EB 04-381

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Chief, MDRD
Enforcement Bureau

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

Complainants,

P.A. No. 00-004

v.

GULF POWER COMPANY,

Respondent.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Enforcement Bureau

DESCRIPTION OF EVIDENCE GULF POWER SEEKS TO PRESENT IN SATISFACTION OF THE ELEVENTH CIRCUIT'S TEST

Respondent Gulf Power Company ("Gulf Power"), pursuant to the Bureau's December 9, 2003 letter memorializing its ruling on Gulf Power's Petition For Reconsideration And Request For Evidentiary Hearing, submits the following description of evidence it seeks to offer in satisfaction of the test articulated by the Eleventh Circuit in Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir. 2002), *cert denied*, 124 S. Ct. 50 (2003) ("APCo v. FCC"):[1]

Introductory Notes

1. In APCo v. FCC, the Eleventh Circuit set forth the following test:

> In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

[1] By order of December 19, 2003, the Bureau extended Gulf Power's submission deadline to January 9, 2004.

311 F.3d at 1370. Gulf Power maintains that the Eleventh Circuit's test runs afoul of established just compensation jurisprudence. Nothing herein, or submitted by Gulf Power hereafter, should in any way be construed as acquiescence to the Eleventh Circuit's test or the correctness of APCo v. FCC. Despite its position that the Eleventh Circuit's ruling is flawed and erroneous, Gulf Power nonetheless undertakes to satisfy the test in this proceeding.

2. The posture of this proceeding is inverted in two ways. First, it is respondent, rather than complainant, who appears to bear the burden of proof (and a heavy burden at that). This burden-shift is contrary to the Commission's procedural rules. See, e.g., 47 C.F.R. § 1.1409. Second, it is respondent, rather than complainant, who is forced to define the issues. The complexity of this unusual role-reversal is compounded by the fact that Gulf Power does not know how the Commission intends to interpret the Eleventh Circuit's test.

3. In addition to being vague and internally inconsistent, the Eleventh Circuit's test appears to be inconsistent with the Commission's own procedures. For example, there is considerable friction between the Commission's traditional reliance on presumptions, and the Eleventh Circuit's apparent "each pole" evidentiary burden. To this end, Gulf Power assumes presumptions still have a place in pole attachment complaint proceedings, and that presumptions inure to the benefit, and work to the detriment, of all parties equally at all stages of the proceeding. Anything less would be unjust.[2]

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[2] It would be patently unfair for complainants to be able to satisfy their burden through presumptions and system-wide averages, yet require a per-pole showing for each of Gulf Power's 138,000+ poles which host CATV and/or Telecom attachments.

Description Of Evidence[3]

4. Evidence concerning the 1998-2002 build-out for Knology of Panama City: Gulf Power seeks to present documentary and testimonial evidence concerning its most substantial make-ready project (Telecom or CATV) to date. In particular, the Knology build-out involved more than 14,000 new attachments (Knology had acquired a company with roughly 5,100 existing attachments). A substantial number of these new attachments required make-ready work in the form of pole change-outs due to full capacity or crowding.[4] The exact number of change-outs required is not known at this time, as it will require a manual review of hundreds of work orders. Whatever the exact number proves to be (whether 100 or 1,000), this is indisputable evidence of "full capacity" or "crowding" as contemplated by the Eleventh Circuit's test.[5] Knology's attachment request evidences not only "another buyer waiting in the wings" but also a buyer at a higher price (Telecom Rate).[6] Gulf Power's willingness to change-out a pole (to accommodate Knology) cannot, as a matter of logic and fairness, be viewed to eviscerate the pre-existing "full capacity" or "crowding," especially since Gulf Power has the

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[3] The evidence described in this submission is evidence that Gulf Power can develop and present through its own records and witnesses. This description does not include evidence which Gulf Power might develop through deposition and paper discovery against complainants, if allowed by the Bureau.

[4] Pole "capacity" is more broad than pole "space" alone. Capacity is also a function of weight and wind loading. In other words, it is possible that a pole is "crowded" or at "full capacity" even though, to the eye, there appears to be usable space remaining on the pole.

[5] APCo v. FCC uses the terms "crowded" and "full capacity" interchangeably at various places in the opinion. The Eleventh Circuit did not clarify whether these terms identify two different pole conditions, or mean the same thing.

[6] As the APCo v. FCC court noted:

> When a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm – a missed opportunity that does not exist in the nonrivalrous scenario. 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.

