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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' TRIAL BRIEF

Michael A. Gross
Vice President,
Regulatory Affairs and
Regulatory Counsel
**FLORIDA CABLE
TELECOMMUNICATIONS ASS'N, INC.**
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303
(850) 681-1990

John D. Seiver
Geoffrey C. Cook
Rita Tewari
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006
(202) 659-9750

Counsel for

**FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, COX COMMUNICATIONS
GULF COAST, L.L.C., COMCAST
CABLEVISION OF PANAMA CITY, INC.,
MEDIACOM SOUTHEAST, L.L.C., and BRIGHT
HOUSE NETWORKS, L.L.C.**

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List ABOVE

TABLE OF CONTENTS

	<u>Page</u>
COMPLAINANTS' TRIAL BRIEF.....	1
I. COMPLAINANTS' SUMMARY OF THE CASE.....	1
A. Introduction and Summary.	1
B. Applicable Legal Standards and Description Of The Issues.	3
1. The APCO Complaint Proceedings and Precedent.....	4
2. Gulf Power Complaint Proceedings.....	9
C. In This Case, Gulf Power Must Prove Three Things To Prevail.	12
D. Gulf Power Cannot Prove Any Of The Three Points, Let Alone All Of Them.	13
1. Gulf Power's Poles Are Not At "Full Capacity"	13
2. Gulf Power Has Failed To Prove Any Actual Loss.....	23
3. Gulf Power's Use Of A "Replacement Cost" Methodology Is Inconsistent With The Rule Of Measuring "Just Compensation" By "Loss To The Owner"; Is Unrelated To The Capacity Of Poles Containing Complainants' Attachments Or Whether Gulf Has Incurred Any Lost Opportunity On Such Poles; And, Moreover, Has Already Been Specifically Rejected By The Commission In The Context Of Utility Pole Attachments	28
4. Gulf Power Has Not Proved Its Case.....	38
II. THE EVIDENCE PROFFERED BY GULF POWER, BECAUSE IT DOES NOT INCLUDE ANY ACTUAL LOST OPPORTUNITY, DOES NOT PROVIDE A BASIS FOR THE USE OF ANY COST METHODOLOGY OTHER THAN THE CABLE FORMULA.....	39
III. SUMMARY OF WITNESS TESTIMONY	43
A. Michael T. Harrelson	43
B. Patricia D. Kravtin	44
C. Ben A. Bowen.....	46
D. Michael R. Dunn.....	46
E. Terry A. Davis	47

F.	Roger A. Spain.....	47
G.	Rex Brooks.....	47
H.	Thomas Forbes.....	47
I.	David Tessieri.....	48
IV.	DESCRIPTION AND STATEMENT OF RELEVANCE OF COMPLAINANTS’ EXHIBITS	48
V.	EVIDENTIARY ISSUES	60
1.	Complainants Object To All Evidence That Does Not Meet The <i>Alabama</i> <i>Power</i> Requirement of Proof Of Actual Loss.....	60
2.	Complainants’ Object To The Introduction Of Any Evidence Concerning Gulf Power’s Alleged “Replacement Costs”	63
3.	Complainants Object To The Introduction Of Any Evidence Concerning The Osmose Pole Audit	63
4.	Complainants Object To The Introduction Of Any Testimony From Gulf Power’s Purported “Expert” Witness, Roger A. Spain, On The Grounds That His Testimony Fails To Meet The “Reliability” and “Relevance” Requirements Under The Supreme Court’s <i>Daubert</i> Ruling.....	64
5.	Complainants Object To The Introduction Of Any Specific Documentary Evidence By Gulf Power At The Hearing That Was The Subject Of Complainants’ Discovery Requests But Which Was Not Produced To Complainants	71
6.	Complainants Object To the Introduction Of Any Evidence Of Pole “Replacement Costs” On The Ground That The Judge Has Already Ruled That Gulf Power Is Precluded From Using Pole Availability Or Costs To Justify Charging A Rate Above Marginal Costs.....	72
7.	Complainants Further Object To The Introduction Of Any Specific Calculations Pertaining To Gulf Power’s Replacement Costs At Or In Excess Of \$40.60 On The Grounds That Gulf Has Waived Any Such Claim	73
8.	Complainants Object To The Introduction Of Any Evidence By Gulf Power That It Has A “Higher Valued Use” For Space On Poles Containing Complainants’ Attachments.....	74
9.	Complainants Move To Strike Gulf Power’s Exhibits 1-3 From Evidence, The Affidavits Of Michael Dunn.....	74

COMPLAINANTS' TRIAL BRIEF

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"), pursuant to the *Scheduling Order*, FCC 05M-60, of December 16, 2005, and the Prehearing Order, FCC 04M-28, of October 1, 2004, respectfully submit this Trial Brief. As specifically required by the Presiding Judge in FCC 04M-28, Complainants' Trial Brief includes: (1) a summary of the case; (2) an explanation of why the FCC cable rate formula provides constitutionally sufficient "just compensation" for any taking of pole space and of why the evidence proffered by Gulf Power does not provide a basis for the use of any "alternative cost methodology," let alone the use of the constitutionally unsound "replacement cost" methodology; (3) a brief summary of what Complainants' two expert witnesses will prove, the subjects on which Complainants intend to cross-examine Gulf Power witnesses, and the significance of Complainants' designated deposition excerpts for three Gulf Power witnesses for whom Gulf Power has not submitted testimony (Rex Brooks, Thomas Forbes, and David Tessieri); (4) a brief description and statement of relevance of documentary evidence submitted by Complainants; and (5) a discussion of evidentiary or other important pre-hearing issues and supporting points and authorities.¹

I. COMPLAINANTS' SUMMARY OF THE CASE

A. Introduction and Summary.

This case involves Gulf Power's attempt to use the statutory right of access to utility poles afforded to cable television systems and telecommunications carriers in Section 224(f) of the Telecommunications Act of 1996 (the "1996 Act"), and the classification of that access as a

