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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*	E.B. Docket No. 04-381

To: Office of the Secretary

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

COMPLAINANTS' REPLY TO GULF POWER'S RESPONSE TO COMPLAINANTS' MOTION TO DISMISS

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, LLC ("Complainants"), by their attorneys and pursuant to this Court's Order dated August 5, 2005, respectfully submit their Reply to Respondent Gulf Power Company's ("Gulf Power") Response to Complainants' Motion to Dismiss.

BACKGROUND

This proceeding was commenced to determine whether Gulf Power could demonstrate that it had incurred a "lost opportunity" as that standard was articulated by the Eleventh Circuit – a missed chance either to sell space on particular utility poles to third parties willing to pay more for the space occupied by Complainants, or to put specific portions of such space to a demonstrable and quantifiable "higher valued use" by Gulf Power itself. *See* Hearing Designation Order at ¶¶ 4-8;

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Alabama Power v. FCC, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert denied*, 540 U.S. 937 (2003)("*Alabama Power*"). The key point is that, in order for Gulf Power to have any possibility of succeeding on its claims, it must be able to show that it actually suffered a provable loss – that it was "out . . . more money" (in the words of the Eleventh Circuit) as a result of not being able to accommodate a particular higher valued use either by a third party who was "waiting in the wings," or by itself. *Id.* at 1369.

As the court in *Alabama Power* clearly explained, Gulf Power cannot, as a matter of law, argue (as it nevertheless tries here) that it is entitled to more pole rent because it successfully accommodated (by means of the customary practice of pole "change-outs" or rearrangements) additional new pole attachers (who paid Gulf Power the entire cost of such change-outs or rearrangements) or that it has some unidentified, non-pole-specific "higher valued use" of its own in simply depriving Complainants of the opportunity to continuing using the attachments they have long held. *See Alabama Power*, 311 F.3d at 1369 ("it would not make sense for the power companies to say, '[e]ven though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the 'full market price' of this pole space'"). Because Gulf Power cannot show that Complainants' attachments have "foreclose[d] any other use," *id.*, it has no case.

In the Motion to Dismiss, Complainants explained that Gulf Power's claims should be dismissed because (1) Gulf Power has no evidence sufficient to meet the pole-specific *Alabama Power* requirements of showing "full capacity" and a "higher valued use" and therefore cannot meet the constitutional standard of "loss to the owner"; (2) Gulf Power cannot substantiate the claims it made in its Description of Evidence of "un-reimbursed expenses" attributable to Complainants; and (3) Gulf Power cannot demonstrate the value of any claimed loss at the time of the "taking." As set

forth in more detail below, Gulf Power's Response fails to rebut these points and indeed further confirms the validity of Complainants' arguments. Accordingly, the time is right for this proceeding to be dismissed with prejudice.

I. Gulf Power Cannot Meet The Pole-Specific *Alabama Power* Requirements of "Full Capacity" And A Demonstrable "Higher Valued Use" And Therefore Cannot Prove It Has Suffered A "Lost Opportunity" Under Fifth Amendment Takings Law

A. Gulf Power Cannot Prove "Full Capacity" Within The Meaning Of *Alabama Power* – That Complainants' Attachments Have "Foreclosed Any Other Use"

One of the two prerequisites that Gulf Power must show in order to meet the *Alabama Power* requirements for seeking compensation above the marginal cost of Complainants' attachments is that "with regard to *each pole* that (1) the pole is at full capacity." 311 F.3d at 1370 (emphasis added). As the Eleventh Circuit explained, by "full capacity," it means that Complainants' attachments (the government "taking") must have "foreclosed an opportunity to sell space to another bidding firm – a missed opportunity." *Id.*[1]

Gulf Power cannot meet this prerequisite. As an initial matter, Gulf errs by confusing the generic term "crowded" with the more specific and rigorous requirement of "full capacity" used in the Eleventh Circuit's actual holding. *See id.* at 1370-71. Gulf is simply wrong in trying to equate a "crowded" pole with one at "full capacity," *see* Response, 3, and arguing that it can meet the "full capacity" requirement by showing that its poles are "crowded." The *Alabama Power* standard is "full capacity" -- nothing less. 311 F,.3d at 1370. The Presiding Judge also recognized that "crowding" is not the same as "full capacity":

> The term 'pole crowding' is ambiguous. The Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is a 'full capacity,' which standard of proof was adopted by the Commission.

