



In February, Gulf Power took the deposition of Complainants' industry expert (Mr. Harrelson), and Gulf Power now foresees possible opinion testimony offered at hearing to the affect that Gulf Power attachment specifications (an integral part of its "crowding" analysis) are "unreasonable" and inconsistent with "industry standard." Gulf Power believes that certain Complainants have attachment agreements with CHELCO that are based on market conditions that justify pole rentals above the Commission formula.

Gulf Power also believes this evidence may help to rebut Complainants' contention that a rate of \$6 provides fair value for mandated access to Gulf Power utility poles. At a minimum, these CHELCO agreements could serve as an illustration of a cost/price model that applies outside the regulated formula, and permits cross-examination of an industry expert who will be supporting the Commission standard.

There also are procedural equities in favor of producing CHELCO agreements. Gulf Power had earlier requested Complainants to produce:

[A]ll joint use pole agreements, including but not limited to all drafts thereof, between you and entities other than Gulf Power.

Complainants objected on grounds of relevance (different utilities use different cost accounts), on grounds of breadth (thousands of pole agreements), and on grounds of unclarity (meaning of "joint use"). In its bottom-line response, the Complainants answered that to the best of their knowledge:

Complainants have no "joint use" pole agreements with other entities where "joint use" has the meaning often ascribed by Gulf Power of co-owning or jointly controlling poles.

Gulf Power contends that it was led by that answer to believe that Complainants had no agreements with non-regulated utilities (e.g. co-ops), and therefore Gulf Power did not timely move to compel. Complainants disagree that Gulf Power was misled, and object to Gulf Power's production on grounds of tardiness. Complainants also continue to object on grounds of relevance and argue that higher fees paid to a non-Gulf Power entity have no bearing on "just compensation" for a particular regulated utility, i.e., Gulf Power.

Finally, Complainants argue that Mr. Harrelson's testimony on industry standards concerning "engineering" practices of pole attachment has no relevance to any CHELCO attachment agreement. That may be a basis to object to specific cross-examination questions at hearing, but this ruling pertains only to limited discovery.

It appears that the description of the structure of the cable pole attachment “market” would be relevant at least to understanding the issue in this case. Also, industry experts should be allowed to testify to market structure.<sup>1</sup> Weight to be accorded is another question for proposed findings and conclusions. Therefore, Gulf Power has carried its burden of persuasion to allow focused questioning of Complainants’ expert about the agreements of Complainants with CHELCO which Gulf Power has reason to believe receives a higher amount of compensation from certain Complainants than the price-regulated utilities such as Gulf Power.<sup>2</sup> Use of CHELCO agreement will be permitted but only for cross-examination, thereby eliminating Complainants’ concerns of burdensomeness.

Complainants are also concerned about undue vagueness in the “joint use” terminology employed by Gulf Power. But there is no showing that Mr. Harrelson could not understand the meaning of “joint use” in both its layman’s and in its industry usages.

Accordingly, IT IS ORDERED that Complainants MUST PRODUCE for Gulf Power by **3:00 p.m. on March 24, 2006**, copies of all current Joint Use Agreements (pole attachment agreements) between any of the Complainants and Choctawhatchee Electric Cooperative, Inc. (CHELCO).

FEDERAL COMMUNICATIONS COMMISSION<sup>3</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>1</sup> However, market structure is not case determinative, as the main issue and related evidence continue to concern determining and measuring reasonable pole attachment costs above marginal costs (i.e., costs above the FCC formula) with respect to full capacity/crowded poles, under standards of *Alabama Power* and the *Gulf Power Order*.

<sup>2</sup> There being no evidence offered to the contrary, Gulf Power will be taken at its word that it first discovered the existence of CHELCO attachment agreements and their price structure during depositions in February 2006.

<sup>3</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.