ORIGINAL

060000

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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Gulf Power Company ("Gulf Power") files its Proposed Findings of Fact and Conclusions of Law pursuant to the Presiding Judge's May 1, 2006 Order (FCC 06M-12), as amended by Order dated June 12, 2006 (FCC 06-M-18). Because the issues to be decided are mixed issues of fact and law, Gulf Power submits a proposed initial decision with findings of fact integrated with applicable conclusions of law.

Gulf Power has met its burden of establishing that the space on its pole network is rivalrous, that it is entitled to fair market value for the space Complainants take on Gulf Power's poles, and that Gulf Power's replacement cost methodology is an appropriate means of valuing the taken space. Gulf Power addressed the issues set for hearing and established, *inter alia,* the following:

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
RCA ____
SCR ____
SGA ____
SEC 1
OTH ____

- Gulf Power's pole space is rivalrous (crowded/full capacity);
- Rivalrous poles are congruous to land;
- Because Gulf Power's poles are congruous to land, a traditional takings law analysis applies;
- Under a traditional takings law analysis, the standard of compensation is fair market value or a suitable proxy; and
- Gulf Power's replacement cost methodology is a suitable fair market value proxy in the context of pole space.

INTRODUCTION

1. This is not the typical pole attachment rate case. *Alabama Power Co. v. FCC,* 311 F. 3d 1370 (11th Cir. 2002) (as long as it remains good law) has permanently altered the landscape. [1] Under *Alabama Power v. FCC*, the Cable Rate is not sufficient compensation for cable attachments once there is proof of rivalry, crowding, or full capacity on Gulf Power's poles. The parties differ sharply, however, on what must be proven, and how it must be proven, for Gulf Power to obtain something higher than the regulated rate. In this case, the following difficult underlying legal questions must be resolved:

What does the holding in *Alabama Power v. FCC* mean and how should it be applied in this case?

2. The answers to the dispositive questions must be harvested from the entirety of the Eleventh Circuit's analysis – not isolated excerpts. The task is made more difficult by the parties' submission of widely divergent theories. As Gulf Power said in its opening statement, this has truly been "a tale of two cases." GP Opening Statement, 4/24/06 Tr., p. 634.

[1] Gulf Power has maintained that the Eleventh Circuit's analysis is flawed. In this proceeding, however, Gulf Power offers an interpretation that harmonizes the novel analysis with the other Eleventh Circuit precedent and long-standing takings jurisprudence.

3. Resolution of the specific issues designated for hearing must rest on an application of *Alabama Power v. FCC* that is practical and in compliance with existing takings jurisprudence. The outcome should be tempered by common sense and its potential precedential effect. The concepts at stake in *Alabama Power v. FCC* cannot be debated in countless mini-trials. The procedure - whatever it is - must be something the Bureau and Commission can apply with relative ease. Gulf Power has offered such an approach, explaining that a rivalrous condition exists on any pole where make-ready would be required in order to accommodate an additional attacher. Make-ready is the method by which utilities expand the capacity of poles to accommodate additional attachments. In practice, utilities and attachers do not disagree on whether make-ready is required for a particular pole.

4. In this case, Gulf Power has proven the critical "unknown" fact in *Alabama Power v. FCC* - its pole space is "rivalrous." 311 F. 3d 1370 ("[N]owhere in the record did APCo allege that APCo's network of poles is currently crowded. It therefore had no claim."). With this critical fact now known, unlike Alabama Power, Gulf Power has a proven claim. *See id.*

5. Gulf Power's proffered approach to *Alabama Power v. FCC's* rivalry standard is simple, workable, meaningful and consistent with long-standing takings law; it also avoids tension between *Alabama Power v. FCC* and other controlling precedent. Complainants, on the other hand, urge a narrow, result-driven interpretation of *Alabama Power v. FCC* that is impractical, inconsistent with takings jurisprudence and nearly impossible to apply (much less for any utility to meet). Complainants parse *Alabama Power v. FCC* in a way that renders its analysis an exercise in futility. In the end, Complainants' urged approach sends all utilities on

the "road to nowhere," forever "chasing their tails," never to reach just compensation. This was not the Eleventh Circuit's intent in *Alabama Power v. FCC* and cannot be the result in this case.

SUMMARY OF CONCLUSIONS

6. Gulf Power has demonstrated that its network of poles is crowded and that its pole space is rivalrous. While there has been much debate surrounding the terms "crowded" and "full capacity," the language need not be sliced so thinly. The underlying focus in *Alabama Power v. FCC* and this case is the concept of "*rivalry*." Kravtin Cross, 4/26/06 Tr., p. 1482 ("a rivalrous condition on the pole would be true whether we call it crowding or full capacity"); *see also* Dunn Cross, 4/24/06 Tr., pp. 722-23 ("In my testimony . . . it's one and the same; crowded and full. I don't draw a distinction."); Bowen Cross, 4/25/06 Tr., p. 1020 ("Full capacity and crowded to me are the same thing").

7. The *Alabama Power v. FCC* decision defined "nonrivalrous" as meaning that a "use by one entity does not necessarily diminish the use and enjoyment of others." 311 F. 3d at 1369. The common example of a "nonrival good" cited by the Court was the "national defense." *Id.* Complainants' economics expert, Patricia Kravtin, identified parks and open-air concerts as other types of nonrival goods, and food and land as common examples of rivalrous goods. Kravtin Cross, 4/27/06 Tr., pp. 1491-92; 1496-98. Gulf Power's poles are more like food and land than the national defense or open air concerts. A person can touch and feel Gulf Power's pole space just as a person can touch and feel food and land. This reality was predicted in *Alabama Power v. FCC* when the Court compared pole space to railway lines and explained that "[t]he possibility of crowding is perhaps more likely in the context of pole space." 311 F. 3d at 1370.

8. The Eleventh Circuit has been clear that any pole capacity analysis relates to the *current* condition of *particular* poles – not future hypothetical poles. *Alabama Power v. FCC*, 311 F. 3d at 1370 (discussing Alabama Power's lack of evidence concerning *current* crowding on its pole network); *Southern Company v. FCC*, 293 F. 3d 1338, 1347 (11th Cir. 2002) (referring to a *particular* pole when determining capacity for attachments). As such, the analysis in this case must focus on real, existing utility poles.

9. Within this framework, Gulf Power has established that its current pole space is *not*, as the Eleventh Circuit hypothecated, "for practical purposes, nonrivalrous." 311 F. 3d at 1369. Once an attachment is made within the finite space on Gulf Power's poles, that space is lost to Gulf Power. Once an attachment is made, the spacing and operations on the pole forever change. Once a communication cable is attached, Gulf Power's current and future use of the pole is impaired. Given the finite nature of the space, as well as contractual allocations already made on Gulf Power's poles to incumbent local exchange carriers ("ILEC's") (*e.g.*, BellSouth), the space available for taking is inherently limited, if not foreclosed altogether. Complainants' use of Gulf Power's pole space absolutely precludes Gulf Power from using that space, and meaningfully diminishes Gulf Power's use and enjoyment of the remaining pole space.

10. The parties submitted voluminous, detailed evidence concerning exemplar Gulf Power poles.[2] The evidence sparked much debate, from which one undeniable conclusion can be drawn: in many instances, the ability of Gulf Power's poles to accept another attachment is an analysis of inches. In an analysis of inches, rivalry cannot realistically be disputed. Based on the record evidence in this case, Gulf Power's pole space is rivalrous.

[2] This evidence was tendered pursuant to the December 16, 2005 Scheduling Order (FCC 05M-60).

11. Through proof of rivalry, as noted by *Alabama Power v. FCC*, pole space becomes congruent with land, and once this congruence is established, a traditional takings analysis takes hold. 311 F. 3d at 1369. In a traditional takings analysis, fair market value is the standard of compensation. *Id.* at 1368. "Fair market value is established by determining what a willing buyer would pay in cash to a willing seller at the time of the taking." *Id.* (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)). While Gulf Power has established that there is, in fact, an unregulated market for the use of elevated communications corridors, the evidence of comparable transactions uninfluenced by regulation is somewhat limited. Consequently, it is appropriate to incorporate "an alternative to fair market value" (sometimes called a "proxy") to determine the compensation owed to Gulf Power. *Id.*

12. Gulf Power proffers a replacement cost methodology as a proxy for fair market value. The formula underlying Gulf Power's replacement cost methodology is similar to the Commission's existing Cable and Telecom formulas. GP Ex. F (Spain Direct), p. 8. In application, Gulf Power's formula departs from the Commission's formula in several respects. For example, Gulf Power relies on present day pole costs as opposed to historical costs. GP Ex. F (Spain Direct), p. 8; GP Ex. A (Dunn Direct), pp. 27-28; GP Ex. B (Bowen Direct), pp. 39-40. This is an appropriate adjustment in a takings case because, as the court in *Alabama Power v. FCC* recognized, long-standing takings law "rarely countenances the use of historical costs" as a proxy for fair market value. 311 F. 3d at 1368. As Gulf Power's valuation expert explained, historical costs do not accurately represent the fair market value of an asset – especially where,

as here, the asset is always functionally new for attaching entities. GP Ex. F (Spain Direct), pp. 11-12.[3]

13. Gulf Power also established that its pole network is not an essential facility to Complainants. *See* ¶¶ 64-70, *infra.* The evidence is clear that Complainants have other viable options, including underground construction. *Id.* For example, the evidence is that the majority of Complainants new construction is underground and that the decision to go overhead versus underground is a business decision. *Id.* Because other options exist, any hyperbole concerning "monopoly" rates, "duress" or "essential facilities" is unsubstantiated in this record.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Procedural History

14. This is a pole attachment dispute; the latest battle in a nearly ten-year war between pole owners and cable television companies. The war began in 1996, when Congress passed the Telecommunication Act of 1996. Part of the 1996 Act substantially revised the Pole Attachment Act (47 U.S.C. § 224) (the "Act"), which had first been enacted in 1978. The 1978 iteration of the Act vested the FCC with regulatory power over pole attachment relationships between the fledgling cable television industry and incumbent utility pole owners (telephone and electric). Though the Act set parameters for a regulated rate, which utilities (even then) thought was unfairly low, there was no statutory compulsion to allow cable attachments on utility poles. In 1996, though, Congress made two important changes to the Act. First it broadened the scope

[3] The FCC has acknowledged the benefits of abandoning historical costs in favor of a forward-looking cost methodology for pole attachments (for all poles, not just "rivalrous" poles). The Commission declined to adopt such a methodology, however, for fear that it would cause "significant disruption" and "necessitate a long and protracted rulemaking proceeding." *In re Amendment of Rules and Procedures Governing Pole Attachments*, 15 FCC Rcd. 6453, ¶ 9 (2000). While the transition to forward looking costs in the regulated methodology may require such processes, use of forward-looking costs in a takings analysis does not. The Commission's ruling would be subject to judicial review and once affirmed would be binding law. Indeed, this is the procedure the cable companies fought for in *Gulf Power, et al. v. United States*, 187 F. 3d 1324 (11th Cir. 1999).

to include telecommunications carriers (rather than just cable television systems), *albeit* at a higher rate defined by different statutory parameters. Second, it made access mandatory: utilities no longer had the right to deny access, barring engineering issues, safety issues or insufficient capacity. 47 U.S.C. § 224(f)(2).

