf Power from such joint users, and explain the methodologies, if any, used to calculate these rates.

RESPONSE:

Gulf Power Company Pole Space Leased from ILEC			
Company:	30 Poles	35 Poles	All poles
BellSouth Telecommunications Inc.	2'-0"	6'-0"	8'-6"
Sprint-Florida, Inc.	Not specified	6'-0"	8'-6"
GTC, Inc.	Not specified	6'-0"	8'-6"

47. Describe and explain Gulf Power's understanding of the Current Replacement Cost Approach as highlighted in Gulf Power's December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," and explain Gulf Power's application of this approach to calculating pole attachment rental rates.

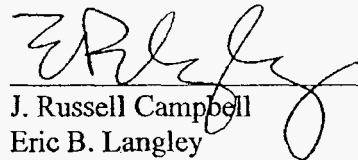
RESPONSE: The Current Replacement Cost Approach, which is a recognized fair market value proxy, looks to the current cost of reproducing the property. It relies on current costs, unlike the Cable Rate and Telecom Rate which rely on disfavored historic costs. Gulf Power will explain its application of the Current Replacement Cost Approach when it discloses its experts in accordance with the Presiding Judge's March 30, 2005 Order.

48. Describe and explain Gulf Power's understanding of the Federal Concessions Leasing Model as highlighted in Gulf Power's December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," and explain Gulf Power's application of this approach to calculating pole attachment rental rates.

RESPONSE: The Federal Concessions Leasing Model is a valuation method proposed by Gulf Power's valuation experts. It uses the Federal government's own methodology for valuing property for which there is no market, or which does not have an easily ascertainable market value. Gulf Power will explain its application of the Federal Concessions Leasing Model when it discloses its experts in accordance with the Presiding Judge's March 30, 2005 Order.

Respectfully submitted,

Ben A. Bowen, Gulf Power Co.



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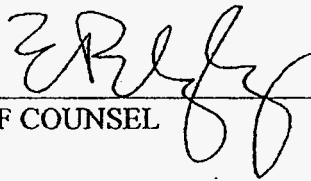
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Responses To Complainants' First Set Of Requests For Production Of Documents has been served upon the following by Electronic Mail and by Federal Express on this the 18th day of April, 2005:

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I hereby certify that a copy of the foregoing *Complainants' Motion to Dismiss (Redacted Version)* has been served upon the following by electronic mail and U.S. Mail on this the 1st day of August, 2005:

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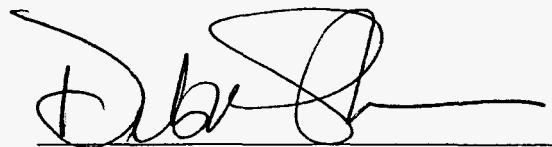
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