¹ Gulf Power's brief, filed April 12, 2006, did not include items (4) or (5). As to the relevance of its exhibits, several of Gulf Power's proffered exhibits should nonetheless be stricken from the record. See Section V (9) below.

physical “taking,” to increase the annual pole attachment rate that it charges for Complainants’ long-standing cable television pole attachments, under the rationale of demanding “just compensation,” from the approximately \$5.65 to \$6.30 per pole, plus make-ready charges, that it now receives under the Commission’s judicially sanctioned formula, to a range of \$38 in the year 2000 to approximately \$65 per pole, per year, in 2006, in addition to any make-ready charges. Gulf Power’s claim, however, is entirely without merit. The controlling and fundamental constitutional principle of takings law that has been uniformly recognized by the courts and this Commission (that forms any necessary context for “interpreting” takings jurisprudence) is that “just compensation” is determined by the actual (not theoretical) loss to the owner whose property is taken, and *not* any alleged (theoretical *or* actual) “gain,” “value,” or “cost savings” to the “taker.”

Because Gulf Power’s case is replete with defects and inconsistencies in light of the controlling precedent, Gulf Power cannot prevail on its claim for additional compensation over and above what it already receives from Complainants under the Commission’s formula. Gulf Power has submitted no evidence of an actual loss or lost opportunity, let alone a quantifiable loss, that was incurred because it was unable to demand that Complainants remove their existing cable television pole attachments. Although Gulf Power initially claimed it would submit such evidence, the record, testimony and exhibits instead demonstrate that Gulf Power has failed in its proof: Gulf Power has not suffered *any* out-of-pocket losses or foregone *any* opportunities that would justify *any* entitlement to “more than marginal costs” or an increase in the rates and payments it receives from Complainants under Section 224 and the Commission’s rules.

B. Applicable Legal Standards and Description Of The Issues.

This case arises from, and is governed by, the legal standards set forth in the opinion of the Federal Communications Commission in *Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, 16 F.C.C.R. 12209 (2001) (“*APCO Commission Order*”), and of the United States Court of Appeals for the Eleventh Circuit in *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1370-71 (2002), *cert. denied*, 124 S. Ct. 50 (2003) (“*Alabama Power*”), which affirmed the *APCO Commission Order*. In that proceeding, the Alabama Power Company, an affiliate of Respondent Gulf Power, argued that the annual utility pole rental rates and make-ready payments paid for cable television attachments that were calculated under the federal Pole Attachments Act of 1978, 47 U.S.C. § 224(d), and the Federal Communications Commission (“FCC”)’s regulations, 47 C.F.R. § 1.1401 *et seq.*, did not provide Alabama Power “just compensation” for the physical “taking” of the space occupied by those attachments on Alabama Power’s utility poles.² The Commission, affirmed by the Eleventh Circuit, rejected Gulf Power’s arguments and instead held that payment of the FCC’s pole rental and make-ready provided Gulf Power with just compensation. The Eleventh Circuit carved out one limited circumstance where Gulf might be entitled to recover more than the marginal costs of hosting Complainants’ attachments: If Gulf could show a specific lost opportunity due to Complainants attachments that prevented them from collecting any more than what Complainants had been paying, Gulf could have a claim to more than just the marginal costs it had recovered from Complainants for the

² The utility’s challenge in *Alabama Power* was only one of the more recent in a series of legal challenges that the utility industry had brought challenging FCC regulation of the pole attachment rates, terms and conditions over more than two decades since Congress passed the Pole Attachments Act in 1978 to curb the monopoly rents and monopolistic practices of the utility industry. See *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (“*Gulf Power I*”); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev’d*, *National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002) (“*Gulf Power II*”); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002); and *Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002). Gulf Power has actively participated in these challenges. In fact, Gulf Power attempted to join Alabama Power in its challenge in the Eleventh Circuit before there had even been a ruling on the Complainants’ complaint in this proceeding. See 311 F.3d at 1366-67.

attachments to the specific poles where the additional opportunity had been actually foreclosed. This is not an “interpretation” of the *Alabama Power* decision or a “heads we win, tails you lose” argument³; rather it is what the court said and what the law is. Gulf Power does not like the precedent and has been challenging it ever since. However, Gulf Power’s challenge to that precedent was unsuccessful and its further challenge to that precedent here is not only untimely, but precluded.

1. The APCO Complaint Proceedings and Precedent. In the *APCO Commission Order*, the FCC affirmed a ruling by the Cable Services Bureau, which had concluded that the utility’s proposed annual pole attachment rate of \$38.81 was unreasonable under the Commission’s rules and directed Alabama Power to allow the cable operators who had filed a Complaint with the FCC to remain on its utility poles at the previously negotiated annual rate.⁴ Significantly, in its ruling, the Commission specifically considered Alabama Power’s claim that any determination of “just compensation” in a physical takings required a different analytical framework than the regulatory takings analysis used by the Supreme Court in its 1987 *Florida Power* opinion. The Commission then addressed and rejected the same exact arguments that Gulf Power makes in this case, including the argument that utility pole attachments, and “just compensation” for them, should be valued by a “fair market value” standard and that “replacement costs” could be used to approximate such a “fair market value.”⁵ The Commission concluded that the FCC’s “cable rate formula, together with the payment of make-ready expenses, provides compensation that *exceeds* just compensation.”⁶

³ Gulf Power Trial Brief at 3.

⁴ 16 F.C.C.R. 12109 (citing *In the Matter of Alabama Cable Telecommunications Assoc. et al. v. Alabama Power Co.*, 15 F.C.C.R. 17346 (Sept. 8, 2000)).

⁵ *APCO Commission Order*, ¶¶ 53-58.

⁶ *Id.* at ¶ 58 (emphasis supplied).

On petition for review of the APCO Commission Order, the Eleventh Circuit again rejected the utility industry's claim to be entitled, in the name of "just compensation," to an annual pole attachment rent exceeding the FCC Cable Rate.⁷ The Court of Appeals first emphasized the governing rule of just compensation:

The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, 'the question is, What has the owner lost? not, What has the taker gained?' This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better.

