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

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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., Complainants, v. GULF POWER COMPANY, Respondent.	E.B. Docket No. 04-381

To: Office of the Secretary

DOCKET FILE COPY ORIGINAL

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

GULF POWER COMPANY'S RESPONSE TO COMPLAINANTS' MOTION TO COMPEL

Gulf Power Company ("Gulf Power") responds to complainants' July 11, 2005 motion to compel as follows:

Introduction

Complainants' 73 page motion to compel takes issue with 40 out of 48 interrogatory responses, and 26 out of 35 responses to requests for production. Gulf Power served the discovery responses at issue on April 18, 2005. FCC rules governing hearing proceedings require that motions to compel must be filed within 7 days (interrogatories) and 5 days (request for production) of the responses and objections. Complainants sought (and Gulf Power consented to) extensions of complainants' motion to compel deadline in order to accommodate a May 27 & 28, 2005 document review in Gulf Power's service territory (and subsequent copying of documents). But the vast majority issues raised in complainants' motion to compel have absolutely nothing to do with the documents Gulf Power did or did not make available during the

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May 27 & 28 document review. Instead, most of the issues raised in the motion to compel are best categorized as legal posturing aimed at complainants' ultimate goal in this proceeding — to render the *Alabama Power v. FCC* test meaningless.

Complainants also repeatedly suggest (or outright claim) that Gulf Power has not produced the evidence described in the January 2004 Description Of Evidence. This is just plain wrong. Complainants are really just arguing that the evidence does not meet the *Alabama Power v. FCC* test. But this is a legal argument -- not an argument which bears on the sufficiency of Gulf Power's responses.[1]

Gulf Power responded completely and thoroughly to almost all of complainants' interrogatories and request for production. Where appropriate, Gulf Power raised legitimate objections to complainants' discovery requests, but even then still provided significant information in response to these objectionable requests. Gulf Power produced roughly 2000 pages of documents and made many thousands of additional documents available for review in Gulf Power's service territory.[2] Complainants' motion to compel does not demonstrate an entitlement to further response. Gulf Power respectfully requests that complainants' motion to compel be denied in its entirety.

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[1] Because complainants repeatedly invoke the January 2004 Description of Evidence, a copy is attached to this Response as Exhibit A.

[2] During the May 27-28 document review, Gulf Power made available for copying and inspection at its headquarters more than ten banker's boxes of documents, including but not limited to pole count information from 1996 and 2001, pole attachment applications and permits for all attachers, and contracts and correspondence files for all attachers. Gulf Power also made available at its Engineering & Construction district offices countless make-ready work orders (maintained in storage and/or large file drawers in the various offices). Complainants spent a day-and-a-half reviewing documents at Gulf Power's headquarters, but did not accept the invitation to inspect documents at the various Engineering & Construction offices.

Interrogatories[3]

Interrogatory No. 2: This is perhaps the leading example of complainants legal posturing. Complainants asked Gulf Power: (1) what is your definition/understanding of the phrase "full capacity?" (2) how do you propose to measure "full capacity?" and (3) what safety codes, specs and agreements support your response? Gulf Power responded specifically and thoroughly to each part of this interrogatory. Complainants, apparently, do not agree with Gulf Power's answers, so they have moved to compel different answers. Gulf Power's answers are Gulf Power's answers. The fact that complainants disagree with the answers does not bear on the completeness of the response.[4]

Interrogatory No. 3: Gulf Power answered the question (which is really a contention interrogatory) without objection. This is another instance where complainants simply do not like Gulf Power's answer.[5]

Interrogatory No. 4: Gulf Power answered the question (a contention interrogatory) without objection. Like Gulf Power's answers to interrogatories 2 and 3, complainants simply disagree with Gulf Power's contentions. That does not mean Gulf Power should be ordered to change its answer.

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[3] The interrogatory responses *not* contested by complainants are nos. 1, 6, 13, 14, 27, 32, 33 and 43.

[4] Complainants also take issue with Gulf Power's use of the term "crowded" rather than "full capacity." This is a non-issue since, for the purpose of the Osmose audit, there is no difference between "crowded" and "full capacity." "Crowded" is defined in the Osmose Statement of Work to mean a pole that cannot host an additional attachment (without make ready) due to vertical clearance requirements.

[5] Complainants also reurge their position that the only applicable time period is 2000-01. This position is at odds with the Hearing Designation Order and completely at odds with complainants' payment history for 2002-05. If this proceeding is truly only about 2000-01 rentals, then complainants should pay their rentals as invoiced by Gulf Power for 2002-05. They have not.