[1] In the *Alabama Power* case itself, the Court noted that Gulf Power's sister subsidiary of the Southern Company, Alabama Power, had not even alleged that its poles were "crowded," let alone that particular poles were at "full capacity" such that they had deprived the utility of an opportunity to sell space to others. *Id.*

FCC 05M-23, Status Order (April 15, 2005), 5. Even Gulf Power itself, in its answer to Complainants' Interrogatory No. 2, recognized a distinction, contending that a "crowded" pole was "*close*" to being at "full capacity" but could still host another attachment, while at the same time arguing that "full capacity" means a pole that "cannot host further communications attachments." *See* Motion to Dismiss, Exhibit C, 2 (emphasis added). Accordingly, Gulf Power is wrong in arguing now that "crowding" is the same as "full capacity."

Gulf Power's effort to blur the distinction between "full capacity" and anything less (such as "crowded" poles), together with its failure to focus on the Eleventh Circuit's explanation that there is "full capacity" only when Complainants' attachments "foreclose" another opportunity or use, undermines each of the "four ways" that Gulf Power claims it can meet the "full capacity" requirement.

First, Gulf Power's reliance upon the future results of the Osmose pole survey will not enable it to identify poles at "full capacity." As Complainants' pointed out in the Motion to Dismiss, the "Statement of Work" in the Osmose survey includes a definition of a "crowded" pole but includes no definition, specifications, or discussion of when a pole is to be deemed to be at "full capacity." *See* Motion to Dismiss, 9. Indeed, the Statement of Work says that its purpose is to "locate, identify, and record information about . . . poles that would be regarded as 'crowded' poles as defined herein." *See* Gulf Power's Motion for Extension of Time (March 23, 2005)(attached Statement of Work). Well, by Gulf Power's own admission, in its answer to Complainants' Interrogatory No. 2, a "crowded" pole is one that can accommodate at least one more attachment, and is therefore not "full." *See* Motion to Dismiss, Exhibit C, 2. While Gulf Power's Response hopes to glide over this significant admission, it is a critical defect that renders the Osmose survey

utterly ineffective in trying to meet the *Alabama Power* "full capacity" requirement.[2] And, the Presiding Judge has already noted that, apart from the Osmose survey, "Gulf Power [has] represented that it cannot identify specific poles it contends are 'crowded' *or* at 'full capacity'" now or at any time prior to the survey. Status Order April 15, 2005), 1 (emphasis added).

Second, Gulf Power cannot rely upon its practice, which is consistent with industry custom and course of dealing, of permitting new attachers to pay the costs of make-ready and change-outs to obtain needed space for attachments in order to demonstrate that a particular pole is at "full capacity," because that practice has *enabled* Gulf Power to obtain additional pole attachment revenue, rather than "foreclosed" it from doing so.[3] The "major build-outs" that Gulf Power says it referred to in its Description of Evidence, *see* Response, 3, are each instances in which Gulf Power succeeded, through normal and customary practices in the pole industry, in providing pole capacity to new attachers and obtaining additional revenue, rather than being deprived of, as the Eleventh Circuit put it, "an opportunity to sell space to another bidding firm." Moreover, Exhibit B to Complainants' Motion to Compel shows conclusively that Gulf Power does not perform any make-ready or change-out work until it receives a check from the new attacher to cover such expenses. Gulf argues that its "historical willingness to accommodate new attachers by expanding capacity cannot be held against it in a Fifth Amendment analysis," Response, 7, but it is exactly this practice that ensures that Gulf is not "out . . . more money."

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[2] Accordingly, the amount of money that Gulf Power has expended on the Osmose survey, *see* Response 2, is irrelevant, as is Gulf Power's contention that discovery is incomplete, since discovery responses that have been provided show that there is no sustainable claim as a matter of law.

[3] Indeed, the change-out process not only provides a utility with a new and perhaps even stronger pole, but with additional, new attachment revenue. The new attacher pays the entire cost of the larger pole and also "gives" the utility additional capacity that can be rented to others in the future, because the most recent attacher only occupies one foot of space, while poles that are changed out come in five-foot longer increments. *See generally* Gulf Power's Response to Complainants' Interrogatory 27, Exhibit D to Complainants' Motion to Dismiss, 14-16. "In instances where attachers pay the costs of a replacement pole, the attacher actually *increases* the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service." *In re Alabama Power*, 16 F.C.C.R. 12209, 12235 (2001)(emphasis added).