15. Gulf Power challenged the constitutionality of the 1996 Act on the grounds that it effected a physical taking without just compensation. The Eleventh Circuit ultimately ruled that while the 1996 Act indeed constituted a physical taking of private property, Gulf Power had not shown that the regulated rate would constitute a taking in every instance. *Gulf Power, et al. v. United States*, 187 F. 3d 1324 (11th Cir. 1999). In essence, the Eleventh Circuit declined the invitation to hold that the regulated rate was unconstitutional on its face. Forced to act in an as-applied context, Gulf Power and Alabama Power (a sister corporation) instituted a "just compensation" rate based on a replacement cost methodology fair market value proxy. This led to cable operators filing complaint proceedings.

16. Without an evidentiary hearing, the Bureau and the Commission granted the complaint against Alabama Power on the grounds that the just compensation rate imposed did not fall within the parameters of the Act or the Commission's regulations. Alabama Power appealed to the Eleventh Circuit. The Eleventh Circuit found that the Commission had "inappropriately focused on rate making cases," but injected a new concept into physical takings analysis – the concept of "nonrivalrous" property. *Alabama Power v. FCC*, 311 F. 3d at 1367 ("When a physical taking is at issue, however, a different analytical hat must be worn."). Applying its new concept, the Eleventh Circuit denied Alabama Power's appeal principally on the grounds of what the court described as "[t]he important unknown fact: nowhere in the record did APCo allege that APCo's network of poles is currently crowded." 311 F.3d at 1367, 1370.

17. Following the Eleventh Circuit's decision in *Alabama Power v. FCC*, the Bureau granted the original complaint filed by the Florida cable operators against Gulf Power. Memorandum Opinion and Order, May 13, 2003 (DA 03-1555). The basis of the Bureau's Order was that Gulf Power "submitted no evidence . . . that would satisfy the test articulated by the Eleventh Circuit." *Id.*, at 9. Because its evidence was filed prior to the Eleventh Circuit decision in *Alabama Power v. FCC*, Gulf Power requested the opportunity to present evidence in a hearing, specifically on the *Alabama Power v. FCC* holding. The Bureau entered the Hearing Designation Order setting the following issues for hearing: "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 such compensation." Hearing Designation Order, September 27, 2004 (DA 04-3048), p. 11.

II. Gulf Power's Pole System

18. Gulf Power is an investor-owned utility that generates and distributes electricity to more than 400,000 customers in Northwest Florida. GP Ex. B (Bowen Direct), p. 5. Gulf Power distributes electricity to residential, commercial and industrial customers in 71 towns and communities, stretching along the Gulf of Mexico from the Alabama border on the west to the Apalachicola River on the east. *Id.*, pp. 5-7. Gulf Power's core business is the distribution of electricity to ratepayers. *Id.* Gulf Power utilizes both underground and overhead infrastructure to deliver electricity to its ratepayers. *Id.*, pp. 3, 6. A significant portion of Gulf Power's overhead plant is supported by the utility poles that are at issue in this proceeding. *Id.*

19. Gulf Power owns approximately 225,000 wooden distribution poles; approximately 150,000 of these are "joint use poles." GP Ex. B (Bowen Direct), p. 6. A "joint use pole" is a pole to which one or more entities other than Gulf Power are attached. *Id.*, p. 1.

Roughly 95% of Gulf Power's pole plant are wooden poles ranging in height from thirty to forty-five feet, with the "typical joint use pole" being forty (40) feet tall or taller. GP Ex. A (Dunn Direct), pp. 21-22; 25-26; GP Ex. B (Bowen Direct), pp. 6-7, 41; GP Ex. 67 (Burgess Depo.), p. 78; GP Ex. 68 (Routh Depo.), pp. 75-76 ("I would say that the far majority are going to be, you know, 40 to 45."); GP Ex. 69 (Smith Depo.), pp. 62-64; GP Ex. 87A (Forbes Depo. Cross Designations), pp. 105-107; GP Ex. 85A (Brooks Depo. Cross Designations), p. 17; Dunn Cross, 4/24/06 Tr., pp. 39, 814-815, 832-833, 884; GP Ex. 39 (Gulf Power Pole Inventory); GP Ex. 54 (Gulf Power Roll Forward Ledger).

III. Complainants' Attachments

20. The Complainants are Cox Communications Gulf Coast, LLC ("Cox"), Comcast Cablevision of Panama City, Inc. ("Comcast"), Mediacom Southeast, LLC ("Mediacom"), and Brighthouse Networks, LLC ("Brighthouse"), all cable television systems under Section 224.[4] Each of these entities has attachments on Gulf Power's poles through a mandatory right of access under the Act. GP Ex. A (Dunn Direct.), p. 33; GP Ex. B (Bowen Direct.), p. 9. The only Complainant with whom Gulf Power has a current pole attachment agreement is Mediacom. GP Ex. B (Bowen Direct), p. 9. That contract specifies that Mediacom is attached through their mandatory right of access. *Id.*

21. The other Complainants (or predecessors in name/interest) have had one or more written agreements with Gulf Power. GP Ex. A (Dunn Direct), p. 8; GP Ex. B (Bowen Direct), pp. 9-10; *see also* GP Exs. 6-8 (previous attachment agreements between Gulf Power and Brighthouse, Cox and Comcast, respectively). These agreements expired in 2000 and Gulf

[4] There is evidence in this case that Complainants may also be providing telecommunications services, which would entitle Gulf Power, at a minimum, to the higher Telecom Rate. Because this is not the crux of this proceeding, no specific findings in this regard are made.

Power announced its intention to cease voluntary attachment relationships. GP Ex. A (Dunn Direct), p. 8; GP Ex. B (Bowen Direct), p. 9; *see also* GP Ex. 1 (Aff. of Michael R. Dunn), pp. 1-8; GP Ex. 3 (Third Aff. of Michael R. Dunn), pp. 2-3. Since that time, all attachments have remained on Gulf Power's poles pursuant to mandatory access but the parties have not been able to agree on new terms and conditions governing the attachments. GP Ex. B (Bowen Direct.), pp. 9-10.

22. Complainants attach coaxial, fiber, and service drops to Gulf Power's poles. GP Ex. B (Bowen Direct), p. 13. If the attachment is a "main line" attachment, the wire is usually secured to the pole with a three-bolt clamp. *Id.* If the attachment is a "service drop" – in other words a line leading into a customer's house or place of business – it is usually secured using a J-hook. *Id.* If a main line attachment is on a pole, that attachment occupies at least one foot of space. *Id.* If a cable company has a service drop as well, the actual usable space occupied could be significantly more than one foot. *Id.* Complainants also attach other fixtures and appliances to Gulf Power's poles, such as amplifiers and battery back-up devices, in addition to bonding to Gulf Power's grounds. *Id.*

IV. Gulf Power's Pole Space is Rivalrous

A. "Rivalry" Is The Standard

23. The analysis in this proceeding springs from the Eleventh Circuit's introduction of the concept of "rivalrous" property into a physical takings case. 311 F. 3d at 1369. The rivalry concept has its origins in economic theory. Complainants' economist, Ms. Kravtin, testified that "[A] nonrival good is one whose consumption by one person does not diminish its availability for others." Kravtin Cross, 4/26/06 Tr., p. 1369. The Eleventh Circuit, in speculating that pole space "may be, for practical purposes, *nonrivalrous*," explained the concept

as follows: "This means that use by one entity does not necessarily diminish the use and enjoyment by others." 311 F. 3d at 1369.

24. The Eleventh Circuit used two different terms in relating the rivalry concept to utility poles: "crowding" and "full capacity." *See, e.g.*, 311 F. 3d at 1370 ("if crowded, the pole space becomes rivalrous". . ."[i]n the 'full capacity' situation, it is the zero-sum nature of pole space, like land, that is the key."). At various stages of this proceeding, the parties have had spirited debates concerning a potential substantive distinction between the terms. For its part, Gulf Power uses the terms synonymously. Dunn Cross, 4/25/06 Tr., pp. 722-723, 726; Bowen Cross, 4/25/06 Tr., p. 1020. Although Complainants' now criticize the use of the phrase "crowding," it appears they have vacillated on this point. Kravtin Cross, 4/26/06 Tr., pp. 1449-84; Harrelson Cross, 4/27/06 Tr., pp. 1603-18; *see also,* GP Exs. 74-75 (drafts of Complainants' expert reports using the terms "full capacity" and "crowding" synomously, and subsequent documents reflecting attorney recommendations to stop using the term "crowding").

25. Fortunately, the Court's decision need not rest on some unarticulated or nuanced distinction in the wording chosen by the Eleventh Circuit. As Complainants' own expert agreed, the central premise is whether there is a rivalrous condition on the pole – whether it is called "crowding" or is couched as "full capacity." Kravtin Cross, 4/26/06 Tr., p. 1482 ("But I believe the evidentiary burden for Gulf Power in terms of demonstrating a rivalrous condition on the pole would be true whether we call it crowding or full capacity"). As such, while the terms "crowding" and "full capacity" may still appear in the evidence and analysis, they are both merely descriptive of the rivalrous condition on Gulf Power's poles.

B. There Can Only Be One Definition of a "Pole"

26. The parties were unable to agree on what a "pole" is for purposes of a rivalry analysis. Gulf Power says that a pole is a pole in its current condition – a unique stick of wood in the ground with finite dimensions and certain wires/facilities added. Complainants allege that a pole is not really a pole for purposes of a rivalry analysis. Instead, according to Complainants, poles are "dynamic" and "whether a pole is genuinely at full capacity does not depend on the condition of the pole at a fixed moment in time." Compls. Ex. B (Harrelson Direct), pp. 7-8. Complainants contend that the rivalry analysis must focus not on actual existing poles, but on "the potential of a pole or replacement pole(s) at a given location to accommodate attachments." *Id.* Complainants' engineer goes so far as to say there must be "two definitions" of what a pole is. Harrelson Cross, 4/27/06 Tr., p. 1592.

27. Complainants' focus on the hypothetical pole seems to arise from their application of rivalry as an "economic" concept. *See, e.g.,* Kravtin Cross, 4/26/06 Tr., 1382 ("it doesn't make economic sense to look at this one snapshot at this point in time and make decisions as to what is available either to the power company for its own use or to another potential attacher"); 1460 ("if we are talking about a situation where there is rivalry, rivalrous condition on a pole, as an economist that means to me it must be full in an economic sense").

28. While the Eleventh Circuit borrowed the notion of rivalrous property from the world of economics, its application in this case is neither theoretical nor economic. The focus is on actual pole space; it is a space analysis. The *Alabama Power v. FCC* rivalry analysis targeted the **current** condition of APCo's poles – not some future, hypothetical condition. 311 F.3d at 1370 ("Nowhere in the record did APCo allege that APCo's network of poles is ***currently*** crowded.") (emphasis added). Complainants' "hypothetical" pole analysis would render the

analysis in *Alabama Power v. FCC* meaningless. Each side measured and photographed fifty exemplary poles – real poles with current conditions. Complainants' engineering witness spent approximately 100 hours or more photographing and analyzing pole measurements. Harrelson Cross, 4/27/06 Tr., p. 1629. Gulf Power spent over $100,000 on a contractor to go out and take measurements concerning the current status of its pole space. Bowen Cross, 4/25/06 Tr., 1033-1036. The parties undertook those substantial efforts for a reason – to measure space on poles. The engineers and contractors were not debating "economic" theory.

