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

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

GULF POWER COMPANY'S PRE-TRIAL BRIEF

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I. INTRODUCTION

Gulf Power owns a network of poles in northwest Florida. Complainants, through their mandatory right of access, attach their facilities to Gulf Power's poles. This is a takings case. This hearing was set by the Bureau to determine whether Gulf Power is entitled to compensation above "marginal cost" for Complainants' attachments. In order to answer this question, the Presiding Judge must apply *Alabama Power v. FCC* – a previously unapplied and uninterpreted case. There are few (if any) true facts in dispute.

Gulf Power offers a practical, real world, interpretation of *Alabama Power v. FCC* that comports with existing takings jurisprudence. Complainants, on the other hand, offer an interpretation of *Alabama Power v. FCC* that is impractical and inconsistent with controlling law (not to mention, nearly impossible to meet). In this pre-trial brief, Gulf Power begins to explain how *Alabama Power v. FCC* must be interpreted and why Gulf Power should prevail in its claim for just compensation.

II. PROCEDURAL HISTORY

Complainants initiated this dispute almost six years ago by filing a pole attachment complaint challenging: (1) Gulf Power's exercise of its express contractual right to terminate existing pole attachment agreements; and (2) Gulf Power's annual charge of $38.06 per pole for Complainants' mandatory access. While this case was dormant, a similar case *Alabama Cable Telecommunications Association v. Alabama Power Company,* was working its way through the FCC and the Eleventh Circuit Court of Appeals. The Eleventh Circuit's decision in *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), introduced a novel standard never before articulated in takings jurisprudence.

The *Alabama Power v. FCC* decision criticized the underlying FCC decisions, finding that the Bureau and the Commission had "inappropriately focused on ratemaking cases" in

rejecting Alabama Power's claim for fair market value pole attachment rentals. 311 F.3d at 1367. Before announcing its new standard, the Court explained: "While we might ordinarily be sympathetic to [APCo's] argument, APCo's case is complicated by one known fact, one unknown fact, and one legal principal." *Id.* at 1368. The known fact and the legal principal have been, and will continue to be, discussed at length in this proceeding. The "unknown fact" upon which the case turned was that "nowhere in the record did APCo allege that APCo's network of poles currently is crowded. It therefore had no claim." 311 F.3d 1370. Gulf Power's case is markedly different.

Unlike Alabama Power, Gulf Power has been given an opportunity to address the standard announced in *Alabama Power v. FCC*. After *Alabama Power v. FCC* was decided, but prior to any determination by the FCC concerning interpretation or implementation of the new ruling, the Bureau issued an Order granting Complainants' complaint. The Bureau's order was based principally on Gulf Power's failure to present the type of evidence discussed in *Alabama Power v. FCC*. Because the Bureau retroactively applied the new standard without giving Gulf Power the opportunity to address it, Gulf Power requested an evidentiary hearing.

Over Complainants' objections, Gulf Power's request for hearing was granted in a Hearing Designation Order dated September 27, 2004. The issues for hearing were described as:

> Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators and, if so, the amount of any such compensation.

(Hearing Designation Order, ¶ 11). Answering these questions requires the parties, and ultimately the Presiding Judge, to address the underlying, more difficult question:

> **What does the standard announced in *Alabama Power v. FCC* mean?**

III. *ALABAMA POWER v. FCC*

All parties agree, for the purposes of this proceeding, that *Alabama Power v. FCC* is controlling authority.[1] The parties differ sharply, however, in their interpretation of its meaning. Gulf Power believes that in order to survive any meaningful scrutiny, *Alabama Power v. FCC* must be interpreted practically and consistent with Supreme Court takings jurisprudence. Complainants, however, spin the *Alabama Power v. FCC* standard into a "heads Complainants win; tails Gulf Power loses" evidentiary standard. In support of their impractical spin, Complainants attempt to reduce the entire *Alabama Power v. FCC* analysis to nothing more than a one-sentence "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.

311 F.3d at 1370.

This "test" (which is actually *dicta* rather than part of the dispositive holding) cannot be read in isolation from the remainder of the opinion. Nor can it be divorced from Supreme Court takings jurisprudence or practical common sense. As succinctly stated by the Eleventh Circuit, the specific reason Alabama Power lost the case was its failure to allege that its network of poles was currently crowded:

> 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.