311 F.3d at 1369. The Eleventh Circuit cited and agreed with an important decision of the Second Circuit Court of Appeals that resolved a takings claim for just compensation where Amtrak was given the power to force its way onto the tracks of other railroad companies:

Assuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable [marginal] costs, will receive what it would have had but for the taking. In other words, the owner . . . will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. . . . *If the Fifth Amendment required such a sharing [of the overhead costs of ownership, then the petitioners] would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation, it is that the value to the taker is not to be considered, only loss to the owner is to be valued.*

Id. at 1370 (citing *Metropolitan Transp. Auth. v. ICC*, 792 F.2d at 297 (emphasis added)).

⁷ 311 F.3d at 1368-72. The Eleventh Circuit had already considered and rejected the claim that the FCC's formula failed to provide "just compensation" when resolving Gulf power's initial claim that the FCC formula under the "voluntary access" regime did not provide just compensation after the 1996 amendments created a "mandatory access" regime. *Gulf Power I*, 187 F.3d 1324, 1338 (11th Cir. 1999) ("There is nothing in *Duquesne*, or in the record before us, which indicates that the rate of compensation provided in this Act (before its amendment) for voluntarily provided access was just above confiscation. We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the plaintiffs' view, constitutionally inadequate under the current Act for forced access situations. *Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum*) (emphasis supplied).

Next, the *Alabama Power* court considered how the principle of measuring just compensation by “loss to the owner” applies in the context of utility pole attachments. The Eleventh Circuit observed that “marginal cost provides just compensation” and that the FCC’s formula for pole rental attachment, “which provides for much more than marginal cost, necessarily provides just compensation,” in almost every situation involving pole attachments.⁸ The Eleventh Circuit explained that in ordinary takings claims involving land, the property taken is “rivalrous,” in that “its possession by one party results in a gain that precisely corresponds to the loss endured by the other party.” *Id.* at 1369. However, after noting that that pole owners use the make-ready engineering process and are paid substantial amounts of money in make-ready costs by those who need to have make-ready done in order to attach, *see Id.* at 1368-69,⁹ the Court stated that “the property that has been taken – space on a pole – may well lack this congruence” . . . [and] “may be, for practical purposes, *nonrivalrous*.” *Id.* (emphasis in original). This means that, in light of the make-ready process that utilities use to provide space for attachers, an attachment by one party “does not necessarily diminish the use or enjoyment” by the pole owner or existing or future attachers to pole space on any given pole. *See id.* at 1369. Thus, the Court explained, for a pole owning utility to have a claim for “just compensation” in excess of the marginal costs caused by an attachment, a pole owner must identify a situation where existing attachments actually “foreclose[] an opportunity to sell space to another bidding firm – a missed opportunity” *Id.*

A pole owner may not simply claim, as Gulf does in this case, that it has “lost” the “opportunity” to charge “market” rates. *Id.* As *Alabama Power* states,

⁸ *Id.* at 1370-71.

⁹ Indeed, the Eleventh Circuit noted that “APCo received more than a million dollars in make-ready payments from cable company attachers.” *Id.* at 1369, n.21.

[I]t would not make sense for the power companies to say, ‘Even 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 [taker—the government or its beneficiary, the cable and telecommunications attachers] at what we deem the ‘full market price’ of this pole space.’

Id. Instead, a pole owner must prove that an existing attachment or attachments has caused it to in fact suffer a real loss – to be “out more money” as a result of an actual “missed opportunity” to sell space that was precluded because of Complainants’ existing attachments. *See Id.*

Recognizing there might be circumstances where payment of marginal costs would be insufficient on a particular pole, the Eleventh Circuit established the following requirements, which it emphasized had to be met for “each pole” for which a utility brings a claim in excess of existing make-ready and rental payments under Section 224:

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 1370-71 (emphasis supplied). The Court further explained that, “[w]ithout such proof, any implementation of the [FCC] Cable Rate (which provides for *much more* than marginal cost) necessarily provides just compensation.” *Id.* (emphasis added). Thus, for poles that are not at full capacity, or that are at full capacity but as to which Gulf has not proven that it was unable to accommodate a particular attacher (so there is no lost opportunity), the FCC formula provides *more* than the constitutional minimum for just compensation. In other words, consistent with the constitutional standard for just compensation of “loss to the owner,” a power company may make out a claim for additional compensation *only* if the existing *attachments* are proven to have either actually “foreclose[d] an opportunity to sell space to another bidding firm” or forced the pole owner to forego the opportunity of putting the space to a demonstrable and

quantifiable “higher valued use,” which could then be part of a required evidentiary showing that the pole owner was actually “out [] more money than it [was] before the taking.” *Id.* at 1369, 1370. Without that showing of an actual lost opportunity which resulted in a monetary loss because Gulf could not terminate Complainants’ attachments, Gulf Power simply has no claim.¹⁰

Moreover, the Eleventh Circuit recently discussed *Alabama Power* and reiterated that a property owner claiming a taking has the burden to present evidence that it has actually “suffered a loss.” In *Klay v. Humana, Inc.*, 425 F.3d 977 (11th Cir. 2005), the Court considered a claim by the American Medical Association (“AMA”) that it should be able to charge a license fee of its own choosing in complying with a subpoena from managed care providers rather than just being compensated for the costs that it actually incurred in producing documents. The Eleventh Circuit described the subpoena’s effect as a taking of the AMA’s intellectual property and proceeded to discuss, and apply, its ruling in *Alabama Power*. After noting the rule of measuring just compensation by “loss to the owner,” and that, in an “ordinary takings case,” one party’s loss corresponds to another party’s gain, the Court stated:

A different rule prevails for another form of property. If the property is nonrivalrous – i.e., one party’s use of the property ‘does not necessarily diminish the use and enjoyment of others’ – compensation for the nonrivalrous use of the property will ordinarily be limited to the marginal cost incurred by that use. *See id.* This limitation is proper even if the taking deprives the owner of the opportunity to sell the use of its property at a desired price, because the ‘one immutable principle in the law of just compensation . . . is that the value to the taker is not to be considered, only loss to the owner is to be valued.’