Only in those situations where there is no possible extra capacity would any specific pole be subject to the "zero-sum" classification with "finite" availability such that one entity's presence on a specific pole would actually deprive another of the opportunity to attach to that pole. "In the 'full capacity' situation, it is the zero-sum nature of pole space, like land, that is key." 311 F.3d at 1370. Again by its own admission, see Response 7, 9, Gulf Power has been able to provide capacity, new attachers have been accommodated, and there has been no instance of any "missed opportunity." Moreover, Gulf has not identified a single pole that was not changed-out or rearranged leading to a denial of access by another "actual" attacher.[4] As such, *all* of Gulf Power's poles, especially including those that have been – or could be – rearranged or changed-out do not reflect the "zero-sum" condition that the *Alabama Power* court made a prerequisite for using its analogy to "rivalrous use" of land. Accordingly, just like Alabama Power, Gulf Power simply "ha[s] no claim" for "compensation above marginal cost" for any of its poles in its service area. *Id.*, citing *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948) ("By evidence merely of bookkeeping losses, respondent did not carry its burden of proving actual damage. Just compensation is a practical conception, a matter of fact and not of fiction.").

Third, Gulf Power cannot rely upon a "statistical extrapolation from the Osmose audit" to show poles at "full capacity," both because, as described above, the Osmose pole survey is not designed to measure "full capacity" (as opposed to pole "crowding"), and because the *Alabama Power* decision, by requiring a showing "with regard to each pole," 311 F.3d at 1370, precludes the reliance upon any theoretical gamesmanship such as an "extrapolation." Gulf Power's August 31, 2005 Status Report indicates that it must be placing great faith in such an extrapolation, since it

[4] *See* Complainants' Motion to Compel (1) Gulf Power's Production of Documents Needed by Complainants to Prepare for the Hearing, and (2) Further Responses to interrogatories as to which the Presiding Judge Previously Required Supplemental Responses, filed August 31, 2005, at pp. 3-5 (Supplemental request No. 1 sought identification of poles where access was denied and none were specified).

shows "no change" in the number of poles counted since its July status report (which showed that fewer than 10,000 poles in one area out of Gulf Power's 150,000 poles have been surveyed in five months, with the draft report due in less than 30 days). Any incomplete extrapolation such as that suggested by Gulf Power in any event would be inconsistent with the exacting legal standard, as reflected in the December 15, 2004 and the April 15, 2005 Orders, of a showing "with respect to specific poles." See Status Order, 4.

Finally, the Eleventh Circuit's requirement of proof of "full capacity" for "each pole" also renders incompetent any evidence that Gulf might hope to present about "system averages" or calculations based upon "FCC presumptions."

In sum, while Gulf Power may want to "reserve its rights to challenge" the *Alabama Power* holding on appeal (despite the Supreme Court's already having denied certiorari), in order to prevail it here it must be able to demonstrate specific poles at "full capacity" under that test, and, as shown above, it cannot do so.

B. Gulf Power Cannot Prove It Has Been Deprived Of The Opportunity Either To Sell Space On Poles Hosting Complainants' Attachments To Another Bidding Firm For More Money Or Put Such Space To A Specific And Quantifiable "Higher Valued Use" Of Its Own

Gulf's arguments that it can meet the "higher valued use" prong of the *Alabama Power* test are similarly unavailing. As Complainants pointed out in their Motion to Compel, the Eleventh Circuit in *Alabama Power* stated that a pole owner making a constitutional claim for compensation above marginal costs must also demonstrate:

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

311 F.3d at 1370 (emphasis added). This means that, as required by the constitutional standard for "just compensation" of "loss to the owner," Gulf Power would have to show that, either with respect

to a third party's offer or Gulf's own use, Gulf Power had actually "incur[red] a "lost opportunity or [some] other burden." *Id.* at 1369. As its Response makes clear, Gulf cannot make this showing.

Gulf Power first repeats one of its initial mistakes in trying to equate "crowding" on poles with a "lost opportunity." *See* Response, 6; *supra*, 3. Essentially, Gulf Power is here trying to conflate the two key elements of the *Alabama Power* test. But the Eleventh Circuit itself explicitly pointed out that "there is no 'lost opportunity' foreclosed by the government unless the two factors [full capacity *and* a provable higher valued use that the utility was deprived of] are present." *Id.* at 1371 n.23.