29. Complainants' "dynamic" or "hypothetical" pole analysis is also irreconcilable with the Eleventh Circuit's ruling in *Southern Company v. FCC,* and § 224(f)(2) of the Act. In *Southern Company,* the Eleventh Circuit recognized a utility's statutory right to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 293 F. 3d 1338. The court made clear that such a capacity analysis (pursuant to § 224 (f)(2)) must be focused on a "particular 'pole . . .'" *Id.* at 1347. To hold otherwise would render Congress' express words concerning a utilities' right to exclude meaningless. Consistent with Eleventh Circuit precedent and the clear impact of § 224(f)(2), the pole relevant to the rivalry analysis is a pole in its current condition – not some future hypothetical pole. There can be only one definition of a pole in this proceeding: a pole is a pole.

C. The Known Facts About Gulf Power's Poles Demonstrate Rivalry

30. With the claimed confusion concerning the terms "crowding" and "full capacity" addressed, and with the focus of the analysis appropriately directed at real (not hypothetical) poles, it must now be determined whether the evidence demonstrates the fact that was "unknown" in *Alabama Power v. FCC* – whether Gulf Power's network of poles is rivalrous. The answer is yes; Gulf Power has proven rivalry in several complimentary ways.

1. Structural Rivalry

31. A pole is a tangible piece of property. GP Ex. A (Dunn Direct), p. 21; Bowen Cross, 4/25/06 Tr., pp. 1039-41; GP Ex. 70 (Harrelson Depo.), p. 121. It has a top and a bottom. *Id*; Harrelson Cross, 4/27/06 Tr., pp. 1582-83. It has finite dimensions and a finite amount of space upon which attachments can be made. GP Ex. A (Dunn Direct), p. 21; GP Ex. B (Bowen Direct), pp. 25-26. As Complainants' engineer admitted "[a] 40 foot pole is identifiable as a finite piece of property" and a "specific piece of wood" that you can "fill." GP Ex. 70 (Harrelson Depo.), pp. 121, 124; *see generally id.*, 121-27. According to Complainants' engineer: "there's always a limit to any given pole." *Id.*, p. 122-23. Each pole has unique characteristics. Harrelson Cross, 4/27/06 Tr., pp. 1582-83 ("[t]here are unique characteristics from pole to pole").

32. The finite space on any one of Gulf Power's poles can be broken down into two parts: the "usable" space and the "unusable" space. GP Ex. B (Bowen Direct), pp. 13-14, 41; GP Ex. 70 (Harrelson Depo.), pp. 121-23. The unusable space includes: (1) the portion of the pole which is underground (usually 10% of height + two feet); (2) the portion of the pole above ground required to support minimum mid-span clearances; and (3) the safety space, required by the NESC and/or Gulf Power specifications. GP Ex. B (Bowen Direct), pp. 13-14, 41.

33. A portion of unusable space on the pole arises directly from the presence of a communications attachment (ILEC, CATV, Telecom, other). GP Ex. A (Dunn Direct), p. 31; GP Ex. B (Bowen Direct), p. 14; Dunn Re-Direct, 4/24/06 Tr., pp. 880-82. The NESC requires a forty-inch "Communications Workers Safety Zone" ("CWSZ") between the lowest electrical wire and the highest communications wire. *Id*; GP Ex. 38 (NESC § 238E) This mandated spacing has a direct impact on the space available for either an additional communications

attachment or other uses Gulf Power may have in its core operations. *Id.* The CWSZ is itself an exemplar rivalrous condition in Gulf Power's joint use poles because the very presence of a communication cable diminishes pole space available for use by Gulf Power.[5]

34. The evidence overwhelmingly established the typical joint use pole is forty (40) feet tall. GP Ex. A (Dunn Direct), pp. 21-22; 25-26; GP Ex. B (Bowen Direct), pp. 6-7, 41; GP Ex. 67 (Burgess Depo.), p. 78; GP Ex. 68 (Routh Depo.), pp. 75-76 ("I would say that the far majority are going to be, you know, 40 to 45."); GP Ex. 69 (Smith Depo.), pp. 62-64; GP Ex. 87A (Forbes Depo. Cross Designations), pp. 105-07; GP Ex. 85A (Brooks Depo. Cross Designations), p. 17; Dunn Cross, 4/24/06 Tr., pp. 739, 814-15, 832-33, 849. Complainants tendered no evidence to rebut or undermine Gulf Power's proof. Tellingly, the exemplar poles submitted by the parties substantiate the 40 foot conclusion. The average pole height of the forty poles identified by Gulf Power was just over 40 feet. *See* GP Exs. 42 (summary of Osmose data) and 43 (Gulf Power's Fifty Pole Identification). The average pole height of the 50 poles identified by Complainants was over 43 feet. *See* Compls. Ex. 6 (Harrelson Direct) (Volumes 1 and 2).

[5] Mediacom testified:

> Q: What's the purpose of that 40-inch clearance requirement?
>
> A: So that –
>
> MR SEIVER: If you know.
>
> THE WITNESS: Well so that workers have a safe distance from the conductor. A cable guy climbing the pole would have adequate space between a conductor wire for safety reasons.
>
> BY MR. LANGLEY:
>
> Q: It's there to protect the communication workers?
>
> A: It's there, yeah. Yeah, it's to give you enough clearance.

GP Ex. 68 (Routh Depo.), p. 39.

35. On this typical 40 foot pole, 6 feet of space is in the ground and unusable. Bowen Cross, 4/25/06 Tr., pp. 1039-41. At least 18 feet of clearance above ground is needed,[6] and 40" of separation (CWSZ) is required between the highest communication wire and the lowest electric wire. *Id.* at 1050; GP Ex. 40 (Osmose Statement of Work); GP Ex. B (Bowen Direct), p. 29. With the buried portion and required clearances, generally only 28.5 feet of space is unusable. *See* Dunn Cross, 4/25/06, Tr., pp. 832-33; GP Ex. A (Dunn Direct), pp. 25-26; GP Exs. 35-37. On a typical joint use pole, this leaves only 11.5 feet of usable space for all attachers (electric, communications, and others). GP Ex. A (Dunn Direct), pp. 25-26; GP Ex. B (Bowen Direct), p. 25; *see also* GP Ex. 35 (40 foot pole diagram).

2. Systemic Rivalry

36. While there is 11.5 feet of usable space on a typical joint use pole, only a small portion of that space is actually available for attachment by cable companies and CLEC's. GP Ex. A (Dunn Direct), p. 21 (" . . . there is a limited amount of usable space on any given pole to which a cable or telecommunications company can attach.").

37. Gulf Power has contractual agreements with several ILEC's. These relationships are not regulated by the FCC and generally predate the emergence of the cable television industry. GP Ex. A (Dunn Direct), p. 22; GP Ex. B (Bowen Direct), pp. 20-21. Given the mutual consideration that arises from joint ownership responsibilities, the ILEC agreements reflect different terms and conditions as compared to cable or CLEC attachment agreements. *Id.*

38. The ILECs contract for the lower most portion of the usable space on the pole. GP Ex. A (Dunn Direct), p. 23-24; GP Ex. B (Bowen Direct), p. 21; *see also* GP Exs. 32-34

[6] The 18 foot clearance requirement is a mid-span requirement. At the pole, an attachment must be placed higher than 18 feet in order to achieve 18 foot clearance at mid-span. GP Ex. 40 (Osmose Statement of Work); GP Ex. B (Bowen Direct), p. 21.

(various ILEC agreements). By way of example, BellSouth has contractually acquired the lowest three feet of usable space on Gulf Power poles measured from 19'2" to 22'2" above ground on a forty foot pole. GP Ex. A (Dunn Direct), p. 23; GP Ex. B (Bowen Direct), p. 21.

39. The ILECs generally attach in the upper most portion of their space. *Id.* The terminated agreements with Complainants (and other attachers) also set forth a specific order of attachment designed to protect this allocated space. GP Ex. A (Dunn Direct), pp. 23-24; GP Ex. B (Bowen Direct), p. 23; *see also, e.g.*, GP Ex. 7 (1997 Agreement between Gulf Power and Cox), Section 11.

40. When the contractual spacing is applied to Gulf Power's typical joint use pole (with 11.5 feet of usable space), the rivalrous nature of the space is even more apparent. On a forty-foot pole, with three attachers (power, ILEC and one cable) *the pole cannot accommodate another attacher.* GP Ex. A (Dunn Direct), pp. 25-26. In order to expand capacity to allow an additional attacher and remain compliant with the NESC and Gulf Power specifications, a different, taller pole must be installed. GP Ex. A (Dunn Direct), p. 26. In fact, even to accommodate three attachers, Gulf Power's own contractually allocated space must be reduced from 8.5 feet to 7.5 feet on the typical joint use pole. *Id.*

41. In *Alabama Power v. FCC*, the Eleventh Circuit alluded to examining a utility's pole "network" for rivalry as well as requiring a "pole-by-pole" analysis. The Court contemplated the allegation and proof of a crowded *network* of poles – not necessarily any single crowded pole within the network. This is evident in at least three places in the opinion:

- Power companies have something that cable companies need: *pole networks*. 311 F. 3d at 13621 (emphasis added).
- Suppose, for example, that a power company must, for its own "core" electric distribution activities, establish a

network of poles that reaches one million feet into the sky. *Id.* at 1369 (emphasis added).

- There is not an active unregulated market for the use of "*elevated communication corridors*," however, and so an alternative to fair market value must be used. *Id.* at 1368 (emphasis added).[7]

A "network" crowding analysis makes sense for several reasons. First, attachment to a single pole is atypical; it is the network of poles that attracts communications attachers. GP Ex. F (Spain Direct), p. 6. Second, Congress' intended purpose was for the FCC to "institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. No. 95-234, at 21, *reprinted* in 1978 U.S.C.C.A.N. 129. A network crowding analysis based on presumptions and obviates the need for detailed engineering proof and potential counterproof on a pole-by-pole basis, and instead is an approach that is financially efficient and much more consistent with the FCC's past practices. The voluminous evidence and course of this proceeding (which examined just one hundred exemplary poles) proves the point. Although the parties did not agree on much during the course this proceeding, the parties appear to agree that an actual/literal pole-by-pole analysis is not realistic. GP Ex. 70 (Harrelson Depo.), p. 127 (a pole-by-pole analysis is "not realistic"); GP Ex. B (Bowen Direct), pp. 26-27.

42. Gulf Power's evidence concerning the spacing on a typical joint use pole, when coupled with the spacing required contractually and by code is compelling evidence of systemic or network pole crowding (that is rivalry). In fact, Gulf Power's evidence in this regard was

[7] As set forth in paragraphs 85-83, *infra*, the evidence shows that there is an active unregulated market for pole attachments.

unrebutted by Complainants. This analysis alone satisfies the principles espoused in *Alabama Power v. FCC.* Gulf Power's evidence, however, went much further.

3. The Exemplar Poles Demonstrate Rivalry

43. Although Gulf Power's unrebutted structural and systemic crowding evidence is proof enough to entitle it to fair market value, pole-by-pole crowding/capacity data concerning 100 examplar poles was also elicited during the hearing. On these 100 poles, whether labeled "crowding" or "full capacity," the parties seemed to be addressing the same universe of data. *Compare* GP Exs. 40 (Osmose Statement of Work), 42 (Bowen Pole Summary); 43 (Gulf Power 50 Pole Identification); *with* Compls. Exs. 6-7; Harrelson Cross, 4/27/06 Tr., pp. 1611-18; GP Ex. 76 (Harrelson's "Sources of Crowding and Code Violations").