Interrogatory No. 5: Gulf Power objected to the first half of this question on the grounds that it was "vague, ambiguous, and impossible to understand." Gulf Power stands by this objection. With respect to the second half of the interrogatory, Gulf Power responded without objection. Again, complainants' argument is that they do not think Gulf Power's response meets the *Alabama Power v. FCC* test. But this is a legal position, not a matter of whether Gulf Power has or has not provided the requested information.

Interrogatory No. 7: Gulf Power answered this contention interrogatory without objection. Complainants take issue with the response because they disagree with the legal position taken by Gulf Power. To the extent complainants seek additional information, Gulf Power objects to the interrogatory as irrelevant to the hearing proceeding and not reasonably calculated to lead to the discovery of admissible evidence, insofar as "marginal costs" (to the extent this differs from what complainants already pay) is not at issue. The "floor" in this case is the Cable Formula (plus negotiated payments to account for grounds and arrestors). Anything below the floor (assuming the truth of complainants' contention) is irrelevant to this proceeding.

Interrogatory No. 8: This interrogatory asked Gulf Power, in essence, to provide full engineering information with respect to each pole Gulf Power contends is at full capacity. If this were possible, then Gulf Power would not be conducting the Osmore audit. As it relates to the evidence in the January 8, 2004 Description of Evidence, Gulf Power has already provided and/or made available all of the specific evidence in its possession identified in that filing.

Interrogatory No. 9: Gulf Power answered this contention interrogatory about actual loss without objection. Complainants argue: "Gulf Power can't just claim that its 'actual' loss is

the difference between what they receive and what they want, hypothetically, under just compensation." (Complainants' Motion to Compel, p. 19). Why not? Gulf Power's contention with respect to its actual loss may prove to be legally incorrect, but this does not mean that Gulf Power should have to change its answer.

Interrogatory No. 10: Gulf Power answered this contention interrogatory without objection. As it relates to the $40.60 just compensation charge, the methodology for reaching this figure was provided to complainants near the beginning of this proceeding in June 2000.

Interrogatory No. 11: It is unclear what complainants want. Do they want more names?[6] Do they really just want addresses (including a home address) and phone numbers? All current Gulf Power employees can be reached through undersigned counsel. To the extent complainants want contact information for non-Gulf Power employees, they have equal access to such information.

Interrogatory No. 12: Complainants take issue with the fact that Gulf Power did not designate "which persons helped answer which interrogatories." This is unrealistic. Gulf Power's responses were the product of a collaborative effort. If complainants are trying to figure-out who they need to depose, they can issue a proper "30(b)(6)" notice and the appropriate Gulf Power employee will be proffered.[7]

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[6] This interrogatory asks Gulf Power to identify "all persons, whether or not employed by Gulf Power" who have knowledge or information relating to Gulf Power's legal or factual contentions. This is incredibly overbroad as it includes friends, family and colleagues of the lawyers and Gulf Power personnel directly involved in this novel case.

[7] The FCC rule addressing such deposition is 47 C.F.R. § 1.315(a).

Interrogatory No. 14: This interrogatory appears to be a vestige of some other "form" interrogatories in another case. Complainants accuse Gulf Power of being "cute" and "evasive" when, in fact, all Gulf Power meant by its response was that the question was moot.[8] If complainants are seeking some sort of recovery in this proceeding, Gulf Power is not aware of it.[9]

Interrogatory No. 15: This interrogatory, on its face, is incredibly overbroad and impossible to answer. Complainants' argument, here, appears to suggest that Gulf Power has not produced the information in the January 2004 Description of Evidence (namely make-ready, agreements, invoices, remittances and correspondence). But this is just an inaccurate suggestion on the complainants' part. Complainants actually have in their possession all agreements, invoices, remittances and correspondence. The make-ready work orders were made available in Gulf Power's service territory during the May 27-28 document review, but complainants declined the opportunity to inspect them.

Interrogatory No. 16: Complainants' problem with Gulf Power's response is that the list of 67 businesses and entities (attachers) provided did not provide phone numbers, addresses or "executive contacts." Complainants argue that Gulf Power "must have records documenting these 67 companies attachments." Gulf Power *does* have such documents and has either produced them to complainants and/or made them available for copying and inspection. To ask Gulf Power to package this information in a more user-friendly way is to ask Gulf Power to do complainants' work for them.

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[8] Perhaps Gulf Power's response should have been more blunt and less subtle.