Next, Gulf Power wrongly argues that it can meet the *Alabama Power* test without proving that it lost an opportunity to sell to an "actual" buyer of pole space. *See* Response, 6. It cannot. *See* 311 F.3d 1370. In "just compensation" claims involving utility poles, unlike the land cases relied upon by Gulf Power involving a "hypothetical willing buyer," the Eleventh Circuit explained that a utility "must show . . . another buyer of the space is waiting in the wings." *Id.* There is nothing "hypothetical" involved. Without a showing that it "missed out" on renting space to a new attacher, Gulf was not deprived of anything, and has no "loss" that requires additional compensation under the Fifth Amendment.[5] This is important here because unlike other taking cases, Gulf Power has been receiving *more* than "just compensation" for the space on its poles (without regard to any hypothetical other buyers). *If* – and *only if* – there were some buyer who could not place an attachment on a particular pole would Gulf be entitled to claim anything more than *marginal costs* – not some hypothetical market price. Hypothetical buyers simply are not part of the formula establishing any right to "just compensation" that exceeds what Complainants already pay to Gulf Power. With only a "hypothetical" buyer of the space, Gulf's purported loss is "hypothetical" and

[5] Perhaps recognizing the weakness of its arguments, Gulf Power is relegated to arguing that the *Alabama Power* court erred – that it was "without power" to impose the requirements it did. *See* Response, 6. That argument is "too little, too late" as the Supreme Court denied certiorari. *See, supra*, p. 2.

under the *Alabama Power* test that generated this proceeding, and all other takings precedent, the "Cable Rate (which provides much more than marginal cost) *necessarily provides just compensation*." *Alabama Power*, 311 F.3d at 1370-71 (emphasis added).[6]

Gulf Power also cannot rely upon the contention that "any space occupied by a cable company can conceivably be put to a 'higher valued use.'" *See* Motion to Dismiss, 13 (answer to Interrogatory No. 5). Gulf Power clings to this argument in its Response, claiming that is "axiomatic" that any of "its own operations" constitute a higher valued use. Response, 7. The *Alabama Power* decision, however, doesn't accept "axiomatic" evidence, or a claim of hypothesized value that the claimant believes is self-evident, as the standard. Instead, it expressly required "proof" of a higher valued use that was "foreclosed" or "missed." *Id.* at 1370.[7] Similarly, Gulf Power's argument, *see* Response, 7, that anytime it changed out a pole it had a buyer "waiting in the wings" "at a higher price" doesn't meet the *Alabama Power* test, because those change-outs *enabled*, rather than "foreclosed" a new opportunity and, importantly, did not deprive Gulf Power of any "higher valued use." The Presiding Judge recently observed that "Gulf Power is not claiming damages for any actual loss." *See* Discovery Order, 6. This concession is dispositive of Gulf

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[6] In the Commission's decision that led to the Alabama Power decision, and which clearly dealt with the cost issue, the Commission found (*In re Alabama Power*, 16 F.C.C.R. 12209, 12231 (2001)(footnote omitted)):

> The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator. In addition to these charges, the attacher pays a proportionate share of pole capital costs and operating expenses based on the amount of space occupied by the attachments. The Commission's pole attachment rate formula for cable attachers allocates the cost of the entire pole by the percentage of total usable space used. The formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The Supreme Court determined that this formula results in a rate that is not confiscatory. Under the Florida Power standard of review for regulated rates, the current pole attachment formula for cable attachments, which is substantially unchanged from that reviewed by the Florida Power court, provides just compensation.

[7] Alabama Power unsuccessfully posed a variation on this contention, arguing that the inability to charge the pole attachment rate for telecommunications carriers, which in most instances is greater than the rate that for cable operators, did not establish any "lost opportunity" either. *Alabama Power*, 311 F.3d at 1371, n.23.

Power's case. Without proof of a "lost opportunity" or "other burden," Gulf Power has no claim. 311 F.3d at 1369; *see also* Motion to Dismiss, 17-18 (listing cases requiring proof of "actual damage").[8]

Gulf Power's final argument concerning the second element of the *Alabama Power* test – that there is a hypothetical and undefined value simply "in excluding attachers," *see* Response, 8 – is inconsistent both with Eleventh Circuit's requirement of "proof" of a specific "higher valued use" and the more general principles of Fifth Amendment takings law that "just compensation" does not include the ability to extract monopoly rents, *see Lord Manufacturing Co. v. United States*, 84 F.Supp. 748 (1949); *United States v. Commodities Trading*, 339 U.S. 121, and that a party seeking such compensation has the burden "of proving actual damage," *see United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948). Perhaps most fundamentally, Gulf Power's reliance upon a generalized "value" of "excluding" Complainants ignores the requirement that any compensation for such "exclusion" must nonetheless be based upon specific proof of loss. While losing the ability to "exclude" Complainants may have been the basis for finding that a taking had occurred when Congress amended 47 U.S.C. § 224 to require utilities to allow cable operators and telecommunications carriers to have non-discriminatory access to utility poles,[9] the amount of