¹⁰ Indeed, because Gulf Power has not submitted any evidence that comports with the standard set by the Eleventh Circuit in *Alabama Power* and adopted by the Commission for this proceeding, Gulf Power’s challenge to the FCC’s *methodology* (and urging the adoption of a different methodology that does not relate to specific poles, specific capacity, or specific opportunities) is more of a “legal issue that hardly warrants a hearing” and that already has been decided by the Commission and by the Eleventh Circuit in their *Alabama Power* decisions. *See* Section V (1), *infra*, pp. 60-62.

425 F.3d at 985 (citing *Alabama Power*, 311 F.3d at 1370; and quoting *Metropolitan Transp. Auth. v. ICC*, 792 F.3d at 297). The Court went on to find that “the AMA did not suffer a loss in the commercial value of its property.” *Id.* at 986. Then, the Eleventh Circuit observed that the AMA’s appeal was “similar to *Alabama Power*” and it described the holding in *Alabama Power*:

We rejected the argument of *Alabama Power* and held that, because the use of the utility poles was nonrivalrous and *did not deprive Alabama Power of the opportunity to sell access to other providers*, the compensation owed to *Alabama Power* was limited to the marginal costs of allowing access to the cable providers.

Id. (citing *Alabama Power*, 311 F.3d at 169-71)(emphasis added). Thus, a property owner claiming a taking in such circumstances must prove that it was “deprived of the opportunity to sell access” to others and “suffered a loss” as a result. In *Klay*, the Court found that “[a]s in *Alabama Power*, the AMA has not lost the opportunity to sell its product to other persons,” and, as a result, the AMA was only entitled on its takings claim to its “production costs” of complying with the subpoena. 425 F.3d at 986.¹¹ Significantly, the Court of Appeals noted that even though the AMA could “sell its intellectual property at its market price” to other “willing buyers,” this fact did not permit the AMA to recover more on its takings claim than its actual loss or expense of complying with the subpoena. Therefore, consistent with *Alabama Power* and *Klay*, it is only where a “forced” sale actually precludes another sale that there could be a “lost opportunity” entitling the owner to recover more than the marginal costs associated with the first “forced” sale.

2. *Gulf Power Complaint Proceedings.* Approximately six months after the Eleventh Circuit rendered its decision in *Alabama Power*, the Enforcement Bureau, on May 13, 2003,

¹¹ In its Pre-Trial Brief, *Gulf Power* unsuccessfully attempts to distinguish *Klay* by arguing that poles are different from medical databases. *Gulf Power Pre-Trial Brief*, 6 n.5. As the Eleventh Circuit explained, however, the appeal in *Klay* “is similar to *Alabama Power*,” and the applicable principle—that a party claiming additional compensation for a taking must prove it has actually suffered a loss – is identical. *Id.* at 986.

issued a Memorandum Opinion and Order in this case granting Complainant cable operators' Complainant against Gulf Power's proposed new pole attachment rate of \$38.06.¹² In its *Opinion*, the Enforcement Bureau specifically rejected Gulf Power's arguments, which it continues to make in this proceeding, that the FCC should abandon the Cable Rate, apply a "reproduction cost methodology" using the "replacement cost of poles at current prices," include additional Federal Energy Regulatory Commission ("FERC") accounts, and change the allocation of costs under the FCC Cable Rate to increase the allocation to cable television attachers of portions of the unusable space on poles. *Id.* at ¶¶ 14-16.¹³ The Bureau, citing the Eleventh Circuit's decision in *Alabama Power*, concluded that Gulf Power had submitted no evidence that would satisfy "the test articulated by the Eleventh Circuit" and further found that the Commission had addressed and rejected the specific challenges to the FCC Cable Rate formula "time and again" that are raised yet again in this proceeding. *See Id.* at ¶ 16, and nn. 58-64.¹⁴

One month later, on June 23, 2003, Gulf Power filed a Petition for Reconsideration and Request for Evidentiary Hearing ("Rehearing Petition").¹⁵ In its Rehearing Petition, Gulf Power challenged the Eleventh Circuit test set forth in *Alabama Power*, arguing that it "violat[e]d well-established legal principles" and, alleging, because it purportedly "ignored the 'market value' standard for determining the value of the property taken," that "[t]he Eleventh Circuit's standard is unlawful." *Id.* at pp. 5, 9. After criticizing the Eleventh Circuit's opinion, Gulf Power

¹² *In the Matter of Florida Cable Telecommunications Assoc. et al. v. Gulf Power Co.*, 18 F.C.C.R. 9599 (2003).

¹³ These precise arguments had already been considered and rejected by the Commission, which was upheld in the Eleventh Circuit. *See Alabama Power*, 311 F.3d at 1367. In fact, the Commission considered and rejected the affidavits submitted by Mr. Michael Dunn, Gulf's witness in this case and whose affidavits have been marked as exhibits in this case. *See* Part I.D.3, *infra*.

¹⁴ *See also Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 F.C.C.R. 6453 (2000) ("Fee Order"); and *APCO Commission Order*, ¶ 61.

¹⁵ Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, PA No. 00-004 (June 23, 2003).

nevertheless requested an opportunity to present evidence to meet the Alabama Power test. Among the categories of “evidence” that Gulf Power claimed it had was “[t]estimony and documentary evidence concerning Gulf Power’s lost opportunities and the rivalrous nature of its pole space.” *Id.* at pp. 11-12.