44. Complainants essentially assert that the data analyzed at the parties' great expense is irrelevant. In fact, both of Complainants' experts admitted that they concluded that none of Gulf Power's pole space is crowded before they even reviewed any measurements. Mr. Harrelson testified as follows:

> Q: Can you render an opinion without taking measurements on the pole?
>
> A: Generally, yes.
>
> Q: You have rendered an opinion in this case about poles and concluded that they were not at full capacity without ever looking at the pole, haven't you?
>
> A: Yes.

Harrelson Cross, 4/27/06, p. 1636; *see also id.,* p. 1643 (concluded that a Gulf Power pole was not at full capacity without ever seeing a photograph or any measurements); p. 1621 (Complainants' expert did not need any measurements to render an opinion); p. 1626 ("I can tell you visually"). For her part, Ms. Kravtin was able to opine in March of 2005 that [Gulf Power]

has "not presented credible evidence to support the crowding claims" without ever seeing a single Gulf Power pole or even having reviewed any of the discovery in this case. Kravtin Cross, 4/26/06 Tr., pp. 1471-74.

45. Despite the Eleventh Circuit's observation that "[t]he possibility of crowding is perhaps more likely in the context of pole space [as compared to rail lines]," 311 F. 3d at 1370, Complainants contended that pole space is rarely, if ever, rivalrous. According to Complainants, the only time a pole can be crowded/at full capacity – rivalrous - is when a different, taller pole (not yet in the ground) cannot physically be installed due to some limitation, for example, zoning restrictions, an FAA rule, or an obstruction. Compls. Ex. B (Harrelson Direct), pp. 6-8; Harrelson Cross, 4/27/06 Tr., p. 1628 (agreeing that for purposes of Complainants' reservation he could "just go out to the location and look up and see if there's anything obstructing you putting up a larger pole."). Not surprisingly, Complainants and their expert have asserted a definition that results in their desired conclusion that: "[t]he percentage of poles which [are crowded] is very small." Compls. Ex. B (Harrelson Direct), p. 8. In Complainants' view, even a pole that must be pulled from the ground and replaced with a taller pole to accommodate a new attachment is not rivalrous. GP Ex. 70 (Harrelson Depo.), pp. 122-126. Concerning the exemplar poles submitted by both sides, Complainants' engineer concluded **none** were rivalrous. Compls. Ex. A (Harrelson Direct), p. 12 ("Gulf Power has not established that any of the 50 poles it identified may reasonably be said to be at full capacity.").

46. Gulf Power takes a different tack. Gulf Power asserts that if make-ready must be performed to host an additional attachment, the pole is rivalrous. Make-ready is the method by which additional pole capacity is created. Gulf Power's conclusion, therefore, is that if make-

ready would be required to expand capacity, capacity does not exist. GP Ex. B (Bowen Direct), p. 26-28; Dunn Re-Direct, 4/24/06 Tr., pp. 844-50.

47. Gulf Power has the better of this argument. First, Gulf Power's approach reconciles the Eleventh Circuit rulings in both *Alabama Power v. FCC* and *Southern Company* with § 224 (f)(2) (which provides that a "utility....may deny a cable television system or any telecommunications carrier access to its poles...where there is *insufficient capacity* and for reasons of safety, reliability and generally applicable engineering principles."). In *Alabama Power v. FCC,* the Court specifically referenced § 224(f)(2) and equated its use of the term "full capacity" with the concepts captured in § 224(f)(2): "Congress contemplated a scenario in which poles reach full capacity when it created a statutory exception to the forced attachment regime." 311 F. 3d at 1370. In *Southern Company*, electric utilities appealed an FCC rulemaking that "require[d] a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs." 293 F.3d at 1346 (quoting *Order on Reconsideration*, 14 FCC Rcd. 18049, 51 (Oct. 20, 1999)). The concept of capacity expansion was defined by the Commission to include steps taken "to rearrange or change out existing facilities at the expense of the attaching parties in order to facilitate access." *Order on Reconsideration*, 14 FCC Rcd. ¶ 18049 53. The Eleventh Circuit held that the "FCC's position [was] contrary to the plain language of § 224(f)(2)." 293 F.3d at 1346.

48. The common sense and proper definition of a rivalrous, "crowded," or "full capacity" pole under *Alabama Power v. FCC* and *Southern Company* is any pole that would require make-ready (either in the form of rearrangement or change-out) to accommodate an additional communications attacher. This is the only way any pole-by-pole crowding analysis

could ever work, and the only way the *Southern Company* and *Alabama Power v. FCC* decisions can be reconciled.

49. Inherent in the testimony of Complainants' engineer is the reality that make-ready involves "expanding capacity." Mr. Harrelson explained that "make-ready" involves the process of either "rearrangement or change-out" in order to accommodate an attachment. Compls. Ex. B (Harrelson Direct), p. 10. Mr. Harrelson then equates that make-ready process to "[e]xpanding pole capacity." *Id.*, pp. 10-11. Similarly, Mediacom testified that a "clear pole" is "[a] pole that requires no make-ready." GP Ex. 68 (Routh Depo.), p. 114. It is axiomatic that if make-ready is required to expand capacity, capacity was not present before. As such, where make-ready is required there is a rivalrous condition on a utility pole.

50. Complainants' economic expert also testified that make-ready is central to a rivalry analysis. According to Ms. Kravtin, the touchstone of rivalry is "exclusion." Kravtin Cross, 4/26/06 Tr., pp. 1501 ("the whole underlying concept under rivalry is the situation where there is exclusion from use of the infrastructure"); 1393-94 ("Where we identify situations where there is a rivalrous condition on the pole, and that there has been exclusion."). Ms. Kravtin goes on the explain that "make-ready" is the "customary way by which Gulf Power and other utilities are able to accommodate attachments so that they don't have to exclude attachments from the pole that come along." *Id.*, p. 1386. If make-ready is the way Gulf Power avoids exclusion, and exclusion connotes rivalry, Gulf Power's application of the holding of *Alabama Power v. FCC* makes sense.

51. Gulf Power's approach is also simple and objective as there is virtually never a disagreement between Gulf Power and Complainants as to whether make ready is required. GP

Ex. 66 (Burgess Depo.), pp. 70-74; GP Ex. 67 (O'Ceallaigh Depo.), pp. 43-44; GP Ex. 68 (Routh Depo.), pp. 58-59; GP Ex. 69 (Smith Depo.), pp. 26, 58-59. For example, Brighthouse testified:

> Q: Does any instance stick out in your mind where Brighthouse said this pole does not require make-ready and Gulf Power said, yes, it does?
>
> A: Not that I can – I cannot come up with an instance that I'm aware of.
>
> * * * *
>
> Q: There's usually agreement as to whether make-ready needs to be done or not?
>
> A: Yes, sir.

GP Ex. 66 (Burgess Depo.), pp. 70 & 72. Cox similarly testified:

> Q: Is there ever disagreement between Cox and Gulf about whether make-ready is required?
>
> A: No, I don't believe I've had that conversation, nor has it been brought to my attention.
>
> Q: The engineers are usually in agreement about whether that's necessary?
>
> A: Yes.

GP Ex. 67 (O'Cealleigh Depo.), p. 44.

As such, other utilities and potential attachers can apply this rivalry standard without the need for Commission involvement. Of course, should parties not be able to reach agreement on whether make-ready is required, a complaint proceeding can be filed.

52. For the purposes of the Osmose audit, Gulf Power identified objective, measurable criteria for determining whether make-ready would be required to accommodate a new attachment. GP Ex. B (Bowen Direct), pp. 28-30; GP Ex. 40 (Osmose Statement of Work). The criteria were derived from the NESC and Gulf Power construction specifications, which the

Complainants concede apply to all attachments made to Gulf Power poles. *Id.*; *see also* GP Ex. 66 (Burgess Depo.), p. 67; GP Ex. 67 (O'Ceallaigh Depo.), pp. 39-40, 54-55; GP Ex. 68 (Routh Depo.), pp. 37-41; GP Ex. 69 (Smith Depo.), pp. 80-85; GP Ex. 40 (Osmose Statement of Work). Gulf Power did not attempt to capture all conditions that would require make-ready to accommodate an additional attachment. GP Ex. 40 (Osmose Statement of Work). For example, the audit did not capture loading requirements. *Id.* Instead, the focus was on practical, widely-accepted, easy-to-measure vertical clearances. *Id.* In this sense, the way Gulf Power defined "crowding" for the purpose of the Osmose audit is conservative.[8]

53. The fifty poles submitted by Gulf Power include forty Osmose poles and ten Knology poles. GP Exs. 42 and 43.[9] The Osmose poles are examples of the varying conditions in the field, with at least one thing in common – each would require make-ready (ranging from rearrangement of existing facilities to poles being changed out) to accommodate an additional attachment. This is a point the Complainants did not dispute. The Knology poles are examples of occasions where Gulf Power performed make ready ranging from rearrangement to pole changing out poles to accommodate new attachments on crowded poles. These poles demonstrate that prior to make-ready being performed, there was insufficient capacity to accommodate Knology's cables and that these poles are rivalrous. The fifty poles submitted by Gulf Power each demonstrate rivalry.

[8] Conversely, Complainants' engineer overreached on his conclusions. Despite admitting that pole loading should be a component of a "full capacity" analysis, Mr. Harrelson concedes that he did not perform an "engineering analysis" on the exemplar poles and that he is unable to render an opinion concerning "whether additional loading considerations would be impacted by adding another communication cable to a pole." *See* Harrelson Cross, 4/27/06 Tr., pp. 1572-78; 1602-1603; Compls. Ex. B (Harrelson Direct), p. 8. Yet, Mr Harrelson concludes that none of the 100 exemplar poles are crowded or at full capacity. *Id.*, pp. 1589, 1624.

[9] Two of the forty Osmose poles were withdrawn at trial. Bowen Cross, 4/25/06 Tr., p. 1001.

54. Complainants also submitted fifty exemplar poles, along with measurements and engineering analysis. Although Complainants' expert attempted to cast the objective data in a different light, the numbers tell the tale – the vast majority of the poles identified by Complainants are rivalrous (requiring rearrangement or a change-out before an additional attachment could be made). Complainants' engineering expert agreed that if Gulf Power's approach to crowding were adopted, a "very high percentage" of the poles discussed in his report would be crowded. Harrelson Cross, 5/1/06 Tr., pp. 1796-97. According to Harrelson's analysis, the actual number is 87% (85 of 98 poles require make-ready). This squares with Gulf Power's evidence concerning structured, systemic and exemplar pole crowding. This also squares with Gulf Power's witnesses who concluded that a large percentage of the network is crowded. GP Ex. A (Dunn Direct), pp. 21-22; GP Ex. B (Bowen Direct), pp. 24-38; Dunn Re-Direct, 4/24/06 Tr., pp. 844-50.[10]

D. Gulf Power's Construction Specifications Are An Appropriate Consideration In The Make-Ready Analysis

55. Complainants' engineering witness took issue with Gulf Power's use of its construction specifications as part of its pole capacity analysis. Compls. Ex. B (Harrelson Direct), pp. 9-11; 44-45. Before addressing Complainants' engineering witness' assertions in this area, it must be emphasized that any dispute over Gulf Power's specifications, or for that matter their history of enforcement in that area, is a sideshow. Gulf Power's specifications and NESC requirements were relied upon by both Gulf Power and Complainants as representative of

[10] One of Complainant's representatives admits that three of the thirteen poles he analyzed are "full." GP Ex. 86 (O'Ceallaigh pole analysis identifying three poles as "full" and nine of thirteen poles as requiring make ready). Complainants' engineering expert testified, however, that he did not even talk to this Mr. O'Ceallaigh regarding the determination that certain poles were "full" prior to testifying as he "didn't see any value" in having such a discussion. Harrelson Cross, 4/27/06 Tr., pp. 1714-28. Mr. Harrelson went even further, opining that Mr. O'Ceallaigh's analysis of the poles was "irrelevant." *Id.*, p. 1726.

the spacing requirements on utility poles. GP Ex. 40 (Osmose Statement of Work); Harrelson Cross, 4/27/06 Tr., p. 1610-18; GP Ex. 76 (Harrelson Draft and Outline); GP Ex. 77 (Harrelson Draft Report); GP Ex. 88 (Harrelson e-mail regarding measurements). The specifications accordingly are most relevant because they reveal the limited and rivalrous nature of the space occupied by Complainants and all other attachers to Gulf Power's poles. The specifications also shed light on Gulf Power's higher valued uses for its own pole space. Spain Cross, 4/26/06 Tr., p. 1279; GP Ex. B (Bowen Direct), p. 39; GP Ex. 12, Plates C-3, C-4, C-8.