311 F.3d at 1370. This is precisely the scenario in the Knology built-out context.

unqualified right to deny access for reasons related to capacity.[7] Moreover, on at least the same number of poles, there was "crowding" prior to the attachment immediately preceding Knology's permit request. In other words, where a change-out was required due to lack of capacity, the last previous attacher was occupying the sole remaining attachment space on the pole, and thus the pole was crowded even before that last attachment. This evidence concerning the Knology build-out satisfies parts (1) and (2)(a) of the Eleventh Circuit's test, with respect to at least the number of capacity change-outs.[8]

5. Evidence concerning make-ready work for KMC Telecom II, Inc., Adelphia Business Solutions, and Southern Light, LLC: Gulf Power seeks to present documentary and testimonial evidence concerning make-ready work for its other significant Telecom attachers (in addition to Knology). This make-ready work, like the make-ready work undertaken for Knology, involved pole change-outs due to lack of capacity. Such change-outs evidence "crowding" and "full capacity" (part (1) of the test), as well as "another buyer waiting in the wings" (part (2) (b) of the test).[9]

6. Evidence concerning make-ready work for Gulf Power's CATV attachers: Gulf Power currently has twelve (12) different CATV attachers within its service area (Comcast Cablevision of Panama City, Inc., Comcast JOIN Holding, Inc., Community Cable Corp., Cox Communications Gulf Coast, LLC, Mallard Cablevision, LLC, Mediacom, Springfield Cable, Inc., Time Warner, Time Warner of Cantonment, Torrence Cablevision USA, Inc., City of

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[7] If voluntary expansion of capacity erases pre-existing "crowding" or "full capacity," then there is a disincentive to Gulf Power expand. If Commission policy (not to mention Congressional policy) favors expansion, then Gulf Power's operational cooperation should not be "counted against it" in the analysis of whether Gulf Power is entitled to something exceeding marginal cost.

[8] This type of evidence does not even account for the number of poles which required make-ready in the form of rearrangement of electrical facilities. Nothing in the Act requires a utility to rearrange its facilities to make room for a new CATV or Telecom attacher.

[9] Also, as noted in paragraph 11, *infra*, KMC, Adelphia and Southern Light pay Gulf Power's just compensation charge of $40.60 per pole.

Valparaiso, and Campbellton Cable). The number of attachments for each attacher ranges from 65,790 (Cox) to 14 (Campbellton). Each time Gulf Power changes-out a pole (due to lack of capacity) to accommodate one of these attachers, that pole was "crowded" or at "full capacity." Gulf Power seeks to present documentary evidence (work orders, etc.) and testimony of such change-outs in satisfaction of part (1) of the test.

7. Evidence concerning geographic overlap of CATV attachers: Gulf Power seeks to introduce documentary (charts, works orders, etc.) and testimonial evidence of the geographic overlap of its CATV attachers.[10] Areas of overlap demonstrate that the number of CATV attachers (for any given pole which hosts at least one CATV attachment) exceeds the Commission's one presumptive CATV attachment. This fact even further compacts the mathematical analysis set forth in Gulf Power's Reply to Complainants' Opposition at pp. 6-7.[11] Such evidence shows "crowding" or "full capacity" as contemplated by part (1) of the Eleventh Circuit's test.

8. Evidence concerning Gulf Power's load studies and business plan: Gulf Power routinely conducts load studies, and prepares reports regarding these studies. These load study reports help determine whether to build new lines and substations, whether to increase the capacity of existing facilities, and how such lines and substations will be built. Gulf Power seeks to present as evidence the load study reports themselves, as well as testimony from Distribution Engineers and Distribution Planners regarding the planning/economic impact of unforetold third-party attachments. Every utility pole holding primary or secondary lines has the potential to hold

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[10] In the Opposition to Gulf Power's Petition for Reconsideration, complainants stated that they "operate cable systems in distinct, non-overlapping geographic areas." (Opposition, p. 15). While this may be true for the named complainants (and perhaps even for members of the Florida Cable Telecommunications Association), it is not true with respect to the entirety of CATV attachers within Gulf Power's service territory.

[11] To the extent the Commission altogether abandons the application of presumptions for purposes of Gulf Power's evidentiary burden, Gulf Power intends to offer proof of the facts underlying the mathematical analysis set forth at pp. 6-7 of its Reply.

a transformer (and thus permit customer service from the pole).[12] However, if an attacher demands access prior to a customer's service need arising, Gulf Power may be forced to change-out the pole (to accommodate a transformer) at its own expense. Gulf Power can prove this point, and demonstrate that this situation creates actual operational problems/expense, both through its specifications book, the load study reports, and through testimony. In the absence of the Act's mandatory access requirement, Gulf Power would at least have the option of making its own decision as to whether the value in "reserving" pole space for future use exceeds the marginal economic benefit of hosting a subsidized attacher.[13] This evidence relates to the "higher-valued use" element in part (2)(b) of the Eleventh Circuit's test.[14]

9. Photographic and engineering evidence depicting attachment arrangements on distribution poles: Gulf Power seeks to introduce evidence of what actual distribution poles look like, as well as testimony describing the pervasiveness of the depicted attachment arrangements. This evidence demonstrates "crowding" or "full capacity" under part (1) of the test. While the Commission may be fully aware of what a typical utility pole looks like, the Eleventh Circuit --

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[12] State law requires Gulf Power, as its core business, to use its facilities to provide retail electric service.