[9] What complainants might ever have been seeking to recover -- even at the outset of this proceeding -- is a mystery since they *never* paid the amounts invoiced by Gulf Power.

Interrogatory No. 17: Gulf Power not only answered this interrogatory completely and thoroughly, but also made *all* of the 1996 and 2001 pole count documents available for inspection.

Interrogatory Nos. 18 and 19: Each of these interrogatories seeks information about Gulf Power's use of cross-arms (or other means of creating "horizontal space" on a pole). This is part in parcel of complainants legal posturing on the issue of "crowding" or "full capacity." Complainants seek to establish that in any instance where more pole space can be created (through make-ready, including use of cross-arms of pole change-outs), there is no "crowding" or "full capacity." But this is a legal hypothesis. If there is one right utilities have maintained in the pole attachment fight, it is the right *not* to expand capacity. See Southern Co. v. FCC, 293 F.3d 338, 1346-47 (11th Cir. 2002). Gulf Power is not claiming in this proceeding that its poles are crowded because capacity cannot be expanded. This proceeding focuses, as it must, on actual present pole conditions (not future, hypothetical pole conditions). If, as complainants urge, there is no such thing as "crowding" or "full capacity" if more space can be created, then the *Alabama Power v. FCC* test is meaningless.

Interrogatory Nos. 20-26: Each of these interrogatories seeks information about the incidence of, and circumstances under which, Gulf Power changes-out its poles in the course of make-ready for communications attachers or its own core business. Complainants argue that this information is relevant because Gulf Power identified "pole change-outs due to full capacity" in the January 2004 Description of Evidence. This is a subterfuge. Complainants' real purpose, here, like in Interrogatory Nos. 18 & 19, is to demonstrate that Gulf Power's historical willingness to expand capacity to accommodate communications attachers eviscerates the

possibility of "crowding" or "full capacity." To the extent complainants are really seeking to "flush-out" the evidence in the Description of Evidence, Gulf Power made that information available for inspection and copying during the May 27-28 document review.[10]

Interrogatory No. 28: Gulf Power objected to this interrogatory (but answered it anyway) on the grounds that it was vague and ambiguous to the extent it could be read to seek information about non in-service poles (in other words, bare poles in a warehouse or stockyard). Apparently, this is exactly what complainants were seeking. Like Interrogatory Nos. 18 through 26, complainants' argument, here, relies on the erroneous legal assumption that the ability (and in the case of Interrogatory No. 28, resources) to install a taller pole eviscerates "crowding" or "full capacity." Even if complainants' legal position is correct (which renders the *Alabama Power v. FCC* test meaningless), there is no need for discovery on this issue since Gulf Power does not contend that its poles are crowded due to the inability to perform a change-out (for reasons of engineering, resources, policy, or otherwise). In short, complainants are trying to prove a moot point.

Interrogatory No. 29: This interrogatory really asked two questions: (1) under what circumstances does a pole have a "lack of capacity"? and (2) where/when has Gulf Power *ever* made such a determination with respect to a pole on which complainants are attached? Gulf Power answered the first question simply and succinctly. With respect to the second question, Gulf Power answered: "[s]uch decisions are made almost everyday in the field and there is no

[10] Complainants state: "to the extent the relevant documents are included within the collection of documents produced for review in May, none were specifically identified as being responsive to this interrogatory." (Complainants' Motion to Compel, p. 30). While this may be technically true, complainants are fully aware that Gulf Power's evidence of pole change-outs would be completed make-ready work orders -- all of which were made available for inspection and copying during the May 27-28 document review.

way of identifying each instance where this has occurred."[11] Moreover, Gulf Power *did* specifically reference the build-outs listed in the January 2004 Description of Evidence as instances of "where and when" Gulf Power has made determinations of "lack of capacity." If complainants expect there to be a memorandum evaluating each pole in a build-out and the reasons Gulf Power's field personnel deemed that the pole needed to be changed-out to accommodate an attacher, they will not find such memoranda.

Interrogatory No. 30: Complainants' argument, here, assumes that Gulf Power has records of each and every instance where it has changed-out a pole to accommodate a transformer or other equipment. This is not the case. The fact that Gulf Power does not have documents or records to support each such change-out does not mean (as complainants suggest) that there is no evidence such change-outs occur.

Interrogatory No. 31: This interrogatory is incredibly overbroad and unnecessarily pries into Gulf Power's core business (which is providing electricity to its customers; not providing subsidized pole space to cable companies). The Distribution Studies were identified as relevant, generally, for the purposes of demonstrating that Gulf Power plans its system around its own core business -- not around the perceived "need" of would-be communications attachers.