311 F.3d at 1370.

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[1] Gulf Power reserves its exception to *Alabama Power v. FCC*. By arguing the meaning of the case or presenting evidence to address the standard, Gulf Power does not concede the correctness of any aspect of the ruling.

There are at least two important notions embedded in *Alabama Power v. FCC's* dispositive holding. First, the Court was contemplating the allegation and proof of a crowded *network* of poles – not necessarily any single crowded pole within the network. This is evident in at least three other places in the opinion:

- Power companies have something that cable companies need: *pole networks. Id.* at 1362 (emphasis added).[2]
- Suppose, for example, that a power company must, for its own "core" electric distribution activities, establish a *network of poles* that reaches one million feet into the sky. *Id.* at 1369 (emphasis added).
- There is not an active unregulated market for the use of *"elevated communication corridors,"* however, and so an alternative to fair market value must be used. *Id.* at 1368 (emphasis added).[3]

A "network" crowding analysis makes practical sense for several reasons. First, attachment to a single pole is of little value to the Complainants. It is the network of poles – and the fact that the utility has done all the heavy lifting in building the network – that makes it appealing. Second, a network crowding analysis obviates the need for detailed proof and counter-proof on a pole-by-pole basis – an approach that is financially efficient and much more consistent with the FCC's practice vis-à-vis pole attachments. The voluminous evidence and course of this proceeding (now narrowed to a hundred exemplary poles) prove this very point.[4] A proceeding relating to more than one hundred thousand poles would be impractical.

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[2] Based on evidence that will be elicited at hearing, this is inaccurate. Despite years of contending that utility pole networks are "essential facilities," Complainants admitted in this proceeding that they almost always have the option of installing their plant underground and that the decision to go overhead versus underground is almost always an economic decision. *See* Gulf Power Exhibits G, H, I, and J. Utility pole space is economical for complainants (especially given the years of subsidized rates); it is not and has not been for some time (if ever) "essential." It is time for this myth to be debunked.

[3] As set forth below, there is evidence in this case that contradicts this assertion.

[4] Congress's intended purpose was for the FCC to "institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. No. 95-234, at 21, *reprinted* in 1978 U.S. C.C.A.N. 129. There is a no reason those goals should not be imported into the post-*Alabama Power v. FCC* analysis.

Second, the "crowding" analysis itself – the important "unknown fact" in *Alabama Power v. FCC* – may very well answer the first question raised in the Hearing Designation Order (whether Gulf Power is entitled to receive compensation above marginal costs). The fact that Alabama Power had not alleged that its network of poles was crowded resulted in the Court speculating that space on poles in Alabama Power's pole network **"may be"** *nonrivalrous*:

> This question exposes the unique nature of this case. Typically, the subject of a government condemnation proceeding is ordinary property, such as land. In such a case, the "value" of the thing taken is congruent with the loss to the owner, and there is therefore little tension between the legal propositions in *Virginia Electric* (loss to the owner, not gain to the taker) and *Reynolds* (the full monetary equivalent of the property taken). This is because most property is rivalrous – its possession by one party results in a gain that precisely corresponds to the loss endured by the other party. In this case, however, the property that has been taken – space on a pole – may well lack this congruence. ***It may be***, for practical purposes, *nonrivalrous*. This means that use by one entity does not necessarily diminish the use and enjoyment of others. A common example of a nonrivalrous good is national defense.

311 F.3d at 1369 (emphasis added). The Eleventh Circuit specifically recognized the possibility that pole space could, in fact, be rivalrous when it stated:

> The possibility of crowding is perhaps more likely in the context of pole space, however, and ***if crowded, the pole space becomes rivalrous.*** Indeed Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.

Id. at 1370 (emphasis added).

The entire decision in *Alabama Power v. FCC* hinged on the "unknown fact" – whether Alabama Power's network of poles was crowded. Gulf Power's position in this proceeding is markedly different. Here, Gulf Power will demonstrate, through known (and in many instances undisputed) facts that its pole network is crowded/rivalrous. Gulf Power will establish that

Complainants' use of its pole space meaningfully diminishes Gulf Power's use and enjoyment of the network in many ways (some involving very practical day-to-day operational issues).