[8] The Court may wish to be mindful of judicial efficiency here as well. Gulf Power's Preliminary Statement on Alternative Cost Methodology (filed December 3, 2004) listed three valuation techniques, two of which the Commission has already expressly rejected, along with a variation on Gulf Power's third technique. "Respondent argues that we should apply a different analysis to determine just compensation. Even if we were to assume, for the sake of argument, that Respondent's argument has merit, we would still end up with the same measure of compensation. . . Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments." *In re Alabama Power*, 16 F.C.C.R. 12209, 12233 (2001).

[9] *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-31 (11th Cir. 1999).

constitutionally required compensation for the loss of the ability to "exclude" must still be based on an actual, and not theoretical, loss.[10]

What Gulf Power really seeks to do here is reverse the "loss to the owner" standard and instead impose what Gulf Power and its affiliates have always wanted – a "gain to the taker" standard that would allow pole rents to be set by comparison to what it would cost attaching parties to build their own set of utility poles, or based on the income earned by cable operators from the operation of their cable systems. This is not and never has been the constitutional standard. "That the 'taker' may reap a profit above and beyond the value of the property interest taken does not entitle the person from whom the property is taken to share in those profits. The owner is to receive no more than indemnity for the loss, the award cannot be enhanced by any gain to the taker." *Carroll v. State Bar of California*, 166 Cal.App.3d 1193, 1204-05, 213 Cal.Rptr. 305, 311 (1985), *citing United States v. Miller*, 317 U.S. 369, 375 (1943). This formulation is exactly as the Eleventh Circuit noted: "The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, '[t]he question is, What has the owner lost? not, What has the taker gained?" *Alabama Power*, 311 F.3d at 1369, citing *United States v. Causby*, 328 U.S. 256, 261 (1946)). Having lost nothing, Gulf Power is not entitled to proceed further, as a matter of law.

II. Gulf Power Still Has Failed To Substantiate The Claims, Made In Its Description Of Evidence, That It Has Suffered An Un-Reimbursed Expense Attributable To Claimants' Attachments

In the Motion to Dismiss, Complainants pointed out that Gulf Power had not substantiated the claims that it had made in its Description of Evidence. Motion to Dismiss, 20-25. In particular, Gulf Power had claimed that it had evidence of "the number of occasions . . . in which it was

[10] *See Id.*, at 1337-38. *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)(For a property interest to be protected by the Fifth Amendment, it must be more than an abstract need, desire or unilateral expectation).

required to change-out a pole [at "its own expense"], for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments." *See* Motion to Dismiss, 20, *citing* Description of Evidence, 3-6 and n.13. Complainants posed several requests, in both their Interrogatories (numbers 20-26), and in their document requests, to try to find out what "evidence" Gulf Power actually had, if any. Gulf Power refused to answer the Interrogatories and has been unable to provide a single document to support its claim. *See* Motion to Dismiss, 21-22.

Gulf Power's more recent filings confirm its inability to sustain its claim. In the Discovery Order of August 5, 2005, the Presiding Judge specifically ordered Gulf Power to answer Interrogatory 20, which sought the specification of each instance where Gulf claimed it was not reimbursed for the costs of such a change-out. But Gulf Power's recent supplemental answers to Complainants' interrogatories, filed on August 26th, did not identify even one such instance. Instead, Gulf Power dodged the question by claiming that the answer could be found in unspecified "make-ready documents" already produced. *See* Gulf Power's Supplemental Responses to Complainants' First Set of Interrogatories, 9. Gulf Power provides the same answer in its Response (filed August 29th), claiming that documents it produced "would" include responsive information. *See* Response, 9.

However, as Complainants pointed out in their recent August 31, 2005 Motion to Compel, Gulf Power's "go find the answer yourself" response is legally insufficient. *See* Complainants' Motion to Compel (1) Gulf Power's Production of Documents Needed by Complainants to Prepare for the Hearing, and (2) Further Responses to Interrogatories as to which the Presiding Judge Previously Required Supplemental Responses, 14-15 (*citing Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.R.d. 103, 105 (W.D.N.C. 1993)("When a party responding to

interrogatories chooses to produce its business records in lieu of a conventional response, the responding party must specifically identify the document(s) from which the responding party may derived the answer").