Interrogatory No. 34: Gulf Power fully answered this question without objection.

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[11] This interrogatory is yet another example of the disconnect between complainants legal positioning in the FCC and the realities in the field.

Interrogatory No. 35: Complainants have raised a meaningful point. Gulf Power will respond to this interrogatory, which must have been omitted in the first responses due to oversight.

Interrogatory No. 36: Gulf Power should have objected to this interrogatory as not reasonably calculated to lead to the discovery of admissible evidence, and seeking information irrelevant to the hearing issues. This interrogatory, like Interrogatory Nos. 18 through 26, appears directed to developing complainants theme of "there-is-no-such-thing-as-full-capacity." This theme, though, is inconsistent with the *Alabama Power v. FCC* test. Forcing Gulf Power to answer such discovery would place upon Gulf Power a burden not intended by the Eleventh Circuit.[12]

Interrogatory No. 37: If, as complainants contend, the Cable Rate exceeds marginal cost, then why is marginal cost relevant to the proceeding? The floor in this proceeding is the Cable Rate. Any effort to develop evidence "below the floor" is outside the scope of the hearing issues. See also comments regarding Interrogatory No. 7 above.

Interrogatory No. 38: With this interrogatory narrowed by the second paragraph of complainants' argument, Gulf Power will respond.

Interrogatory No. 39: This interrogatory is an inappropriate attempt to obtain expert discovery before allowed by the Scheduling Order. Gulf Power already has submitted its Preliminary Statement On Alternative Cost Methodology. To the extent complainants seek

[12] It is hard to imagine the Eleventh Circuit envisioned a burden even as high as Gulf Power already is having to meet, since the FCC's policy (in all other instances) relies on presumptions and notions of efficiency.

information regarding the $40.60 rate, they already have it. Complainants' invocation of the Description of Evidence is a red herring, since the Description of Evidence had *nothing* to do with "methodologies, formulae, cost accounts, data."

Interrogatory No. 40: Gulf Power fully answered this interrogatory without objection. Complainants' issue with Gulf Power's response appears to be that it "lacks a representation as to whether the listed documents contain all the documents in Gulf Power's possession, custody, or control that are responsive to the Interrogatory." To the extent such a specific representation is required, complainants should consider it so represented.

Interrogatory No. 41: Gulf Power fully (and specifically) answered this interrogatory without objection.

Interrogatory No. 42: See comments regarding Interrogatory No. 40 above.

Interrogatory No. 44: Gulf Power already described the Sales Comparison Approach in its Preliminary Statement On Alternative Cost Methodology. If, as it appears, complainants really just want the "number" and how Gulf Power's valuation experts reached the "number," they should wait until the expert reports are exchanged per the Scheduling Order.

Interrogatory Nos. 45 and 46: Gulf Power answered these interrogatories by providing rental rates and the amount of space leased by each attacher. Furthermore, Gulf Power produced its joint use agreements, which contain the rental methodology. Gulf Power should not be required to provide more (there is nothing more to provide, anyway).

Interrogatory Nos. 47 and 48: These interrogatories ask the same questions with respect to the Current Replacement Cost Approach and the Federal Concessions Leasing Model, as Interrogatory No. 40 asked of the Sales Comparison Approach. See Gulf Power's comments regarding Interrogatory No. 40 above.

Requests For Production[13]

Request No. 1: Complainants concede that this request is indeed "broad." In particular, this interrogatory is overbroad insofar as it seeks attorney-client privileged communications and information protected by the work-product doctrine. Notwithstanding the severe overbreadth, Gulf Power has still produced and/or made available thousands upon thousands of documents responsive to this request.

Request No. 3: This request for production, like Interrogatory Nos. 39, 44, 47 and 48, seeks to obtain expert discovery before allowed by the Scheduling Order. This request is also impermissibly broad in scope.

Request No. 4: Complainants are way off base here. This request for production (once you wade through the "referring to, relating to, or regarding . . ." language) seeks: (1) communications with other attachers; and (2) make-ready documents. Gulf Power produced or made available all such documents in its possession. Oddly, complainants argue that "Gulf Power has not produced all 'make ready orders.'" (Complainants' Motion to Compel, p. 56).

[13] The requests for production *not* contested by complainants are nos. 2, 5, 12, 17, 18, 20, 21, 22 and 35.