As for the compensation issue (not addressed in *Alabama Power v. FCC* because of the "unknown fact"), if "crowding" equals "rivalrous," and "rivalrous" equals "congruence" to land, then proof of crowding must mean that the traditional means of valuing unique property are applicable.

In summary, Gulf Power submits that *Alabama Power v. FCC* stands for the following proposition as it pertains to this case: once Gulf Power demonstrates that its network of poles is crowded and/or its pole space is rivalrous, it is entitled to fair market value for the space taken on its poles.[5] Gulf Power's evidence will prove crowding, entitling it to fair market value in the proxy of a replacement cost formula – a formula very similar to what the *Alabama Power v. FCC* court recognized would be a "solid argument" (but-for the evidence absent in that record).

IV. WHAT IS CROWDING?

While the parties have grappled with the definition of "crowding" and "rivalrous," a deeper analysis of the Eleventh Circuit's pole attachment precedent, *Alabama Power v. FCC* and *Southern Company*, provides clarity. In explaining why Alabama Power's pole space "may be" nonrivalrous, the Eleventh Circuit hypothesized about "a network of poles that reaches one million feet into the sky" – in other words, a theoretically limitless amount of space for purposes of demonstrating a concept (again, in the absence of the "unknown fact"). Nevertheless, the

[5] The Eleventh Circuit's decision in *Klay v. Humana, Inc.*, 425 F.3d 977 (11th Cir. 2005), provides further insight into the distinction between rivalrous and nonrivalrous property. In *Klay*, the Court considered the proper amount of compensation due the American Medical Association ("AMA"), a non-party, for the compelled production of a database containing physician income information and medical practices. The AMA argued that it was entitled to its normal licensing fee charged to others for use of the data. The Eleventh Circuit held, however, that production of the database was nonrivalous because: (1) a protective order secured the confidential nature of the data; (2) the disclosure for the limited purposes of litigation did not deprive the AMA of the use of its database; and (3) disclosure of the database did not "deprive the AMA of the opportunity to sell its intellectual property at its market price to any willing buyers." 425 F.3d at 986. Gulf Power's pole space, particularly in the context of the evidence in this case, is a far cry from the nonrivalrous database at issue in *Klay*.

court clearly envisioned a real-world scale to the problem in the form of actual evidence of finite existing pole space. If it were otherwise, the Court would simply have said pole space is never rivalrous unless there is a structural limitation that restricts it from being raised one-million feet into the sky.

Instead, the *Alabama Power v. FCC* Court specifically referenced 47 U.S.C. § 224(f)(2) (the "statutory exception to the forced-access regime"). 311 F.3d at 1370. Section 224(f)(2) provides that a "utility....may deny a cable television system or any telecommunications carrier access to its poles...where there is *insufficient capacity* and for reasons of safety, reliability and generally applicable engineering principles." (Emphasis added). This provision had been recently addressed by the Eleventh Circuit in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) ("*Southern Company*"). In *Southern Company*, electric utilities appealed an FCC rulemaking that "require[d] a utility to take all reasonable steps to ***expand capacity*** to accommodate requests for attachment just as it would expand capacity to meet its own needs." 293 F.3d at 1346 (quoting *Order on Reconsideration,* 14 FCC Rcd. 18049, ¶ 51 (Oct. 20, 1999)) (emphasis added). The concept of capacity expansion was defined by the FCC to include steps taken "to rearrange or change out existing facilities at the expense of the attaching parties in order to facilitate access."[6] *Order on Reconsideration*, 14 FCC Rcd. 18049 ¶ 53. The Eleventh Circuit held that the "FCC's position [was] contrary to the plain language of §224(f)(2)." 293 F.3d at 1346.

To the extent *Alabama Power v. FCC* envisioned anything other than proof of finite existing pole space, the analysis must be consistent with the *Southern Company* decision

[6] These capacity expansion issues have been referred to in this proceeding as "make-ready." *See, e.g., Harrelson Direct*, p. 6; *Bowen Direct*, p. 15, and Gulf Power Ex. 3-J.

announced by the same court. That is, a pole is at "full capacity" when there is insufficient capacity to accommodate another attacher without rearrangement or change-out.