56. Although the specifications are relevant, this proceeding is not designed to either penalize the Complainants for failure to abide by the applicable specifications or to find fault with Gulf Power's enforcement thereof. This proceeding is not intended to opine upon the legitimacy of the individual specifications or to determine whether Gulf Power is behind, consistent with, or ahead of the rest of the industry in terms of their construction standards. However, to the extent Complainants assert that Gulf Power's use of its specifications in the crowding analysis should fail because of their engineering expert witness, Complainants have failed.

57. Complainants' engineering expert criticized Gulf Power's specifications as being "decades old," "unreasonable" and "contrary to industry standards." *See, e.g.*, Compls. Ex. B (Harrelson Direct), pp. 44-45; Harrelson Cross, 4/27/06 Tr., pp. 1653-57; 1692-94. On this point, the Complainants' expert should have consulted with his own clients. For their part, Complainants themselves have no quarrel with Gulf Power's construction standards. The specifications (in one form or another) have been a part of Gulf Power's attachment agreements since at least 1978. GP Ex. A (Dunn Direct), p. 11; GP Ex. 9 (1978 Agreement between Gulf Power and Comcast). The specifications were a part of contract discussions every five years

since that time. GP Ex. A (Dunn Direct), p. 11. Mr. Dunn testified that while he was Distribution Manager and Project Service Manager, a time period covering some sixteen (16) years, no attaching entity (including the Complainants) took issue with any of Gulf Power's specification plates. *Id.*, p. 12-15. No Complainant has ever filed an FCC proceeding at any time challenging any of Gulf Power's construction standards as being unreasonable or unfair. In fact, after termination in 2000, when Gulf Power distributed to Complainants its "mandatory access agreement," Comcast returned detailed handwritten comments to Gulf Power which took issue with various substantive provisions of the proposed agreement, but none of the specification plates was marked for discussion or suggested revision. GP Ex. 10.

58. One of Complainants' own representatives summed it up best when he dubbed Gulf Power's construction specifications "**the bible** for pole attachments" and explained that they are consistent with the NESC and his company's (Cox's) own internal requirements. GP Ex. 67 (O'Ceallaigh Depo.), p. 54-55; *see also, id.*, pp. 39-40 (emphasis added).

59. Complainants' engineering expert also asserted that Gulf Power is lax about enforcing compliance with the NESC and/or its own construction standards. Compls. Ex. B (Harrelson Direct), pp. 44-45. Again, it must be emphasized that this issue is not directly material to the findings in this matter. However, to the extent Complainants desire to impugn the rivalry analysis on this point, they again have missed the mark. The evidence demonstrates that Gulf Power has a program in place to ensure compliance, incorporates contractual assurances from attaching entities as part of that program, and also layers into its compliance program audits mandated by the Florida Public Service Commission. GP Ex. A (Dunn Direct), pp. 15-20; GP Ex. B (Bowen Direct), pp. 17-19; Dunn Re-Direct, 4/24/06 Tr., pp. 866-70; *see also* GP Exs. 4 (CATV Permitting Procedure); 5-8 (various documents regarding attachers'

compliance with the NESC and Gulf Power specifications); 11-12 (same) and 14-30 (same). Despite concluding that Gulf Power's program was "lax," Complainants' engineering expert admitted that he did not conduct any research concerning Gulf Power's past practices with regard to ensuring that code violations are fixed once they are identified. Harrelson Cross, 5/1/06 Tr., p. 1781.

60. Complainants also did not dispute their obligation to comply with both the NESC and Gulf Power's construction specifications. Harrelson Cross, 4/27/06 Tr., pp. 1610-18; GP Ex. 76 (Harrelson Draft and Outline); GP Ex. 77 (Harrelson Draft Report). Gulf Power requires that the attaching entity accept responsibility for attaching consistent with the NESC and Gulf Power's specifications. With respect to the NESC, the attachment agreements themselves provide that:

> Notwithstanding the issuance of an attachment permit, Licensee [the attacher] shall at no time make or maintain an attachment to Gulf' pole or substitute pole space if the spacing on the pole, the ground clearance, or other characteristics of the attachment are not in strict conformity with the [NESC] and any other applicable codes, rules, or regulations of any governing body having jurisdiction."

GP Ex. 7, Section 3.

With respect to Gulf Power's specifications, the agreements provide the following:

> Licensee [the attacher] shall also comply with Gulf's specifications for construction . . . . Attached hereto are drawings marked Plates 1 through 11 inclusive which are descriptive of required construction under some conditions and are to serve as construction guidelines by may not apply in all situations. These drawings may be changed from time to time by Gulf and do not supercede any applicable [NESC] requirements, except to the extent that they are more stringent than the Code.

See, e.g., GP Ex. 7, Section 6.

61. Aside from the attachment agreements themselves, the responsibility of the attacher to comply with NESC and Gulf Power construction specification is reinforced at various times throughout the relationship. GP Ex. A (Dunn Direct), p. 17-18; *see also* 5-8; 11-12 and 14-30 (various documents regarding compliance with the NESC and Gulf Power specifications). Gulf Power also has a multi-layer process in place that, under normal circumstances, is designed to ensure compliance by attachers. GP Ex. A (Dunn Direct), p. 18.[11] Complainants' engineering expert also concurs that attachers have an obligation to comply with Gulf Power's standards, since he admittedly testified to that very obligation in other cases. Harrelson Cross, 5/1/06 Tr., pp. 1767-79. In summary, Mr. Harrelson's efforts to discredit Gulf Power's construction standards and joint use practices are unpersuasive and contrary to the great weight of the evidence.

V. Gulf Power Is Entitled To The Fair Market Value Of The Pole Space Taken By Complainants

A. Once Gulf Power Establishes That Its Pole Space is Rivalrous, The Inquiry Turns to Valuing the Pole Space.

62. The second major question that must be resolved is the amount of compensation Gulf Power is due for Complainants' attachments to rivalrous poles. The Hearing Designation Order frames the issues 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." Hearing Designation Order, September 27, 2004 (DA 04-3048), p. 11. The first part of this question was answered when Gulf Power proved that its pole space is rivalrous on any pole that would require make-ready in order to accommodate an

[11] Of course, given the recent hurricanes with which Gulf Power has had to deal, its programs have been anything but normal for some time. *Id.*, p. 18-20.

additional attacher. The second part of the issue requires a determination of amount of compensation due. Under traditional takings law, at this point the case is about valuing Gulf Power's pole space. Memorandum Opinion and Order, May 26, 2006 (FCC 06M-14), p. 4 ("...that evidence, will be considered in deciding, *inter alia*, ultimate issues of pole capacity and 'fair market value' of poles space on Gulf Power's utility poles allegedly taken by cable attachments of Complainants").

63. As novel as the first question was, the compensation question is, in many respects, as difficult given the parties' widely different views of what level of compensation is due for rivalrous pole space. Fortunately, the parties at least agree that valuation is the "endgame." Complainants' economist, Ms. Kravtin, testified as follows:

> As I understand, APCo [v. FCC] is asking for – well, it sets forth conditions of full capacity. And then, if you satisfy that, you move on to proving lost opportunity. For the purpose of making a valuation of what, then, the utility could seek to recover in excess of marginal costs. ***Ultimately, we have to come to a valuation.*** That would be the endgame here. What is a valuation? So in order, from an economic standpoint, to come to what that valuation would be, you have to have data to examine to make that valuation.

Kravtin Cross, 4/27/06 Tr., 1524-25 (emphasis added).

B. Before Valuation, The "Essential Facilities" Overlay Must Be Removed.

64. Before analyzing the parties' positions on valuation, it is important to debunk one myth that Complainants have injected into this case. The myth appears to be a historical vestige of pole attachment disputes: that utility poles are "bottleneck" or "essential" facilities for cable attachments. The supposition behind regulation of pole attachments (and in turn, the rate which Gulf Power claims is unjust, especially for rivalrous poles) is that utility pole networks are "essential facilities" for cable operators. In the regulatory and judicial decisions preceding this

case, it appears as though the original "essential facilities" justification for regulation was recycled.[12]

65. Here, Complainants attempt to again recycle this historical conclusion without supporting evidence. In opening statement, Complainants counsel alluded to "all the pronouncements you see in the law about . . . poles being essential facilities". Compls. Opening, 4/24/06 Tr., p. 674. Complainants' economic expert testified that "Gulf Power has a monopoly ownership over an essential facility to the cable operators." Kravtin Cross, 4/26/06 Tr., p. 1342. Yet, Complainants' counsel acknowledged that he "can't speak from personal knowledge" and Ms. Kravtin conceded that she performed no independent research to determine whether the historical perception concerning essential facilities was still (if ever) true. Compls. Opening, 4/24/06 Tr., p. 674; Kravtin Cross, 4/26/06 Tr., pp. 1347-51. Instead, Ms. Kravtin appears to rely upon the parroted institutional supposition:

> [I] describe in my testimony ... the economic conditions that make something an essential facility, and I believe those hold here in this case for Gulf Power, and that there has certainly been no evidence presented by Gulf Power that would override considerations of that facts that it happened in other regulatory proceedings addressing these very issues.

Kravtin Cross, 4/26/06 Tr., p. 1351.

66. This case cannot be decided based upon unsupported and recycled historical presumptions. The only factual evidence presented on this issue indicates that Gulf Power's pole network is **not** an essential facility to the cable operators. Most notably, the Complainants can

[12] *See, e.g., Alabama Power v. FCC*, 311 F.3d at 1361 ("Certain firms have historically been considered to be natural monopolies – bottleneck facilities that arise due to network effects and economies of scale.") ("[a]s the owner of these 'essential facilities'").

(and regularly do) build their plant underground versus overhead.[13] Mediacom testified that at least 80% of its new construction in 2003, 2004 and 2005 was underground. GP Ex. 68 (Routh Depo.), pp. 128-29. Roughly 40% of Mediacom's total plant is underground. *Id.*, pp. 50-51. Cox testified that 60% of its total plant in Ft. Walton is underground; 40% of its plant in Pensacola is underground. GP Ex. 67 (O'Ceallaigh Depo.), pp. 13-14. Brighthouse conceded that underground construction was an option. GP Ex. 66 (Burgess Depo.), p. 80. Comcast testified that 15% of its plant is underground. GP Ex. 69 (Smith Depo.), pp. 38-39. Complainants' own experts admitted that cable companies have options. Harrelson Cross, 4/27/06 Tr., pp. 1568-70; Kravtin Cross, 4/26/06 Tr., p. 1352. Complainants have done nothing to rebut this compelling evidence.