How would they know? They declined the opportunity to inspect these documents during the May 27-28 document review.[14]

Request Nos. 6 and 7: These requests seek information about use of cross-arms. For the same reasons set forth above with reference to Interrogatory Nos. 18 and 19, the information sought is entirely irrelevant to the hearing issues and Gulf Power should not be required to respond.

Request No. 8: Gulf Power already made these documents available, but upon reasonable notice and coordination will do so again.

Request No. 9: As Gulf Power said in response to this request, and in response to Interrogatory No. 30, Gulf Power does not necessarily document pole change-outs necessitated by its core business. But the fact that there are no documents does not mean there is no evidence.

Request No. 10: See comments regarding Request No. 8 above.

Request No. 11: This request, in essence, seeks: (1) the identity of virtually every member of every line crew, as well as every distribution engineer, employed by Gulf Power; and (2) completed make-ready orders. The first is entirely unnecessary. The second seeks documents which have been requested in multiple other requests for production (and interrogatories), and which Gulf Power has made available for inspection and copying.

[14] Gulf Power stands willing, upon reasonable notice and coordination, to make these documents available for inspection again.

Request No. 13: Gulf Power answered this request without objection.

Request Nos. 14 and 15: Like Interrogatory Nos. 18 through 26 and 28, these requests are aimed at developing evidence of a non-issue. Complainants' argument overtly admits their intent where they state (incorrectly):

> if Gulf power routinely changes-out bigger poles from its pole inventory for smaller poles; if such change-outs are possible on the poles claimed to be at issue; and if Gulf Power is reimbursed for the costs of such change-outs, then it cannot establish the requisite lack of capacity.

(Complainants' Motion to Compel, p. 61). If this proposition is accepted, then the *Alabama Power v. FCC* test is meaningless (unless and until utilities begin routinely denying capacity expansion; is this what the cable companies want?).

Request Nos. 16 and 19: Gulf Power fully answered these requests without objection.

Request No. 23: This request, like Request Nos. 14 and 15, blends notions of hypothetical capacity expansion with the issue of existing actual pole conditions. Gulf Power should not be required to respond to discovery that seeks to develop evidence of non-issues.

Request No. 24: This request, like Interrogatory No. 39, seeks expert discovery outside the timeline established by the Scheduling Order. To the extent complainants seek "facts, data, calculations and other information" relating to the $40.60 rate, this information was produced at the beginning of this proceeding in or around June 2000.

Request No. 25: Gulf Power already produced and/or made available a significant number of documents responsive to this request (and probably should have said so in its initial response). In particular, the completed make-ready orders for the build-outs enumerated in the Description of Evidence were available for inspection during the May 27-28 document review. To the extent more responsive documents are generated by the Osmose audit, those documents will be produced (as indicated in Gulf Power's initial response).

Request No. 26: The fundamental flaw in complainants' argument is that they equate "actual loss" under *Alabama Power v. FCC* (a term not used in *Alabama Power v. FCC*) with "greater money offered by a third party that could not be accommodated on Gulf Power's poles or a distinct, quantifiable, actual, and current higher valued use of Gulf Power's own for the same space occupied by Complainants." (Complainants' Motion to Compel, p. 66). This is purely legal posturing, and not a true matter of discovery (as evidenced by complainants' statement that "Gulf Power must produce its evidence of any actual losses and lost opportunities, or admit that they have none and have their claims dismissed immediately."). Furthermore, many of the documents produced in response to other interrogatories and requests for production bear on these issues. Gulf Power should not be required to give further response.

Request No. 27: See comments regarding Interrogatory No. 39 above.

Request Nos. 28 - 30: Gulf Power not only responded fully to each of these requests without objection, but also provided *specific* Bates ranges to complainants.

Request No. 31: If and when Gulf Power intends to rely upon a valuation method not previously disclosed in the Preliminary Statement on Alternative Cost Methodology, it will notify complainants.

Request Nos. 32 - 34: These requests, like Interrogatory Nos. 44, 47 and 48, seek premature expert discovery. Furthermore, the scope of expert discovery requested is overbroad. The parties can either negotiate a scope of expert discovery, or bring this issue to the Presiding Judge at the appropriate time.

Conclusion

Gulf Power respectfully requests that complainants' motion to compel be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Complainants' Motion To Compel has been served upon the following by Electronic Mail and by United States Mail on this the 15th day of August, 2005:

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OF COUNSEL

Exhibit A

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

Complainants,

P.A. No. 00-004

v.

GULF POWER COMPANY,

Respondent.

To: Enforcement Bureau

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]

[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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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Description Of Evidence has been served upon the following by United States mail, on this the 8th day of January, 2004:

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