Indeed, the *Alabama Power v. FCC* opinion expressly equated its term "full capacity" with the concepts captured in § 224(f)(2): "Congress contemplated a scenario in which poles reach full capacity when it created a statutory exception to the forced attachment regime." 311 F.3d at 1370. Thus, the common sense and proper definition of a "crowded" or "full capacity" pole under *Alabama Power v. FCC* and *Southern Company* is any pole that would require make-ready (either in the form of rearrangement or change-out) to accommodate an additional communications attacher. This is the only way a crowding analysis could ever work, and the only way the *Southern Company* and *Alabama Power v. FCC* decisions can be reconciled.

V. GULF POWER'S EVIDENCE OF CROWDING

A. Network Crowding

At the hearing, Gulf Power will submit specific evidence that its network of poles is crowded. Gulf Power will provide data regarding the height of its in-service poles, more than 95% of which are between 30 feet and 45 feet tall. Both Mike Dunn and Ben Bowen testify that the average joint use pole is 40 feet tall – testimony supported by more than 50 years of combined experience and by Gulf Power's joint use agreements with ILECS (that recognize the "standard" joint use pole as a 40 foot, Class Five pole). Moreover, Mike Dunn will testify that: (1) the average joint use pole is crowded even before the cable company attaches; and (2) in order to accommodate the attachment, Gulf Power already has given up, by compression, one foot of power supply space previously bargained for and allocated in its joint use agreements. *See* Gulf Power Exhibit A.

B. *Pole-by-Pole Crowding*

Gulf Power will submit evidence of a significant number of crowded poles owned by Gulf Power to which Complainants are attached. In addition to the information collected by Osmose Utilities Services, Inc. ("Osmose") (covering approximately 10,000 poles), each side has submitted fifty exemplar poles to aid in the analysis of crowding. *See* Gulf Power Exhibit 42; Complainants' Exhibits 15-17.

The fifty poles submitted by Gulf Power include forty Osmose poles and ten Knology poles. *See* Gulf Power Exhibits 42 and 43. The Osmose poles are examples of the varying conditions in the field, with at least one thing in common – each would require make-ready (ranging from rearrangement of existing facilities to pole change-outs) to accommodate an additional attachment. Using the language in § 224(f)(2), there is "insufficient capacity" on these poles. This is a point the Complainants should not dispute. In fact, each of the Complainants testified in deposition that there is hardly (if ever) *any* dispute as to whether make-ready is required to accommodate a new attachment. *See* Gulf Power Exhibits G-J. The Knology poles are examples of occasions where Gulf Power allowed/performed make-ready ranging from rearrangement to pole change-outs to accommodate new attachments on crowded poles. These poles demonstrate that prior to make-ready being performed, there was insufficient capacity to accommodate Knology's cables.

Complainants also submitted fifty exemplar poles, along with measurements and engineering analysis. Although Complainants' expert attempts to cast the objective data in a different light, the numbers tell the tale – the vast majority of the poles identified by Complainants are crowded, requiring rearrangement or a change-out before an additional attachment could be made.

VI. GULF POWER'S DEFINITION OF A CROWDED POLE

For the purposes of the Osmose audit, Gulf Power identified objective, measurable criteria for determining whether make-ready would be required to accommodate a new attachment. The criteria were derived from the National Electric Safety Code (NESC) and Gulf Power construction specifications, which the Complainants concede apply to all attachments made to Gulf Power poles. *See* Gulf Power Exhibits G-J. Gulf Power did not provide Osmose a complete list of all conditions that would require make-ready to accommodate an additional attachment. For example, the audit did not capture loading requirements. Instead, the focus was on practical, widely-accepted, easy-to-measure vertical clearances. In this sense, the way Gulf Power defined "crowding" for the purpose of the Osmose audit is conservative because it does not actually capture *all* conditions that would require make-ready to accommodate an additional attachment.

VII. COMPLAINANTS' DEFINITION OF A "CROWDED" POLE

According to Complainants, there is rarely such thing as a crowded pole, because most poles can either be rearranged or changed out to accommodate a new attachment. After reviewing the Osmose data and the data associated with the one hundred poles submitted to the Presiding Judge by both sides, Complainants' expert is unwilling to say that a single one of the poles is either "crowded" or at "full capacity." Instead, Complainants proffer that any time a pole can be reconfigured to make space available, it is not crowded. Complainants further assert that, even a pole that must be pulled from the ground and replaced with a taller pole to accommodate a new attachment is not crowded or at full capacity. This point bears repeating: Complainants assert that a smaller pole that is taken out of service and replaced with a larger pole was *not* at full capacity.