67. More compelling is that Complainants' analysis as to whether to build overhead or underground is based more on a "business case" rather than being driven by physical barriers or insurmountable economic barriers. Mediacom testified that its decision to build overhead versus underground is "based purely on a business case." GP Ex. 68 (Routh Depo.), pp. 65-66. Cox testified that when it is evaluating new construction, a "site inspector determines whether or not it would be worth Cox's while to attach to the existing overhead distribution [facilities]" and that the site inspector's opinion is based on cost. *Id.*, 67 (O'Ceallaigh Depo.), pp. 23-24. Cox further testified: "It's just a business case from Cox's perspective." *Id.*

68. Moreover, the cost difference between standard overhead (sometimes called aerial) construction and underground construction is not drastic. For Mediacom, the average cost per mile of overhead construction (which assumes existing pole plant) is $14,000-$15,000; the

[13] Complainants also have the option to install wireless technology, Kravtin Cross, 4/26/06 Tr. p. 1354, as well as construct their own poles. Compls. Ex. 85A (Brooks Cross-Designations), p. 73.

average cost per mile of underground construction is $22,000. GP Ex. 68 (Routh Depo.), p. 69. For Brighthouse, the "internal estimate" is "right around $28,000 for aerial plant and in the 38 to $40,000 [range] for underground." GP Ex. 66 (Burgess Depo.), p. 33. For Comcast, "[u]nderground construction is about $30,000 a mile, $30,035.65 to be exact. . . . Aerial construction 17,000 and some odd few dollars a mile for aerial." GP Ex. 69 (Smith Depo.), p. 41. As Gulf Power's valuation expert, Mr. Spain, testified, these increased initial construction costs (albeit slight) are offset by the decreased risk of loss often associated with underground construction. GP Ex. F (Spain Direct), p. 10; *see also* GP Ex. A (Dunn Direct), pp. 28-29 ("unless, of course, the cable company chose to go underground, which in many instances reduces the risk of loss or damage in a variety of ways.").

69. These are not the type of economic barriers (if they can be considered barriers at all) that invoke the concerns addressed by the essential facilities doctrine. The only evidence presented by Complainants which even remotely touches this issue is Ms. Kravtin's generic testimony that utilities have control over essential facilities to cable operators. Compls. Ex. A (Kravtin Depo.), p. 8. Ms. Kravtin testified: "While an attacher may have the option of going underground in certain cases, that is typically at an expense much greater than the utility's actual costs of accommodating the attacher on its existing pole network." *Id.*, p. 9. But this testimony is belied by the testimony discussed above, and misses the point insofar is it presumes that an attacher is entitled, in every instance, to the cheapest construction option. Notably, Ms. Kravtin did not rely on the price difference between overhead and underground construction or consider the relative benefits of the different options. If an economic entry barrier existed at all, the difference between overhead and underground construction would be the likely dwelling place. On cross examination Ms. Kravtin testified:

Q: Well, the cable operator has an option, don't they?

A: Well, we discussed that yesterday at length. There are options. There are always options. Whether those options are economically and practically feasible is another question.

Kravtin Cross, 4/26/06 Tr., p. 1507. However, Ms. Kravtin conceded that she did not know the difference in cost between overhead and underground construction generally, let alone with respect to the Complainants. *Id.*, pp. 1418-19.

70. Ms. Kravtin's generic testimony regarding Gulf Power's alleged monopoly ownership of an essential facility, in conjunction with her admitted lack of knowledge or research regarding the underlying facts, is not sufficient to overcome the import of the testimony presented by Gulf Power and Complainants' own witnesses. In this case, the evidence shows that Gulf Power's pole network is **not** an essential facility to the Complainants. This conclusion is not merely academic. The essential facilities doctrine is the underpinning of the regulatory regime from which the policy-based, favorable Cable Rate was born. 311 F.3d at 1361-63. That Gulf Power's facilities are not essential severely undermines one of Complainants' main positions in this case – that the Cable Rate is "gracious plenty" even in situations where a pole is rivalrous, crowded or at full capacity.

C. Complainants' Interpretation Of The Standard In *Alabama Power v. FCC* Is Not Supported By Fact, Law, Or Practicality.

71. Complainants argue that the regulated Cable Rate more than compensates Gulf Power for its pole space – even on rivalrous poles – unless Gulf Power can show that it missed out on a specific, identifiable opportunity to sell the specific space occupied by Complainants to another identifiable attacher at a higher rate, or that it had a specific, identifiable and quantifiable higher valued use for that exact space in its own operations. Compls. Ex. A (Kravtin Direct), pp.

45-49. Complainants layer onto these hurdles the requirement that Gulf Power must show that a definite price and term had been negotiated with a potential attacher, and that due diligence revealed that the prospective attacher had the financial wherewithal to meet its obligations under the phantom contract. Kravtin Cross, 4/27/06 Tr., pp. 1524-27. As for higher valued uses, Complainants contend that Gulf Power must come armed with detailed economic analysis concerning specific use on a pole-by-pole basis. Compls. Ex. A (Kravtin Direct), pp. 45-49.

72. Gulf Power contends that once it demonstrates crowding or full capacity, the analysis turns to the proper means of valuing the pole space taken by Complainants. Gulf Power relies upon the pronouncement in *Alabama Power v. FCC* that "if crowded, . . . pole space becomes rivalrous." 313 F. 3d at 1370. Gulf Power asserts that once pole space is determined to be rivalrous, it becomes congruent with land and, therefore, a traditional takings analysis applies. 311 F. 3d at 1369.

73. Gulf Power argues that the target in any takings analysis is "fair market value" and that the Court should look to market evidence (sales comparisons) and fair market value "proxies" (such as replacement costs) to determine just compensation for the pole space taken by Complainants. *See, e.g.*, GP Ex. F (Spain Direct). Gulf Power further contends that the process for determining the appropriate level of compensation can and should be consistent with Congress' intended goal for a "simple and expeditious" regulatory regime. Gulf Power contends that the heavy-handed evidentiary burden suggested by Complainants runs afoul of traditional takings jurisprudence and Congressional goals. Gulf Power contends that such burdensome proof requirements would bog the Bureau down with unwieldy and time consuming litigation.

74. To support their extreme proof requirements, Complainants rely principally on two propositions. First, they rely on an isolated portion of *Alabama Power v. FCC* which says

that a power company must show "(a) another buyer of the space waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." 311 F. 3d at 1370. Second, they rely on jurisprudence which states that the measure of just compensation is "loss to the owner" – most notably a quote from *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961), which says: "[t]he question is, What has the owner lost? not, What has the taker gained?" Complainants use these two propositions as a springboard for arguing that the value of the property at issue (the pole space taken by Complainants) is irrelevant. Complainants instead assert that Gulf Power must show an actual, present, quantifiable lost financial opportunity measured in exact dollars and then, and only then, is there any value to the property in excess of marginal cost.

75. Although Complainants accurately quote isolated language from the authorities they cite, Complainants' legal spin abandons the entirety of the decisions and the history of just compensation jurisprudence. Complainants create unmeetable burdens for Gulf Power and do not advance this proceeding toward the directive of the Hearing Designation Order and the mandate of the Fifth Amendment: to value Gulf Power's pole space.

1. *Alabama Power v. FCC* does not require proof of an actual buyer

76. Complainants argue that, with respect to "another buyer waiting in the wings" Gulf Power must show, on a pole-by-pole basis (1) that there was an actual, present buyer who wanted the same space occupied by Complainants, (2) that the other buyer had agreed to pay a rent higher than the rent paid by Complainants, (3) that the duration of the relationship with the other buyer would exceed the potential occupancy by Complainants, and (4) that the other buyer had the financial wherewithal to meet its obligations. Compls. Ex. A (Kravtin Direct), pp. 45-47. Under Complainants' theory, Gulf Power would (before executing a contract) presumably have

to reach an agreement in principal with this other buyer, then at the last minute back-out of the deal and bring the negotiated terms to court. While backing-out of the deal might save Gulf Power from a breach of contract lawsuit, it might still expose Gulf Power to liability (in the nature of promissory fraud) since Gulf Power was negotiating to sell space that it did not have (or presumably intend) to sell. Though it is unnecessary to opine upon the legal ramifications of such conduct, it is enough to say that this cannot be the evidentiary burden the Eleventh Circuit intended.

77. Further, one of the assumptions in Complainants' proposed evidentiary paradigm is that Gulf Power has negotiated a rate higher than what the Complainants themselves pay. There are at least two problems with this assumption. First, Gulf Power's negotiations with potential attachers are constrained by the existing regulatory regime. In other words, a potential attacher is unlikely to agree to pay in excess of the regulated rate since they (like Complainants) are inclined to believe they are entitled to the regulated rate under any circumstances. Complainants' economic expert, Ms. Kravtin, said as much on cross examination:

> Q: Would it surprise you to learn that the complainants that are in this courtroom today are paying an electric cooperative between $17.50 and $20 [per] pole attachment?
>
> A: No, it would not because those cooperatives are not subject to the section 224 and the cable rate formula.
>
> Q: And that's the only reason it doesn't surprise you?
>
> A: I think that's a pretty major reason.

Kravtin Cross, 4/26/06 Tr., p. 1441.

78. It also appears that Complainants would never concede that any Section 224 attacher who paid an amount higher than the regulated rate did so as a result of arm's-length

negotiations.[14] Gulf Power presented evidence in this case of three telecommunications carriers who are paying, and have paid since year 2001, a per attachment rate of $40.60. GP Ex. B (Bowen Direct), pp. 22-23. These three telecommunications attachers collectively paid the $40.60 rate for 2,598 attachments in 2005. GP Ex. B (Bowen Direct), p. 23. Ms. Kravtin dismisses those transactions, testifying, "I do not believe those represent a fair market proxy because of the conditions that those entities operate [under] in negotiating with Gulf." Kravtin Cross, 4/26/06 Tr., p. 1426.

79. In essence, the burden Complainants propose can never be met. Gulf Power (and all pole owners) would constantly be "chasing its tail" in search of just compensation. This cannot be the intent of *Alabama Power v. FCC,* especially in light of the Eleventh Circuit's specific expectation that a utility would, under certain circumstances, be entitled to just compensation: "a power company whose poles are not 'full' can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full, can seek just compensation." 311 F. 3d at 1371.