[13] This is not just a possibility on a going-forward basis. It happens regularly. Gulf Power intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments. Also, the existence of CATV and Telecom attachments necessitates a 40" safety zone, which further reduces the amount of space available for Gulf Power's core business on its existing poles. Gulf Power will present evidence of the 40" Code requirement, and its impact on core business operations.

[14] Part (2)(b) of test may, in fact, be self-proving. The Eleventh Circuit, in APCo v. FCC, stated:

> Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. See Southern Co. 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. If the Eleventh Circuit can take judicial notice that there is a higher value to the utility in excluding the attacher than in allowing the attacher at a marginal rate, why must Gulf Power offer proof of such a point?

which hypothesized about a one-million foot pole with unlimited usable space -- may not. Should this proceeding end up in an appellate court, this photographic and engineering evidence may be helpful to an understanding of the practical implications of the court's analysis.

10. Testimony regarding the crowding on Gulf Power's poles: Gulf Power seeks to introduce precise, yet simple, testimony (from fact and expert witnesses) regarding the crowding on its network of poles, and the rivalrous nature of its finite pole space. The APCo v. FCC court criticized Gulf Power's sister company for failing to even allege crowding. 311 F.3d at 1370 ("This leads us to the important unknown fact: nowhere in the record did APCo allege that APCo's network of poles is currently crowded. It therefore had no claim."). Gulf Power aims to avoid this pitfall not only by making the allegation of crowding, but also by offering proof of the allegation.[15]

11. Evidence regarding the existence of an unregulated market for pole space: Gulf Power seeks to introduce documentary evidence (agreements, invoices, remittances, etc.) and testimony showing that other attaching entities are voluntarily paying an annual pole attachment charge of $40.60. More than 2,200 attachments are invoiced and paid at the $40.60 charge. The three largest attachers who pay this charge are KMC Telecom II, Inc. (883), Adelphia Business Solutions (220),[16] and Southern Light, LLC (1,153). This evidence demonstrates an active, unsuppressed market price for the pole space at issue.[17] At a bare minimum, this evidence demonstrates that other attachers on at least these same 2,200+ poles, should be paying a higher

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[15] This evidentiary requirement was unknown to Alabama Power (and for that matter to all parties and the Commission) at the time of its submission of evidence.

[16] Adelphia -- which is paying the $40.60 charge -- is a member organization of complainant Florida Cable Telecommunications Association.

[17] Evidence regarding 2,200+ pole attachments far exceeds an "insignificant number of poles priced at arbitrary 'per pole' levels to generate minimum charges to cover the 'floor' of transactional costs." (Opposition, p. 8). In fact, there are a number of attachers with *fewer* attachments paying the regulated rate. Gulf Power intends to present evidence of this fact to rebut complainants' argument.

price.[18] Though this evidence certainly fits within part (2)(a) of the test, its reach is much further insofar as it evidences an *actual* market.

12. Other evidence bearing on the factors set forth in the Eleventh Circuit's test: Gulf Power asks for an appropriate degree of flexibility in its evidentiary presentation. Without knowing how the Commission intends to interpret the test (or even whether the Commission intends to continue its reliance on presumptions), Gulf Power is at a severe disadvantage. However, Gulf Power fully intends to focus its evidence on the Eleventh Circuit's test, without rearguing its earlier positions (except to the extent those positions bear evidentiary light on the test).

Conclusion

13. Gulf Power believes that the categories of evidence set forth above will more than satisfy the Eleventh Circuit's test. Nevertheless, the injection of this newly announced test into this proceeding places the Commission and the parties in an unusual, if not confusing, posture because of the burden-shift (addressed above) and the fact that neither the Commission nor the complainants have presented their positions on how the Eleventh Circuit's test applies in the present context.

14. Accordingly, Gulf Power requests that the Bureau modify the directions set forth in the December 9, 2003 letter by (1) directing the complainants and Commission staff to set-out their positions regarding the interpretation and application of the Eleventh Circuit's test, and (2) directing the complainants to file and serve a designation of evidence they believe is relevant to the test, and allow Gulf Power an opportunity to comment and respond to those submissions.

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[18] It would defy the principles of just compensation to ignore a price reached through arm's length negotiation between a willing buyer and willing seller for identical pole space on the *same pole*.

15. Because the issues under the new Eleventh Circuit test are currently not well-defined in this proceeding, both the Commission and the complainants may differ with Gulf Power as to whether certain categories of evidence are relevant to the test. However, because of these nebulous circumstances, Gulf Power asks for reasonable latitude in its evidentiary presentation. Gulf Power also reserves its right to offer additional evidence in response/rebuttal. Of course, the Commission may reject evidence in its order, but a complete record will shape the issues for appeal (if either side appeals an adverse order) and serves the interests of fairness and due process.

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