According to Complainants, the only time a pole can be crowded or at full capacity is when a different, taller pole (not yet in the ground) cannot physically be installed due to some limitation, for example, zoning restrictions, an FAA rule, or an obstruction. Not surprisingly, Complainants and their expert have asserted a definition that results in their desired conclusion that: "[t]he percentage of poles which [are crowded] is very small." (Direct Testimony of Michael Harrelson, p. 8.)

In order to capture their desired conclusion, Complainants' engineering expert must dismiss the very standard he seeks to apply (a pole-by-pole analysis of Gulf Power's facilities). Complainants' expert goes so far as to state that "in the field and in reality, whether a pole is genuinely at full capacity does not depend on the condition of the pole at a fixed moment in time." (Direct Testimony of Michael Harrelson pp. 7-8.) Instead, Complainants' expert posits that the Eleventh Circuit was focused on "the potential of a pole or replacement pole(s) at a given location to accommodate attachments." *Id.* In short, Complainants definition of crowding relies on hypothetical poles and/or configurations.

This case is about actual poles – poles in the ground today. This case is not about a hypothetical future condition of a pole or a hypothetical future taller pole. Each side measured and photographed fifty exemplary poles – real poles with current conditions. That was done for a reason. The Eleventh Circuit standard, whatever it means, cannot require utilities to litigate about the future possibilities of poles or poles that are not currently in service. The crowded/full capacity analysis is about the poles in their current condition. 311 F.3d at 1370 ("Nowhere in the record did APCo allege that APCo's network of poles is ***currently crowded***.")

Aside from being contrary to common sense, there are also several other fundamental flaws in Complainants' hypothetical pole crowding analysis. First, it would render *Alabama*

Power v. FCC meaningless since it would be a standard that could almost never be met. If the Eleventh Circuit wished to speculate about hypothetical poles or pole configurations, it would have had no reason to focus on the "unknown fact" – the **current** condition of Alabama Power's poles. Second, Complainants' definition cannot be reconciled with 47 U.S.C. § 224(f)(2) and *Southern Company* (also binding in this case) which give Gulf Power the statutory right to deny access "where there is **insufficient capacity** and for reasons of safety, reliability and generally applicable engineering purpose." 47 U.S.C. § 224(f)(2) (emphasis added). Complainants' definition of a "crowded" pole is impractical, unworkable, inconsistent with binding law, and should not be accepted.

VIII. HOW TO VALUE SPACE ON CROWDED POLES

This is a takings case. The standard is just compensation. *Alabama Power v. FCC* summarized the relevant U.S. Supreme Court takings jurisprudence as follows:

> In physical takings cases, the property owner generally must receive the "full monetary equivalent of the property taken." The Supreme Court has remained steadfast in its resistance to a rigid rule for determining just compensation. Typically, fair market value is used. Fair market value is established by determining "what a willing buyer would pay in cash to a willing seller" at the time of the taking. There is not an active unregulated market for the use of "elevated communications corridors,"[7] however, and so an alternative to fair market value must be used. The appropriate alternative, whatever that may be, rarely countenances the uses of historical cost, as several Supreme Court cases make clear.

311 F.3d at 1368 (internal citations to numerous U.S. Supreme Court cases omitted).

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[7] Though the term "active" is open for interpretation, there is undoubtedly an unregulated market for the use of elevated communications corridors. Gulf Power has relationships with ILECs, miscellaneous attachers, and even communications companies who (for business reasons) choose not to insist on the subsidized, regulated rate. Further, the Complainants themselves have unregulated relationships with electric utilities such as Choctawhatchee Electric Cooperative, Inc. ("CHELCO"). Complainants pay CHELCO an annual per attachment fee in the range of $17.50 to $20.00 (as compared to the roughly $6 per pole Complainants are currently paying Gulf Power.) *See* Gulf Power Exhibits G-I; 57, 58 and 59.