80. Finally, *Alabama Power v. FCC* never refers to the buyer "waiting in the wings" as an actual buyer. Instead, *Alabama Power v. FCC* makes reference to the type of buyer urged by Gulf Power – the hypothetical buyer – where it explains that the typical measure of just compensation is fair market value: "Typically, fair market value is used. Fair market value is established by determining what a 'willing buyer would pay in cash to a willing seller' at the time of the taking." 311 F. 3d at 1368 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)). Complainants' economic expert agrees that the "general appraisal method" of fair

[14] If Complainants are instead demanding that Gulf Power produce evidence of a negotiated deal with a non-Section 224 attacher, then this even further complicates (and invalidates) the evidentiary burden proposed by Complainants, since the vast majority of potential attachers (excluding incumbent local exchange carriers) are covered by Section 224.

market value focuses on the hypothetical buyer and seller. Kravtin Cross, 4/26/06 Tr., pp. 1407-09. As Gulf Power noted in its opening statement at trial, requiring proof of an actual buyer at a negotiated price could severely disrupt settled takings law. The "actual buyer" standard urged by Complainants would turn takings law on its head.[15]

81. For example, if the government condemned a person's house, but the owner was unable to prove the existence of an actual other buyer (in whatever time frame was allowed by the government), then Complainants would relegate the homeowner to his costs of moving plus the amount actually paid for the house whenever it was purchased (even if the current cost of the home was significantly higher). To this, Complainants would argue that pole space is decidedly different from land, and that the analogy therefore does not apply. But *Alabama Power v. FCC* addresses this very point, saying: "By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself), the analogy to land becomes more appropriate. In the 'full capacity' situation, it is the zero-sum nature of pole space, like land, that is key." 311 F. 3d at 1370. If the "analogy to land becomes more appropriate" once there is a showing of full capacity (rivalry) on some or all of Gulf Power's poles, then the next step in the analysis (as with the taking of land) is a determination of value – what is the value of the pole space taken by Complainants?

[15] To the extent actual buyers waiting in the wings (wherever the "wings" may be located) are required, Gulf Power proffered its permit records as evidence of continued demand for its pole space. GP Ex. 4. Complainants' engineering expert also admitted increased demand for pole space. GP Ex. 70 (Harrelson Depo.), pp. 129-30.

2. Gulf Power Proved Higher Valued Uses

82. *Alabama Power v. FCC* also discusses the potential for a utility to have a "higher-valued use" of the taken pole space in its own operations. 311 F. 3d at 1370. Unfortunately, this criteria is even less defined than the "buyer waiting in the wings" criteria. Complainants, consistent with their vision of a virtually unmeetable burden of proof, contend that any demonstration of a higher-valued use for a pole space must be pole-specific and include, in essence, a present business plan for the pole space. This cannot be what the Eleventh Circuit envisioned. If it was, the parties would become mired in pole-by-pole mini-trials over the validity and feasibility of the proposed alternative use of the associated pole space, and the economic benefits.

83. Gulf Power presented convincing evidence of higher valued uses for its pole space. Ben Bowen testified that Gulf Power builds its overhead distribution system "[t]o serve its electric ratepayers" and that "[t]hough not every pole has a transformer immediately after the pole is installed, nearly all 40 foot poles (or greater) can and should be able to support a transformer." GP Ex. B (Bowen Direct), pp. 5, 22-26. Mr. Bowen testified, that installation of transformers and street lights are higher-valued uses for Gulf Power's pole space. Bowen Cross, 4/25/06 Tr., pp. 1114-15. Mr. Bowen also testified:

> Once the Complainants attach to our poles, it is difficult to get them off. Gulf Power needs to make use of the space where Complainants are attached (like installation of transformer or street light) we have to perform some type of make-ready. We are not able to put this space to higher valued uses, including exclusion of anyone we don't want on our poles.

GP Ex. B (Bowen Direct), pp. 38-39. Complainants do not attempt to rebut Gulf Power's evidence. Instead, Complainants argue that Gulf Power's evidence just isn't good enough. As

set forth above, Complainants' interpretation of the "higher-valued use" criteria is impractical, unusable and at odds with the law.

84. Finally, Complainants miss the self-proving higher valued use present in this record – exclusion. *Alabama Power v. FCC* explicitly recognizes this fact:

> Perhaps fearing that electric companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. *See Southern Company v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002) ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act.").

311 F. 3d at 1363-64. The *Alabama Power v. FCC* Court's judicial notice of the potential higher value of exclusion is reflected in this case. Ms. Kravtin testified on cross-examination:

> Q: Ms. Kravtin, do you view an electric utility like Gulf Power as a potential competitor to the complainant cable operators?
>
> A: Yes. Certainly Gulf Power and other electric utilities can be competitors in the prevision of communication services.
>
> Q: They can have their own cable network or their own telecommunications network, couldn't they?
>
> A: Yes.

Kravtin Cross, 4/27/06 Tr., pp. 1505-06.

D. Gulf Power's Replacement Cost Methodology is an Acceptable Proxy For Just Compensation.

85. This is a takings case. *Alabama Power v. FCC* noted that "[t]ypically fair market value is used" but that "[t]here is not an active, unregulated market for the use of 'elevated communications corridors,' however, and so an alternative to fair market value must be used." 311 F. 3d at 1368. Unlike in *Alabama Power v. FCC*, in this case there is evidence of an

unregulated market for pole attachments. Gulf Power presented evidence that at least three telecommunications carriers (Adelphia, KMC and Southern Light) are voluntarily paying an annual per attachment charge of $40.60. GP Ex. B (Bowen Direct), pp. 22-23. Complainants have not offered any evidence to suggest that this represents "hold-up" value or monopoly extortion other than the unsupported conclusions of Ms. Kravtin.[16]

86. Gulf Power also presented evidence regarding its "joint use" relationships with three incumbent local exchange carriers – Bellsouth, Sprint and GTC. Of the three ILECs, GTC is most analogous to a cable attacher in that, unlike Bellsouth and Sprint, GTC does not own a significant number of poles to which Gulf Power is attached. GP Ex. B (Bowen Direct), pp. 21-22. GTC pays a per pole annual rate of $29.70 as well as giving other consideration to Gulf Power in the joint use agreement, such as agreeing to accept 45% of liability arising out of the poles. GP Ex. 34 (GTC Agreement). Complainants argue that since GTC contracts for three feet of usable space on a pole (as opposed to the presumed one foot of usable space occupied by a cable attacher), the rate, when divided by three, does not differ significantly from what the Complainants have been paying. But this argument neglects one of Gulf Power's principal positions in this case with respect to space allocation – that the cost of the unusable space on a pole should be born equally by all parties attached to the pole. Since the vast majority of space on any given pole is unusable, a reduction in the GTC rate to account for the differing levels of usable space occupancy (as between GTC and the Complainants) is not significant.

87. Gulf Power also established that Complainants themselves pay significantly more to certain electric cooperatives for identical pole attachments. Mediacom, Brighthouse and Cox

[16] Although Complainants suggest these limited transactions do not constitute a sufficient market, their economist testified that a market can consist of just one buyer and one seller. Kravtin Cross, 4/26/06 Tr., pp. 1440-41.

each have attachment agreements with Choctawhatchee Elec. Cooperative, Inc. ("CHELCO") under which they pay CHELCO rates between $15 and $17.50 per attachment (increasing to $20 in 2007 for Mediacom and Cox). GP Ex. 66 (Burgess Depo.), p. 19; GP Ex. 67 (O'Cealleigh Depo.), p. 16, 132-33; GP Ex. 68 (Routh Depo.), p. 23; GP Exs. 57, 58 & 59. Brighthouse also pays Florida Public Utilities an annual attachment rate in excess of $18. GP Ex. 66 (Burgess Depo.), p. 20. Gulf Power's valuation expert testified concerning his research into the unregulated dealings between electric cooperatives and municipal pole owners, on the one hand, and attachers, on the other. Spain Re-Direct, 4/26/06 Tr., pp. 1263-68. Mr. Spain found "rates in the co-op world were typically in the mid to high teens, frequently as high as about $20" with an "average somewhere in the mid teens." *Id.*, p. 1264. Importantly, these unregulated, negotiated transactions apply to every pole to which the attachers gain access – not just rivalrous poles. Complainants presented no evidence that these rates were the product of extortion, or otherwise unreliable as comparable sales. Cox even testified that these were "negotiated" rates. GP Ex. 67 (O'Callaigh Depo.), p. 133. With respect to the rates paid to CHELCO and Florida Public Utilities, Brighthouse testified:

> Q: Are we are talking about attachments that are identical to the ones that you are attaching to Gulf Power's poles?
>
> A: Yes.

GP Ex. 66 (Burgess Depo.), p. 81. Cox testified:

> Q: Are the attachments that Cox makes to poles owned by Choctawhatchee Electric any different than the attachments Cox makes to Gulf Power poles?
>
> MR. SEIVER: Objection to the form
>
> THE WITNESS: No.
>
> BY MR. LANGLEY:

Q: Any physically different?

A: No.

GP Ex. 67 (O'Cealleigh Depo.), p. 16.

88. This is significant evidence bearing on the question of what amount of compensation is due Gulf Power for rivalrous poles. These unregulated negotiated rates exceed the Cable Rate by many multiples. Although instructive, the evidence concerning comparable transactions is still somewhat limited. As such, consistent with the Eleventh Circuit's analysis, a fair market value proxy is appropriate. 311 F. 3d at 1368.

89. Gulf Power submitted the only expert valuation testimony in the case through Mr. Roger Spain. Ms. Kravtin did not hold herself out as a valuation expert and did not purport to testify as a valuation expert. Kravtin Cross, 4/26/06 Tr., p. 1340. Mr. Spain testified that the most accurate proxy for determining the value of the pole space taken by Complainants is a replacement cost methodology, and that the replacement cost methodology urged by Gulf Power is "consistent with the cost methodology for estimating fair market value." GP Ex. F (Spain Direct), pp. 7, 13-15. Kravtin does not dispute Mr. Spain's valuation testimony.[17] Instead, she rejects (as do Complainants in their arguments) the fair market value standard altogether on the grounds that there is no indication that a market could appropriately function. Even if this were true (a proposition which is belied by the market evidence in this case), it would miss the point. Gulf Power does not contend that a vibrant market for pole space exists. Nor does Mr. Spain rely principally on sales comparables in rendering his opinion. Rather, Mr. Spain testified that, while comparable unregulated sales were instructive as corroborative evidence, they should not

[17] Since she is not a valuation expert, and holds no certifications in the fields of asset valuation or appraisal, she would have been in a poor position to engage Mr. Spain in the art of valuation.

be the principal focus in valuing the pole space taken by Complainants. *Id.*, p. 7. Mr. Spain instead opined that a replacement cost methodology was most appropriate: "As a general rule, the cost approach is the most appropriate method for a valuation of an in use asset. The cost approach is frequently used to value unique assets for which there is no quantifiable income stream." *Id.*[18]

90. Based on the evidence in this case, while perhaps not perfect, a replacement cost methodology hits closer to the mark than the Cable Rate for determining the fair market value of the space taken by Complainants on Gulf Power's poles. As stated by Terry Davis (an accountant with Gulf Power who spent several years in Gulf Power's Rates and Regulatory department): "The replacement cost methodology ... seeks to reflect today's costs both in terms of investment and operating expenses." GP Ex. E (Davis Direct), p. 5. Mike Dunn testified that replacement costs are "more appropriate than historical or embedded costs" because "[h]istorical or embedded costs have little to do with the value of the property at the time a taking occurs." GP Ex. A (Dunn Direct), pp. 27-28. Since just compensation is "measured at the time of the taking,"[19] something approximating current costs is appropriate. The Commission has even noted the benefits of a forward looking cost methodologies for pole attachments. *See* footnote 3, *supra*. A cost-based approach is familiar to the Bureau, and has the added benefit of being based on incontrovertible cost data.

[18] Mr. Spain also shared that several states that regulate pole attachments have departed from the FCC Cable Rate in many of the same ways urged by Gulf Power, including use of a replacement cost methodology. Spain Re-Direct, 4/26/06 Tr., pp. 1264-68.