After considering Gulf Power’s Rehearing Petition, the Bureau, on September 27, 2004, issued its Hearing Designation Order (“*HDO*”).¹⁶ The *HDO* granted Gulf Power the opportunity at a hearing to try to satisfy specific requirements set forth in a decision of the United States Court of Appeals for the Eleventh Circuit in *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (2002). *HDO*, 4 n.21. The Bureau explained that “a utility pole owner is constitutionally entitled only to marginal costs [of attachments] unless certain conditions are present” and quoted the Eleventh Circuit’s *Alabama Power* test. The *HDO* established the issues for hearing 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.” *HDO*, ¶ 11. The *HDO* further provided that, with respect to each of the two distinct prongs established by *Alabama Power*, Gulf Power “bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*” (emphasis added). *HDO*, ¶ 8; *see also Status Order*, FCC 05M-23 (April 15, 2005), 4. The *HDO* specifically noted that the Commission was not expressing any “opinion about the ultimate merits of the Petition – *i.e.*, whether Gulf Power is entitled to receive compensation above marginal cost – leaving that determination to an ALJ.” *HDO*, ¶ 5, n.21.

¹⁶ 19 F.C.C.R. 18718 (2004).

C. In This Case, Gulf Power Must Prove Three Things To Prevail.

To meet its burdens under its claim for “just compensation,” Gulf Power has to make three principal showings, “with regard to each pole,” *see* 311 F.3d at 1370, for which it makes a claim: (1) First, it has to identify specific poles that are at “full capacity”; (2) Second, Gulf Power has to prove that it has incurred an actual loss as to those specific poles either by “missing out” (in the Eleventh Circuit’s words) on a specific opportunity to lease pole space to another party willing to pay more than Complainants or by not being able to put the space occupied by Complainants to a quantifiable, demonstrable “higher-valued use” in Gulf’s own operations; and (3) Third, if Gulf Power were able to meet the first and second showings, it would then have to substantiate and quantify the specific amount of its actual lost opportunities on particular poles in order to claim an entitlement to a higher annual pole rent than the contractually negotiated rent that it already receives from the Complainants. As the Eleventh Circuit explained, “without such proof [of full capacity and actual loss], any implementation of the [FCC] Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.” 311 F.3d at 1370-71; *see also Klay*, 425 F.3d at 986 (discussing *Alabama Power* and describing requirement that pole owner prove that it has been deprived “of the opportunity to sell access to other providers” and has “suffered a loss”).¹⁷

Gulf suggests that Complainants’ statement of the two prong test expressed unambiguously in *Alabama Power*, the HDO, as well as subsequent cases is really a “spin” or “dicta.”¹⁸ This is not only a complete surprise,¹⁹ but completely at odds with the Eleventh

¹⁷ In its Pre-Trial Brief, Gulf Power suggests that *Alabama Power* only requires proof of pole “crowding.” Gulf Power’s Pre-Trial Brief, 3. But the Eleventh Circuit’s holding clearly stated that “In unique cases such as this one, marginal cost meets this test [of loss to the owner] – unless, of course, the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use. 311 F.3d at 1372. This proof does not exist when “the cable company’s use does not foreclose any other use.” *Id.* at 1369.

¹⁸ Gulf Power Trial Brief at 3.

Circuit's and the Commission's subsequent decisions that had no trouble understanding the terms of the test and applying it.²⁰ Accordingly, arguments about the efficacy or appropriateness of the test are misplaced. Certiorari was denied so the case remains fully effective and binding. Trying to bootstrap an argument that because the poles are "crowded" that the fair market value standard or replacement cost is appropriate is a desperate attempt to avoid the clear and unambiguous terms of the test on which Gulf Power agreed (but utterly failed) to submit evidence.²¹

D. Gulf Power Cannot Prove Any Of The Three Points, Let Alone All Of Them.

1. Gulf Power's Poles Are Not At "Full Capacity"

First, Gulf cannot meet the first prong of the *Alabama Power* test, "full capacity," because Gulf has failed to identify a single pole on which it has been, since mid-2000 when it notified Complainants that it was raising its annual pole rent by more than 500%, unable to accommodate an additional attacher. Like all utilities, Gulf Power routinely uses the process of

¹⁹ Gulf Power stated that the two prong test set forth in *Alabama Power* and the HDO, and relied on by Complainants, was the legal standard created in that decision. Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, filed June 23, 2003 at 4 (Compls. Ex. 49 marked for identification). Gulf Power did say that the standard was "unlawful," but not that the standard was something else or that the Eleventh Circuit did not mean what it said. *Id.*

²⁰ See, e.g., *Klay v. Humana, Inc.*, 425 F.3d 977, 986 (11th Cir. 2005) ("We rejected the argument of *Alabama Power* and held that, because the use of the utility poles was nonrivalrous and did not deprive *Alabama Power* of the opportunity to sell access to other providers, the compensation owed to *Alabama Power* was limited to the marginal costs of allowing access to the cable providers.); *Georgia Power Co. v. F.C.C.*, 346 F.3d 1033, 1047 (11th Cir. 2003) (Quoting the two prong standard from *Alabama Power* and concluding "It follows that *Georgia Power's* claim that FCC has failed to provide just compensation must be rejected in light of this Circuit's precedent."); *Georgia Power Co. v. F.C.C.*, 346 F.3d 1047, 1050 (11th Cir. 2003) (in companion opinion to prior-cited *Georgia Power* decision, noted that the utility intervenors conceded that *Alabama Power* decision "dispose[d] of their claim."). See also *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 15932, 16345 n.84 (2003); *Omnipoint Corp. v. PECO Energy Co.*, 18 FCC Rcd. 5484, 5487 n. 19 (2003); *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co.*, 17 FCC Rcd. 25238, 25241 nn. 22, 23 (2002) (all three citing *Alabama Power* as controlling).

²¹ It would constitute inappropriate judicial activism and a particular breed of hubris for a trial court to "interpret" a higher court's ruling with a heavy hand, trying to divine what the court must have meant, if the ruling is clear and unambiguous. See, e.g., *St. Mary of Nazareth Hospital Center v. Heckler*, 587 F. Supp. 937, 939 (D.D.C. 1984) (following the express language of a Court of Appeals decision) (rejecting defendant's argument that "the Court of Appeals did not really mean what it said" and stating that "[t]his court...finds no ambiguity or confusion in the Court of Appeals decision), *aff'd*, 760 F.2d 1311, 1315, 1318 (D.C. Cir. 1985) (reaffirming its earlier decision as "clear") (noting that to reconsider defendant's contrary position "would be for the court to fail to hold HHS to the deferential but meaningful standards of judicial review of its decisions").