A. The Subsidized "Favorable" Cable Rate is Insufficient

The Cable Rate, which is the current basis for Complainants' pole attachment rentals, does not yield just compensation. First, it is based on historical costs instead of current costs that reflect the present value of the property. In *Alabama Power v. FCC*, the Court drew a critical distinction between "just compensation" and the "regulated rate" when it noted, "a power company whose poles are not 'full' can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation." 311 F.3d at 1371.[8]

B. Replacement Cost Methodology

Gulf Power proposes to use a replacement cost model as the basis for determining just compensation. The methodology employs the same basic formula used to compute the Cable Rate: Investment x Carrying Charge x Space Allocation Factor. The key differences are the inputs for investment and space allocation. The Cable Rate "investment" uses the average historical cost of all poles in service, minus accumulated depreciation, minus an arbitrary reduction of 15%. Gulf Power's replacement cost methodology uses the average cost of a 40 foot wood pole (the standard joint use pole) from the previous year, plus an allocation for grounds and arrestors (necessary equipment on the pole which benefits all attachers, but is not captured by the Cable Rate), plus an allocation for general plant used to support the operations of distribution.

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[8] But for the failure to allege or prove that its network of poles was crowded/rivalrous, it appears the *Alabama Power v. FCC* Court would have agreed that the Cable Rate was constitutionally insufficient. *See, supra;* "At first blush, the power companies appear to have a solid argument: "While we might ordinarily be sympathetic to this "more favorable" argument...". The Cable Rate is the product of policy – not just compensation. Congress intended for the statutory methodology to "spur the growth of the cable industry, which in 1978 was in its infancy." H.R. Rep. No. 104-204, at 91-92, 1996 U.S.C.C.A.N. at 58; *See also* S. Rep. No. 95-580, at 12-14 (1978), *reprinted* in 1978 U.S.C.C.A.N. 109, 120-23.

As for the space allocation factor, the Cable Rate allocates the pole based solely on the presumed occupancy of usable space (1 ft./13.5 ft.). Gulf Power's replacement cost methodology allocates space more akin to the FCC's Telecom Rate, which allocates unusable space (at least most of it) equally among all attaching entities. This allocation squares with Congress's recognition of the common sense fact that "the unusable space on a pole is of equal benefit to all entities attaching to the pole." H.R. Rep. No. 104-204, 92, 1996 U.S.C.C.A.N. at 58-59; H.R. Con. Rep. No. 104-458, 206, 1996 U.S.C.C.A.N., at 220.

Roger Spain, Gulf Power's valuation expert, testifies that a replacement cost methodology is the most reliable means of approximating fair market value for the space taken by Complainants. Even this methodology, as employed by Gulf Power, is conservative insofar as it (1) relies on the previous year's actual cost data, and (2) does not include any kind of enhancement factor to capture the assembled value of the network. Rather, Gulf Power's replacement cost methodology uses the average, fully loaded installed cost of a 40 foot pole. Mr. Spain's opinion of the appropriate means of valuing the space taken by Complainants is also consistent with jurisprudence on valuing other unique property. Complainants do not even purport to offer alternative valuation evidence for the taken pole space. Instead, they rely on an economist – not a valuation expert – to hypothesize about the policy-based implications of the relationship between Gulf Power and Complainants, as well as the meaning of *Alabama Power v. FCC*. But it is value – not policy – that is the focus of a just compensation analysis.[9] All Complainants' economist does is embrace the historical "favorable" Cable Rate.

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[9] Complainants' economist opines that Gulf Power will be able to exploit its monopoly power if allowed to charge market rates. But such histrionics completely overlook the fact that the courts – not Gulf Power – have the final say over the amount to be charged. One of the very purposes of this proceeding is to determine what rate constitutes just compensation. Gulf Power has made clear and reaffirms once again, it seeks just compensation, an unregulated rate – not a monopoly rate.

C. *The "Loss To The Owner" Standard*

Complainants rely heavily on the argument that just compensation is measured by the loss to the owner, not the gain to the taker. But relying on this mantra neglects two important points. First, once property is demonstrated to be rivalrous (in this case, crowded) then, according to *Alabama Power v. FCC*, the loss to the owner corresponds to the value to the taker. The theoretical gap between "loss to the owner" and "gain to the taker" (which may exist where pole space is infinite) is eliminated. Second, Gulf Power's "loss" is the value of the space taken – whatever that value may be. Fair market value proxies, such as replacement costs, are intended to "step in" where it is difficult to determine value based on what a willing buyer and a willing seller would agree upon in a perfectly competitive market. Further, it would be a misreading of authority to altogether exclude consideration of "value" from the perspective of the taker. As Roger Spain will testify one of the reasons one entity might sell an asset is because it is more valuable to the buyer than the seller. (Direct Testimony of Roger A. Spain, pp 25-26; "[I]t is common for a business, instead of using an asset in its own operations, to sell that asset at fair market value to someone with a higher valued use.").