[19] 311 F. 3d at 1368 (citing *United States v. Miller*, 317 U.S. 369, 373 (1943)).

91. Gulf Power's proposed replacement cost methodology follows the same basic formula as the Cable Rate:

Investment x Carrying Charge x Space Allocation Factor

The main differences are in the investment and space allocation factors. GP Ex. E (Davis Direct), p. 6; GP Ex. A (Dunn Direct), pp. 26-32; GP Exs. 1-3 (Dunn Affs.). Specifically, Gulf Power's replacement cost methodology uses the previous year's actual cost data (as a proxy for "current" costs) and allocates the unusable space on the pole equally among the average number of attachers per pole. *Id.*

92. Complainants' main general objections to Gulf Power's replacement cost methodology are that (1) it produces an annual rate that is many times higher than the Cable Rate, (2) the same methodology has been rejected previously by the Commission, (3) it constitutes monopoly rents, (4) it relies on system averages, rather than a pole-by-pole computation, and (5) it unlawfully seeks to extract "value to the attacher." The fact that the replacement cost methodology yields a rate many times higher than the Cable Rate is inconsequential. This could just as easily demonstrate that the "favorable" Cable Rate is unfairly or artificially deflated. The fact that the Commission has previously rejected a replacement cost methodology is inconsequential. To the extent the Commission commented on similar methodologies in the past, it certainly was not in the context of *Alabama Power v. FCC* or the evidence presented in this case. This is the first time the Commission has endeavored to interpret or apply *Alabama Power v. FCC*. Most importantly though, *Alabama Power v. FCC* (the controlling precedent) did not reject this methodology. To the contrary, the court stated, "[a]t first blush, the power companies appear to have a solid argument" and "we might ordinarily be sympathetic to this argument." 311 F. 3d at 1367-68. What "complicated" Alabama Power's

case in *Alabama Power v. FCC* was "one known fact, one unknown fact, and one legal principle" – not an underlying inapplicability of any particular methodology. 311 F. 3d at 1368.

93. Complainants' concern about monopoly rents is likewise unfounded, and unsupported by the evidence, since neither the Commission nor a reviewing court will allow monopoly rents. Gulf Power does not have unfettered discretion to charge whatever rent it pleases, even on those poles for which fair market value is owed. The evidence also shows that Gulf Power's replacement cost methodology is conservative, rebutting Complainants' argument of monopoly rent. *See* GP Ex. F (Spain Direct), pp. 15-18. The use of system averages in determining the value of pole space taken by Complainants does not undermine Gulf Power's replacement cost methodology. To the contrary, it makes the methodology more appealing in that it is consistent with the Commission's existing practices of using system averages and presumptions and (must importantly) that it will not mire the Commission in countless pole-by-pole mini-trials.

94. Complainants' "value to the attacher" objection is a bit more nuanced and a subtle effort at obfuscation. Complainants are correct in arguing that the proper measure of just compensation is loss to the owner, rather than gain to the taker. 311 F. 3d at 1369. There very well may be circumstances where those two concepts are not congruous. But *Alabama Power v. FCC* seems to contemplate that in the rivalrous pole scenario (such as in the case with land), the two concepts would indeed be congruous. 311 F. 3d at 1370 ("In the 'full capacity' situation, it is the zero-sum nature of pole space, like land, that is key."). If Gulf Power were really trying to extract "value to the attacher," its proposed methodology would not be based on any type of cost allocation. Instead, it would seek to charge Complainants $1 less than their next cheapest alternative. This is not what Gulf Power's replacement cost methodology is designed to capture;

it is designed to capture the value of the space taken by Complainants. Here, where the replacement cost methodology is an accepted (if not preferred) means of valuing a unique, in-use asset, the "value to attacher" mantra is unfounded.

95. Finally, in many ways, Gulf Power's replacement cost methodology is conservative. As Mr. Spain testified, Gulf Power's calculation does not capture the value of the most desirable poles to which attachers take access (cherry-picking) and fails to account for other items a standard valuation would quantify. GP Ex. F (Spain Direct), pp. 15-18.

E. Gulf Power's Departure From the Cable Rate is Supported By the Evidence.

96. Complainants contend that the Cable Rate is more than just compensation in the absence of proof of an actual buyers or quantifiable higher-valued use, as discussed above. Ms. Kravtin generally endorsed the Cable Rate as reflecting economically appropriate cost allocation principles. Compls. Ex. A (Kravtin Direct), p. 15-19.

97. Gulf Power argues that the Cable Rate suffers from numerous specific deficiencies which render it unfit as a measure of just compensation under the Constitution. GP Ex. F (Spain Direct), pp. 11-13, 15. Among the specific deficiencies Gulf Power cited are: the Cable Rate's use of embedded or historical costs; the Cable Rate's exclusion of certain costs from the investment side of the equation (most notably the absence of an allocation for general plant and the absence of any cost for investment in grounds and arrestors); and the fact that the Cable Rate (unlike the Telecom Rate) allocates the cost of the entire pole based solely on the percentage of usable space occupied. *Id.* Moreover, Gulf Power contends that certain of the presumptions embedded in the Cable Rate are at odds with the actual data. GP Ex. A (Dunn Direct), pp. 26-34; GP Exs. 1-3 (Dunn Affs.); GP Ex. B (Bowen Direct), pp. 38-42.

98. Gulf Power has proven that the Cable Rate is an unreliable and insufficient measure of compensation for rivalrous poles for at least two reasons. First, the Cable Rate relies upon historical or embedded costs. As *Alabama Power v. FCC* notes, "[t]he appropriate alternative, whatever that may be, rarely countenances the use of historical costs, as several Supreme Court cases make clear." 311 F. 3d at 1368. In other takings cases, historical costs have been called "the false standard of the past." *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 (1949). Gulf Power's valuation expert, Mr. Spain, testified that the "use of historical costs is inconsistent with the accepted application of the cost methodology for estimating fair market value." GP Ex. F (Spain Direct), p. 11. There is simply no evidence in the record which would support the use of historical costs in determining the proper measure of compensation for Gulf Power's pole space.

99. Second, the Cable Rate allocates the cost of the entire pole based solely on the percentage of usable space occupied. The Telecom Rate, which applies to physically identical attachments, allocates the unusable space in a more equitable manner. Congress, in creating the Telecom Rate (which was new to the 1996 Act) observed that "the unusable space on a pole is of equal benefit to all attaching parties to the pole." H.R. Rep. No. 104-204 1995 U.S.C.C.A.N. at 58-59; H.R. Con. Rep. No. 104-458, 206, 1996 U.S.C.C.A.N., at 20.

100. The fact that the Cable Rate does not "fully allocate" the costs associated with the space occupied by cable companies is evidenced by Mr. Kravtin's strained effort to reconcile the differences between the Cable Rate and the Telecom Rate. Ms. Kravtin testified on direct and cross examination that *both* the Cable and the Telecom Rates "reflects economically appropriate cost allocation principles." Compls. Ex. B (Kravtin Direct), p. 15; Kravtin Cross, 4/26/06 Tr., p. 1399. Mr. Spain also noted that unregulated pole owners have noted "inherent flaws in the

FCC's" formula and have modified their cost based methodologies in the same manner as urged by Gulf Power's replacement cost methodology. GP Ex. F (Spain Direct), pp. 22-23; Spain Re-Direct, 4/26/06 Tr., pp. 1264-68.

101. It is undisputed that the Telecom Rate is a more complete cost allocation formula. It is undisputed that a cable television will occupy the same space on Gulf Power poles as a telecommunications wire. As such, both cost formulas cannot "reflect economically appropriate cost allocation." Considering the totality of the record evidence in this case, the Cable Rate is not the answer to the second part of the issue set forth in the HDO.

CONCLUSION

102. The Hearing Designation Order defined the issue set for hearing 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.

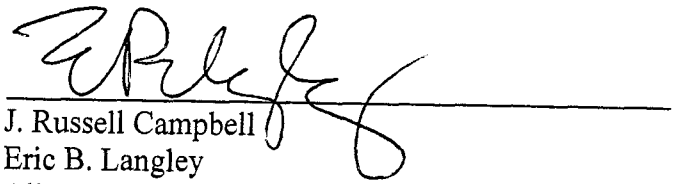
The Hearing Designation Order placed the burden of proof upon Gulf Power. Gulf Power has met its burden of proof on all issues.

103. The totality of the evidence received in this proceeding, applied in the context of *Alabama Power v. FCC*, establishes that Gulf Power is entitled to compensation above marginal costs on "rivalrous" poles – those poles which would require make-ready to host an additional attachment. The precise manner in which the parties determine the number of rivalrous poles to which Complainants are attached can be negotiated by the parties, but the Court strongly encourages the use of statistical samplings or system averages in order to avoid the cost of system-wide surveys by both parties.

104. The amount of compensation due for rivalrous poles should be guided by fair market value or a reasonable proxy thereof. Valuation is not an exact science. The Court does

not presume, in these findings of fact and conclusions of law, to set a specific rate Complainants must pay for crowded or full capacity poles. Such details are best left to negotiations between the parties – negotiations which appear to have worked for both sides when freed of the constraints (or benefits, depending on perspective) of the regulated rate. The Court does find that, based on the record in this case, the Cable Rate is an unacceptable benchmark. The Court further finds, based on the evidence in this case, that Gulf Power's replacement cost methodology provides the best guidance to the parties for determining the value of the property at issue. The Court further finds that the parties should consider in their price negotiations the so-called "unregulated" transactions in evidence in this case (specifically, Complainants' own agreements with CHELCO and Florida Public Utilities, Gulf Power's agreements with the ILECs, and Gulf Power's agreements with the three telecommunications carriers who, for whatever reasons, do not insist on the regulated rate).

105. If the parties are unable to reach agreement through the negotiations ordered herein, then they may avail themselves of the Commission's complaint procedure to resolve the issues of (1) what number of poles are "rivalrous" as defined in this decision, and (2) the proper quantification of fair market value (with the parameters defined in this decision) for the space taken on those poles. It is the Court's hope, though, that this decision provides enough guidance that further proceedings on these issues will not be necessary. That said, you can take a horse to water, but you can't make him drink.



J. Russell Campbell
Eric B. Langley
Allen M. Estes
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2015
Telephone: (205) 251-8100
Facsimile: (205) 226-8798

Ralph A. Peterson
BEGGS & LANE, LLP
P.O. Box 12950
Pensacola, Florida 32591-2950
Telephone (850) 432-2451
Facsimile: (850) 469-3331

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Proposed Findings and Conclusions of Law has been served upon the following by United States mail and E-mail on this the 30th day of June, 2006:

Lisa Griffin Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 **Via E-mail**	Shiela Parker Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 **Via E-mail**
Rhonda Lien Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 **Via E-mail**	Marlene H. Dortch, Secretary Federal Communications Commission Office of the Secretary 445 12th Street, SW Washington, D.C. 20554
James Shook Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 **Via E-mail**	David H. Solomon Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554
Director, Division of Record and Reporting Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, Florida 32399-0850	Federal Energy Regulatory Commission Docket Room 1A-209 888 First Street, NE Washington, D.C. 20426
John D. Seiver Geoffrey C. Cook Rita Tewari COLE, RAYWID & BRAVERMAN 1919 Pennsylvania Avenue, N.W. Suite 200 Washington, D.C. 20006 **Via E-mail**	

OF COUNSEL