“make-ready,” which involves re-arrangement of existing attachments and substitution of incrementally taller poles (“change-outs”) for a variety of purposes, including to accommodate new attaching entities or new attachments by existing attachers.²² The Eleventh Circuit, in *Alabama Power*, took note of the significance of make-ready payments, calling it a “known fact.” 311 F.3d at 1368-69. It was after noting the significance of make-ready that the Eleventh Circuit observed that space on a pole “may be, *for practical purposes*, nonrivalrous.” *Id.* at 1369 (emphasis added). Indeed, Gulf Power’s own “CATV Permitting Procedure” provides that if “line work is needed for CATV Company to safely attach,” then the Gulf engineer will prepare a work order, identify the cost of such line work, and grant the permit to the attacher after the costs are paid to Gulf Power. Compls. Exh. 2, pp. 3-4. As Gulf’s own “Application and Permit” form states, make-ready work is routinely done “to provide space for Licensee’s attachments.” Compls. Exh. 2, p. 5. Gulf has also formally admitted its “historical willingness to accommodate attachers by performing make-ready.” *See Order*, FCC 05M-50 (Oct. 12, 2005), 2. The Presiding Judge has taken note of this admission, finding that Gulf Power “still has the burden of proving that if ‘virtually any pole can be changed out’ and that it has historically done so when needed or requested, there are still poles that it can prove to be at ‘full capacity’ and/or ‘crowded.’” *Order*, FCC 05M-50 (Oct. 12, 2005), 3.²³

²² *See* Deposition of Michael R. Dunn (“Dunn Dep.”), pp. 61-64 in Complainants’ Designation of Deposition Testimony to be Accepted into Evidence (“Compls. Depo. Excerpts”), p. 111 (witness testified it is “not usual” for one party to move its facilities to allow a new person to come in)(Complainants will henceforth refer to [witness name], Dep., p. __ (Compls. Depo. Excerpts, p. __)).

²³ Gulf Power wrongly relies upon a portion of the ruling in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002), for the opposite proposition – that “full capacity” exists whenever a rearrangement or a changeout needs to be done to provide space for attachment. *See* Gulf Power Pre-Trial Brief, 7. In *Southern Co.*, the issue decided by the Eleventh Circuit was that “when it is agreed” by all parties that capacity is insufficient, a utility may not be forced to provide third parties access to a particular pole. But the issue in this case is not “forcing,” but deciding when capacity may genuinely be said to be “full,” as *Alabama Power* said, “for practical purposes.” 311 F.3d at 1369. The FCC has always been clear that make-ready, in the form of “steps to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access,” is a part of determining available capacity. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 F.C.C.R. 18049, ¶ 53 (1999). In this case, the question is whether the pole owner is able, under

Gulf Power clearly cannot meet this burden. The evidence shows, together with admissions by Gulf Power's own witnesses, that Gulf Power has failed to identify specific poles that are, in the words of the Eleventh Circuit, "rivalrous" – poles for which make-ready may not be done to, in the words of Gulf's permitting procedure, "provide space" for additional attachments. Evidence of poles that were changed out or rearranged through the pre-paid make-ready process were not "full" at that time and would not be "full" now. Indeed, if changeouts or rearrangements made additional space available, then a new attacher was accommodated (an opportunity was realized not foreclosed) so no loss was suffered. Thus "no claim" for compensation *in excess* of marginal costs or the FCC formula could be made.

Nearly a year ago, the Presiding Judge commented that Gulf Power "cannot identify specific poles it contends are 'crowded' or at 'full capacity' until [a pole] audit is completed." *Status Order*, FCC 05M-23 (April 15, 2005), 1. Accordingly, the Judge, after clarifying that the term "crowding" is ambiguous and that Gulf Power cannot rely on identifying "crowded" poles but instead must identify specific poles at "full capacity," permitted Gulf Power the opportunity to conduct a survey of "each pole controlled by Gulf Power that is occupied by all or any of the Complainant cable companies." *Id.*, pp. 5-6. Gulf Power hired Osmose Utilities Service, Inc. ("Osmose") to conduct this survey. However, the survey has several fundamental flaws that completely vitiate its probative value in this proceeding as to the first prong of the *Alabama Power* test.

its own, and industry standard make-ready practices, to make capacity available. The answer is clear. It is part of Gulf's own policies and practices, as set forth in its CATV Permitting Procedure, to "provide space" using make-ready, *see* Compls. Exh. 2, and, as set forth below, Gulf's witnesses have admitted that its engineers do not use insufficient capacity as a reason for denying attachments when make-ready can be performed. *See* Dunn Dep., p. 129, Brooks Dep., pp. 45-46 (Compls. Depo. Excerpts, pp. 116, 85) (discussed *infra*, p. 20). Because Gulf Power is able to perform make-ready as a means of accessing readily available pole capacity, a pole may not be considered to be at full capacity unless, taking account of the available make-ready procedures, no further attachments may be made. *See* Kravtin Testimony, pp. 32-33.

The first, and most glaring, problem with the Osmose survey is that, in providing instructions to Osmose, Gulf Power asked Osmose to record data about “crowded” poles but not “full capacity” poles, even though it has formally admitted that, even in Gulf Power’s own view, there is a substantive distinction between the two terms. When Complainants’ asked Gulf Power in discovery for its definitions of a pole at “full capacity” and a “crowded” pole, Gulf responded that it understands “the phrase ‘full capacity’ (as used in *APCo v. FCC*) to mean a pole that cannot host further communications attachments.” In stark contrast, Gulf Power answered that it understands “the term ‘crowded’ to mean a pole that is *close* to being at ‘full capacity’ – in other words, a pole with room for only one additional communications attachment.” See Compl. Exh. 56, 2 (Response to Complainants’ Interrogatory No. 2)(emphasis supplied). Instead of asking Osmose to survey poles at “full capacity,” however, Gulf Power stated that the purpose of the audit was to obtain information about “poles that would be regarded as ‘crowded’ poles as defined herein” and only provided Osmose with a definition of “[a] ‘crowded’ pole” that was based solely upon whether the poles being reviewed contained one of several spacing violations of the National Electric Safety Code (“NESC”), including inadequate spacing between the lowest electric attachment and the highest communications attachment. Compl. Exh. 3, p. 5 (Osmose Statement of Work, p. 4 of 20).