D. The Second Part of the *Alabama Power v. FCC* "Test"

Reading the *Alabama Power v. FCC* opinion as a whole (rather than isolating a single sentence within the opinion), there is really only one part of the "test" – whether Gulf Power's pole space is rivalrous. Once the pole space is shown to be rivalrous (whether on a network basis or pole-by-pole basis), the focus turns to the proper means of valuing the property. But to the extent the Court interprets *Alabama Power v. FCC* to require a two-part showing, the second part of the "test" – another buyer waiting in the wings or a higher-valued use in the utility's own operations – must be interpreted in the context of Supreme Court takings jurisprudence and in the context of the origins of mandatory access.

1. ***Another buyer waiting in the wings***

Gulf Power cannot be forced to show another *actual* buyer "waiting in the wings" to purchase the space occupied by Complainants. Such an interpretation would run afoul of the hypothetical willing buyer/willing seller standard embedded in takings law and fair market value standards. Requiring Gulf Power to show a present buyer for specific space on a specific pole would be akin to requiring the owner of a condemned piece of land to prove there was actually another person at that time prepared to purchase the land for an already-negotiated price. The consequences of such a burden are severe: if the land owner could not offer proof of an actual buyer "waiting in the wings," he would be relegated to nothing (or, under the logic of the Cable Rate, perhaps what his grandfather paid for the property in 1940). This cannot be the intent of *Alabama Power v. FCC*, and would be inconsistent with one hundred years of Supreme Court precedent. The buyer "waiting in the wings" must be a hypothetical buyer.

To the extent the "waiting in the wings" language contemplates a proffer of buyers in the market, generally, Gulf Power has introduced evidence (through its CATV Permit Records) concerning buyers of pole space on an annualized basis for the years 1999 through 2005. *See* Gulf Power Exhibit 4. Gulf Power also has introduced testimony regarding buyers in the market (at higher prices) other than Complainants.

2. Higher-valued use

One of the privileges of ownership is the right to exclude others. Gulf Power's right to exclude the Complainants from its poles has been taken-away by Congress. In fact, one of the reasons Congress took this right was because it *assumed* exclusion of attachers would be a higher-valued use. The *Alabama Power v. FCC* case explicitly recognizes this fact:

> Perhaps fearing that electric companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. *See Southern Company v. FCC*,

> *293 F.3d 1338, 1341-42 (11th Cir. 2002)* ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act.").

311 F.3d at 1363-64. In addition to the axiomatic higher-valued use of exclusion, Gulf Power also offers evidence of, among other things: (1) other buyers in the market willing to pay a higher price; (2) the continuing need to install its own facilities (such as transformers) on its own poles; and (3) the inconvenience and un-recovered cost (albeit unquantified) that result from Complainants' attachments.[10]

IX. SUMMARY OF WITNESS TESTIMONY

A. Mike Dunn

Mike Dunn was the Project Services Manager at Gulf Power before his retirement in April 2003. Mr. Dunn's direct testimony covers five topics. First, Mr. Dunn discusses his background and joint use experience. Mr. Dunn has over fifteen years experience negotiating joint use contracts and over twenty years of direct involvement in all phases of joint use relationships, including direct dealings with the Complainants.

Second, Mr. Dunn discusses Gulf Power's joint use spacing requirements. Mr. Dunn will demonstrate that Gulf Power's poles are tangible pieces of real property. He will explain that each pole has spacing considerations that have evolved over the year. Consideration of these spacing requirements is the purest form of a capacity analysis that does not require costly and time consuming pole-by-pole measurements. Mr. Dunn will explain the origin of the spacing

[10] This portion of the test, if it applies, must also be read in conjunction with the Eleventh Circuit's subsequent decision in *Klay*, 425 F.3d at 986 ("The disclosure did not deprive the AMA of the opportunity to sell its intellectual property at its market price to any willing buyers' ...").

requirements and also discusses Gulf Power's typical joint use pole that he utilizes in discussing the crowding/full capacity analysis.