Gulf Power has been repeatedly unwilling and/or unable to support its contention that it incurred un-reimbursed expenses attributable to Complainants' attachments. *See* Gulf Power's Responses to Complainants' Second Set of Requests for Production of Documents, 6-7. Indeed, even in its most recent filing, its Itemization of Evidence Provided that is Referred to in the Description of Evidence (August 31, 2005), Gulf Power utterly fails to "itemize" or otherwise specifically identify a single document that shows any un-reimbursed expense attributable to Complainants. Accordingly, Gulf Power's inability to provide one iota of proof for its claims to have suffered a "loss" in the form of an un-reimbursed expense attributable to Complainants, despite having alleged that it had such proof in its Description of Evidence, provides another basis for dismissing these proceedings.

III. Gulf Power Has No Evidence Of Utility Poles At "Full Capacity," A "Higher Valued Use" It Was Deprived Of, Or Any Actual Loss At The Relevant Time That It Claimed A Taking – On Or About July 2000

In their Motion to Dismiss, Complainants explained that Gulf Power attempted to terminate Complainants' existing contracts on or about July 10, 2000 and that, if there were a "taking" of a portion of Gulf Power's utility poles, it happened at that time. Complainants also cited to established caselaw which holds that the "value of property taken by a governmental body is to be ascertained as of the date of taking." *See generally United States v. Clarke*, 445 U.S. 253 (1980); *see also* Motion to Dismiss, 25-26 (citing cases). Complainants pointed out what the Presiding Judge also has noted: that Gulf Power "cannot identify specific poles it contends are 'crowded' or

at 'full capacity,'" *see* Status Order (April 15, 2005) 1, as of the time of the claimed taking. *See* Motion to Dismiss, 9, 26.

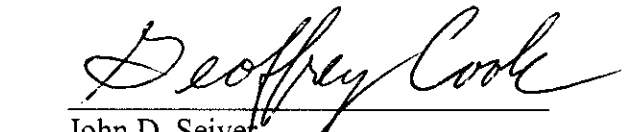
In its Response, Gulf Power fails to respond in any substantive way to Complainants' point. Gulf Power doesn't even attempt to distinguish the caselaw cited by Complainants. It simply argues that the "taking began in summer 2000 and continues to the present." Response, 9. Putting aside for the moment that Gulf Power's failure to show any loss then or now is fatal to any constitutional claim, where there is a claim of a physical taking, such as this case involving attachments on a utility pole, "the amount of the [just compensation] award is measured by the value of the property *at the time of taking*, not the value at some later date." *See Palazzolo v. Rhode Island*, 533 U.S. 606 639 (2001)(emphasis added). The only other argument that Gulf Power can muster – that Complainants have served discovery requests seeking information back to 1998 – is an utterly irrelevant and ineffectual response. Complainants' discovery requests are based upon defending against Gulf Power's claim that its property is being taken "continu[ously]," but does not detract from the force of Complainants' point – that Gulf Power has no proof of the value of its claimed taking at or even near the time that the taking is supposed to have occurred. This is another fatal flaw that warrants dismissal.

CONCLUSION

As discussed above and in Complainants' Motion to Dismiss, Gulf Power has shown (1) that it cannot meet the "full capacity" and "higher valued use" standards set forth in *Alabama Power* and that it cannot therefore identify any actual, out-of-pocket loss or specific, quantifiable "lost opportunity" caused by Complainants' attachments; (2) that, contrary to claims in its Description of Evidence, it cannot produce evidence of an un-reimbursed expense attributable to Complainants and (3) that it has no evidence of the value of any property "taken" as of the time

of the alleged "taking." For these reasons, Complainants respectfully submit that these proceedings should be dismissed with prejudice.

Respectfully submitted,



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September 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Complainants' Reply to Gulf Power's Response to Complainants' Motion to Dismiss* has been served upon the following by electronic mail and U.S. Mail on this the 6th day of September, 2005:

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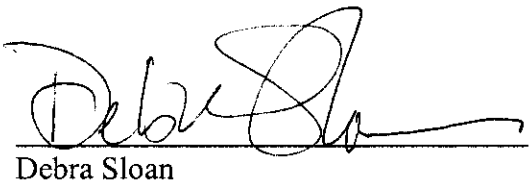

Debra Sloan