Gulf Power may argue that it has generally equated a “crowded” pole with one at “full capacity,” but, as the Presiding Judge made clear in the his Order, words have meaning, and the “Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is at ‘full capacity,’ which standard of proof was adopted by the Commission.” FCC 05M-23 (April 15, 2005), 5. Osmose’s representative admitted at his deposition that Gulf had provided no information about when a pole is at “full capacity”:

Q: Has Gulf given you any information about what constitutes a pole at full capacity?

A: No.

Tessieri Dep., 51 (Compls. Depo. Excerpts, p. 172A). By Gulf Power's own admission, there is a substantive distinction between "crowding" and "full capacity," and Gulf Power only asked Osmose, whose representatives never read the Alabama Power decision,²⁴ to look for poles that met its definition of "crowded," not poles at "full capacity." Consequently, the Osmose survey is, as a matter of law, not relevant to this hearing.²⁵ This is not a semantic problem but a fundamental hole in Gulf Power's proof: if a pole is "crowded" it may accommodate another attachment. If that pole may accommodate another attachment, then there cannot be a "lost opportunity."

A second serious problem with Osmose's report is that Osmose only examined poles at one fixed moment in time and utterly failed to consider whether the make-ready process, which is part of Gulf's permitting procedure and that Gulf uses every day in the field, could be used to "provide space" (the words used in Gulf's permitting procedure) for additional attachments on the poles surveyed by Osmose. The Osmose representative, Mr. David Tessieri, admitted that Osmose only recorded violations of the NESC that its technicians saw on the day they visited and gave no consideration to "whether or not the NESC violations it saw could be fixed."²⁶ Mr. Tessieri conceded that Osmose "didn't consider" whether it was possible to rearrange attachments or to use the routine practice of changing-out a pole to provide space for additional attachments.²⁷ Indeed, the Osmose representative testified that he had "never seen" Gulf

²⁴ See Tessieri Dep, 57 (Compls. Depo. Excerpts, p. 173).

²⁵ See, *infra*, Section V(3).

²⁶ Tessieri Dep., 157 (Compls. Depo. Excerpts, p. 182).

²⁷ Tessieri Dep., 315-17 (Compls. Depo. Excerpts, p. 205-06)

Power's CATV permitting procedure.²⁸ As Complainants' expert, Michael Harrelson testifies, "In all instances, the poles reviewed by Osmose could readily be re-arranged or otherwise made ready to accommodate additional attachments."²⁹

A third major problem with the Osmose pole survey is that, even assuming that "crowded" meant the same as "full capacity" and that Gulf Power did not regularly use make-ready to accommodate additional attachers, Osmose compiled no data on the period of time, or range of dates, when the poles it surveyed contained any NESC violations. In a Prehearing Order of December 15, 2004, the Presiding Judge required that any pole survey or report should include: "a complete accounting (1) by identification, (2) by description of current utilization, and (3) *by current plans for future usage*, with respect to each pole owned and/or controlled by Gulf Power that is occupied by all or any of the Complainant cable companies." However, as Mr. Tessieri conceded, Osmose only recorded pole data for the "state of the pole at th[e] time" that its technicians say them.³⁰ The Osmose technicians only logged data on one day for each pole. *See* Compls. Exhibit No. 9. Osmose has no knowledge as to whether any changes have been made in the field to any of the poles it surveyed since its technicians took their photographs or of any plans for future usage.³¹ However, as Complainants' expert points out, even since the dates last spring when Osmose took its photographs, a number of the poles at issue have been changed out to taller poles or had extensions bolted to the top using splints to provide additional space. *See* Compls. Exh. 6, pp. 8-9 (pole # 342-164 is a pole that has already been changed out to a taller pole) and pp. 52-54 (pole 312-106 is s a pole with an extension added to the top).

²⁸ Tessieri Dep., 66 (Compls. Depo. Excerpts, p. 174).

²⁹ Harrelson Testimony, p. 13.

³⁰ Tessieri Dep, p. 315 (Compls. Depo. Excerpts, p. 205).

³¹ Tessieri Dep, p. 370 (Compls. Depo. Excerpts, p. 211).

Accordingly, even assuming Gulf's unrealistic, static view of poles, Gulf is unable to provide any range of dates during which it could demonstrate "full capacity" on the 40 Osmose poles at issue in this hearing. Without such proof, it has no basis for satisfying the first prong of the *Alabama Power* test for any defined period of time, let alone show that a pole was at full capacity in 2000 or any subsequent year to allow consideration (if ever submitted) of evidence of any specific "lost opportunity" to accommodate another attacher.

A fourth problem with the Osmose data is that it gave no consideration to what party was responsible for creating the NESC or other purported spacing violations that Osmose technicians recorded. This is a significant defect, because, if a party other than the Complainants created the alleged NESC violations, but such violations could have been avoided had the proper make-ready been performed initially, then the violations wouldn't exist and the pole might not, even in Gulf's unrealistic, static view of capacity, be deemed "crowded." Osmose's Mr. Tessieri testified:

Q: Okay. And did Osmose give any consideration in reporting NESC violations that led to the classification of crowding as to who caused the NESC violation?

A: We did not --

Q: Okay.

A: - make any determination.

Q: Okay. So is it accurate to say that no matter whether it was Gulf Power's own wiring practices or those caused by an attacher, if the Osmose file personnel observed an NESC violation as specified here, their job was then to classify that pole as crowded.