Third, Mr. Dunn will explain Gulf Power's make-ready procedures. Mr. Dunn will explain that embedded within the concept of make-ready is the notion that there is currently insufficient space on the pole to accommodate the additional attachment. Mr. Dunn also will discuss NESC issues as they are applied to make-ready, spacing on poles and Gulf Power's inspection processes.

Fourth, Mr. Dunn will apply the Eleventh Circuit's crowding/full capacity standard to Gulf Power's poles and conclude that Gulf Power's network of poles is crowded. Mr. Dunn will discuss Gulf Power's typical joint use pole and demonstrates the finite amount of space available for attachment. Mr. Dunn will also explain the spacing with the use of demonstrative aids.

Mr. Dunn will conclude his testimony with a discussion of Gulf Power's replacement cost methodology. The methodology was developed at his direction and he is familiar with its purpose, the areas in which it departs from the Cable Rate and why the replacement cost methodology cost more appropriately represents the value of the space that has been taken from Gulf Power.

B. Ben Bowen

Ben Bowen has worked with Gulf Power for nearly 20 years. He is currently managing Gulf Power's Joint Use Program. Mr. Bowen's testimony will demonstrate, among other things, that Gulf Power's pole network is crowded. Mr. Bowen's testimony will discuss Gulf Power's distribution system, generally, and specifically as it relates to the portion of Gulf Power's distribution system to which Complainants are attached. Mr. Bowen's testimony will provide data regarding the attributes of Gulf Power's overhead distribution system – in particular, that more than 95% of the system is comprised of wood poles ranging from 30 feet to 45 feet tall.

Mr. Bowen's testimony will detail the relationship between Gulf Power and the Complainants as well as other third-party attachers. This testimony will outline the similarities and differences between the relationships, as well as the various rates Gulf Power collects.

Mr. Bowen's testimony will explain the clearance requirements under the NESC, Gulf Power specifications, and sound engineering practice, in addition to how these clearance requirements impact the determination of crowding. Mr. Bowen's testimony will explain the origin and results of the Osmose audit, and why it was stopped. Mr. Bowen's testimony will explain Gulf Power's 50 pole identification and why each of these poles (through the use of examples) is crowded. Mr. Bowen will also offer testimony supporting Gulf Power's proposed replacement cost methodology – principally the underlying operational assumptions within the methodology (40 foot pole assumption, number of attaching entities, space allocation, etc.).

C. Terry Davis

Terry Davis has worked with Gulf Power for 20 years in various accounting and treasury positions. She is currently the Assistant Secretary and Assistant Treasurer for Gulf Power. Ms. Davis's testimony will relate almost exclusively to Gulf Power's proposed replacement cost methodology. Ms. Davis will explain how the replacement cost rate is computed, as well as the basis and purposes behind the individual components of the replacement cost methodology. Rather than walking through each year, number by number, Ms. Davis's testimony will use an exemplary single year calculation, walking through the steps of the calculation, the source of the input and the underlying rationale. Ms. Davis will testify concerning the amounts Gulf Power has invoiced the Complainants for pole attachment rentals, the amounts Complainants have actually paid, and the difference between the two (with interest calculations).

D. Roger Spain

Roger Spain is a certified public accountant and certified valuation analyst engaged by Gulf Power in this proceeding. Mr. Spain's testimony will focus on the appropriate method by which to estimate the fair market value of the pole space taken by Complainants. Mr. Spain will testify that of the three accepted methods for estimating fair market value (cost, market or income methods) the cost method is the most appropriate in this instance. More specifically, Mr. Spain explains that Gulf Power's proposed replacement cost methodology is an appropriate estimation of the fair market value of the space Complainants take from Gulf Power's network of poles. Finally, Mr. Spain will testify that the market method is an indicator of the fair market value of taken pole space.

X. CONCLUSION

Complainants' theory of the case simply breaks down when scrutinized under the law and the real world facts. To the contrary, Gulf Power offers a meaningful interpretation of *Alabama Power v. FCC*, and significant evidence that its network of poles is crowded and its real property rivalrous. The evidence Gulf Power will present at hearing – both through its own witnesses and through cross-examination of Complainants' witnesses – will demonstrate (1) that its interpretation of *Alabama Power v. FCC* is correct, and (2) that it is entitled to pole attachment rates exceeding the subsidized, "favorable" regulatory Cable Rate.

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