A: As defined by the statement of work, yes.

Q: Okay. And is that also true, that the 'crowded' label was to be applied if there was an NESC violation, regardless of whether the

NESC violation was caused by one of the four cable companies here or by some new attachment by a third entity?

A: It was – there was no determination as to who – you know, it didn't matter.

Tessieri Dep., pp. 157-58 (Compls. Depo. Excerpts, p. 182). Not only did Osmose not consider who caused the NESC violations it purported to record; it also claimed to have no knowledge of what steps are taken to remediate or fix those violations and of whether Gulf Power, as owner of the pole, has a responsibility to see that those violations are cured. Tessieri Dep., p. 158 (Compls. Depo. Excerpts, p.182). As Complainants' expert, Mr. Harrelson, explains, Gulf Power has an affirmative responsibility both to monitor its pole attachments and see that NESC violations are not created, and, once it knows of such violations, to take steps to see that they are cured; these steps will affect the capacity for additional attachments. Harrelson testimony, pp. 12-13, 60-61.

Finally, Gulf Power should be barred from relying upon any of Osmose's pole audit because Gulf Power was not forthright with the Presiding Judge or the parties about Osmose's work. As noted above, the Judge directed Gulf Power to compile data about each and every Gulf Power pole containing Complainants' attachments. *Status Order*, FCC 05M-23, 6. Gulf represented to the Judge and the parties in June 2005 and later through the summer that it was going to follow the Judge's Order. Most notably, in its June 2005 Status Report, Gulf Power reported that the "number of poles to be surveyed" was 150,000 and that "[w]hile reviews as a result of QC/QA may cause some delay, the full survey, with appropriate staffing, should be completed within the time frame reflected in the Statement of Work (target date of October 23, 2005)."³² However, unbeknownst to the Judge and the parties, that is not what Gulf Power was

³² Gulf Power Company's June 2005 Status Report on Pole Survey, pp. 1-2.

telling Osmose. As Mr. Tessieri admitted at his deposition, Gulf Power decided in May of 2005, just two months after signing the Osmose Statement of Work, to “stop the project.”³³ Therefore, despite telling the Judge and the parties that the survey “should be completed” and completed “within the time” frame specified by the Judge, Mr. Ben Bowen of Gulf Power had in fact directed Osmose to “stop” or “cease” the project, and to simply “clean up” its existing measurements, up to a specified cost limit.³⁴ Gulf Power continued, in its July and August 2005 Status Reports, to represent that “the number of poles to be surveyed” remained at 150,000 and that there was “no change,”³⁵ but the reality was far from the case, as Mr. Tessieri admitted at his deposition that “there wasn’t any” work being done by Osmose during those summer months or thereafter.³⁶ This misleading and outrageous use of the Osmose survey to prolong unnecessarily these proceedings and increase their expense, while simultaneously using cost as one of the reasons to discontinue Osmose’s work, warrants a ruling barring Gulf Power from relying at all upon the already deficient Osmose pole audit.

In sum, Osmose’s pole survey did not produce evidence of poles at full capacity; did not consider Gulf’s own permitting procedure for providing space through rearrangement or changeout; did not consider when NESC violations were created or how long they have existed or whether they remain; did not consider who caused alleged NESC violations and who has a responsibility to cure them; and did not in fact do what Gulf Power claimed that it would.

Accordingly, the Osmose data is not probative evidence as to the first prong of the *Alabama Power* test, the requirement of showing individual poles at “full capacity.”

³³ Tessieri Dep., pp. 107-08 (Compls. Depo. Excerpts, p. 177).

³⁴ Tessieri Dep., pp. 272-74 (Compls. Depo. Excerpts, pp. 195-96) (after the “stop” was ordered, Osmose was to “clean up” its work, and Gulf directed that the “clean up” work should only “take it to this number, you know, as far as dollars, and stop it at that number”).

³⁵ Gulf Power Company’s July 2005 Status Report on Pole Survey, p. 1; Gulf Power Company’s August 2005 Status Report on Pole Survey.

³⁶ Tessieri Dep., pp. 284-86 (Compls. Depo. Excerpts, pp. 198-99).

Similarly, the ten poles containing Knology attachments have not been shown to be at full capacity. As Complainants' expert, Michael Harrelson testifies, the documentation submitted by Gulf Power demonstrates that, "consistent with its permitting procedures, Gulf Power regularly performs make-ready to successfully enable additional attachments to be added to its poles."³⁷ On each of the Knology poles cited by Gulf Power, make-ready was in fact performed to accommodate Knology's additional attachments, and, moreover, Gulf Power has offered no proof that any of the ten poles currently lack the capacity for an additional attachment.³⁸

Gulf's own witnesses further make clear that the Gulf Power poles at issue in this case are not at "full capacity." Gulf's witness, Michael Dunn, has admitted that he has no knowledge of any instances in which Gulf Power denied a party access to a utility distribution pole "because another cable operator was there."³⁹ Similarly, Gulf Power's Mr. Rex Brooks could not recall any specific instance of ever denying a cable operator the opportunity to attach because of an inability to provide space on a pole.⁴⁰ Mr. Brooks explained that makeready is used to make room for new attachers and only in "limited cases" is there a situation where, because of "engineering practice you just physically could not change the height of the pole."⁴¹ Even in Gulf Power's view, Mr. Brooks conceded that make-ready, including rearrangement and change-

³⁷ Harrelson Testimony, pp. 13-14

³⁸ *Id.*

³⁹ See Dunn Dep., 129 (Compls. Depo. Excerpts, p. 116):

Q: Did you ever deny access to someone else that wanted to get on the pole because the cable operator was there and there was no opportunity to let the other person on?

A: We have denied access to things like signs on certain transmission poles but not because another cable operator was there, to my knowledge.

⁴⁰ Brooks Dep., pp. 45-46 (Compls. Depo. Excerpts, p. 85).

⁴¹ Brooks Dep., pp. 45-46 (Compls. Depo. Excerpts, p. 85).