

foreclosed by Complainants' attachments. Compl. Ex. B, Vol. 1, Harrelson Testimony, pp. 13-14.

489. On each of the Knology poles identified by Gulf Power, make-ready was performed to accommodate successfully Knology's attachments. Compl. Ex. B, Vol. 1, Harrelson Testimony, pp. 13-14; Gulf Power Ex. 43, p. 49.

490. Gulf Power offered no evidence at the hearing that any of the ten poles it designated containing the Knology attachments lack the capacity for an additional attachment. Compl. Ex. B, Vol. 1, Harrelson Testimony, pp. 13-14.

491. In sum, with respect to the issue of capacity, Gulf Power presented no proof of any instance in which Complainants' attachments foreclosed or excluded another use of a pole by either a separate entity that wanted to attach or by Gulf Power itself. *See Spain Cross, April 25, 2006 Tr., pp. 1167-68; 1176.*

C. Gulf Power May Not Rely Upon A "Replacement Cost" Methodology Because It Is Inconsistent With The Rule of Measuring Just Compensation By "Loss To The Owner"; Is Unrelated To the Alabama Power Criteria; Has Been Previously Rejected By The Commission; And Furthermore, Gulf Power Has Waived Any Claim To A "Replacement Cost" Annual Pole Rent Of \$40.60

492. "The burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking." 311 F.3d at 1370.

493. Proof of the "amount of any loss" must adhere to the rule that just compensation is measured by "loss to the owner" of the property at issue and not by what the "taker" has gained." 311 F.3d at 1369.

1. Gulf Power's Replacement Cost Methodology Is Based Upon Gain To the "Taker," Not Loss To The Owner

494. Replacement costs, as applied by Gulf Power, are based upon the concept of valuing pole attachments by the cost savings (gain) to Complainants of not having to build an

- “independent” set of poles themselves, rather than any loss to the pole owner. Dunn testimony, p. 28; Compls. Ex. 88, Davis Dep., p. 125; Compls. Ex. 90, Spain Dep., p. 161.
495. Gulf Power’s replacement cost methodology is based explicitly upon the goal of making Complainants pay for “value to the cable operator” “even if there’s no additional cost” to Gulf Power. Compls. Ex. 88, Davis Dep., p. 125; Compls. Ex. 85, Brooks Dep., pp. 42-43; Davis Cross, April 25, 2006 Tr., p. 913, 954-55, 994.
496. Gulf Power’s replacement cost methodology, by including allocations for such expenses as company-wide “general plant” and the cost of installing distribution poles, seeks to force Complainants to pay a substantial share of the expenses Gulf incurs for its own operations regardless of the presence of any communications attachments. Gulf Power Ex. B, Bowen Testimony, p. 39; Gulf Power Ex. E, Davis Testimony, p. 9.
497. Gulf’s Power’s replacement costs calculations are not based upon any loss to Gulf Power caused by Complainants. Compls. Ex. 88, Davis Dep., p. 118; Spain Cross, April 26, 2006 Tr., p. 1215.
498. The Fifth Amendment bars attempts by property owners seeking “just compensation” for takings to force the “sharing” of the “overhead costs of ownership.” 311 F.3d at 1370 (*citing Metropolitan Transp. Auth. v. ICC.*, 792 F.2d at 297).
499. Gulf Power’s application of a replacement cost methodology in its pole attachment rate calculations is inconsistent with the principle of measuring just compensation by loss to the owner. Compls. Ex. 88, Davis Dep., p. 125; Compls. Ex. 85, Brooks Dep., pp. 42-43.

2. Gulf Power's Use Of Replacement Costs Is Unrelated To The Alabama Power Requirements Of "Full Capacity" And "Higher Valued Use"/ "Lost Opportunity"

500. Gulf Power's replacement cost methodology is not based upon the capacity of the poles to which Complainants are attached to accommodate one or more additional attachers. Compls. Ex. 88, Davis Dep., p. 99.
501. Gulf Power's replacement cost methodology is not based upon any determination of whether a particular pole is at "full capacity" or not. Compls. Ex. 85, Brooks Dep., pp. 68-69.
502. Gulf Power's replacement cost methodology is not based upon any inability of Gulf Power to lease space on poles to third parties (persons other than Gulf Power or existing attachers). Compls. Ex. 85, Brooks Dep., pp. 68-69.
503. Gulf Power's replacement cost methodology is not based on any inability of Gulf Power to reserve space for itself. Compls. Ex. 85, Brooks Dep., pp. 68-69.
504. Gulf Power's replacement cost methodology is not based upon any determination of whether a particular pole containing Complainants' attachments was in fact changed out or replaced. Compls. Ex. 86, Dunn Dep. p. 106.
505. Gulf Power's replacement cost methodology is premised upon charging Complainants a "replacement cost" annual pole rent for each and every pole on which Complainants' have an attachment. Davis Testimony, p. 13; Compls. Ex. 84, Bowen Dep. p. 246.
506. Gulf Power cannot attribute any of its "replacement cost" calculations to specific poles containing Complainants' attachments. Gulf Power Ex. E, Davis Testimony, p. 14. Replacement cost relates to a brand new 40-foot pole, not an existing pole that may be

older and cost less, or a pole that cost Gulf nothing because it was paid for on a change-out. Compls. Ex. 85, Brooks Dep., pp. 108-110

507. Accordingly, Gulf Power's replacement cost methodology does not meet the requirements of the Eleventh Circuit's Alabama Power opinion that any constitutional claim for "just compensation" in excess of marginal costs be based upon a showing for "each pole" at issue of both "full capacity" and a lost opportunity in the form of a foreclosed opportunity to sell space to a third party "waiting in the wings" or a specific "higher valued use" by Gulf Power itself for such specific poles. *See* 311 F.3d at 1370-71.

3. The Commission Has Already Rejected The Use Of A Replacement Cost Methodology As A Method Of Valuing Utility Pole Attachments

508. Gulf Power proffered its replacement cost methodology in this case as a way of calculating what it believes is the "fair market value" of Complainants' pole attachments. Gulf Power Ex. F, Spain Testimony, pp. 4-5, 13-14.

509. As a general rule, however, "[w]here a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 53 (citing *United States v. Miller*, 317 U.S. 369, 374 (1942); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

510. In particular, "[t]here is no non-monopoly market in pole attachments." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 55.

511. "There are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 55.

512. Any pole rents that Gulf Power negotiates with other service providers not covered by the Commission's pole attachment rate formulas reflect a monopoly value. Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 55.
513. Any pole rents that Gulf Power negotiates with communications service providers covered by one of the Commission's pole attachment rate formulas but who do not formally challenge such rents at the Commission because doing so would prevent or delay such providers' ability to construct their network, also reflect Gulf Power's "leverage" and ability to impose monopoly terms. *See e.g.*, Compls. Ex. 77, pp. 1, 5; *see also* Compls. Ex. A, Kravtin Testimony, pp. 13-14, 60.
514. Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the standard appraisal techniques for determining market value, including replacement costs, "are particularly unsuited for valuing pole attachments." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 53.
515. "A pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 57.
516. "Because the utility's interest in the property [poles] is not completely destroyed, requiring the use of replacement costs as a measure of just compensation is inappropriate." Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 57.
517. The Commission has previously found that "[I]t is not feasible to reproduce existing utility poles. Zoning, environmental, local government, and financial constraints make *Alabama Power Commission Order* it impractical and often impossible to construct new pole systems." Compls. Ex. 48, , ¶ 57.

518. Many of the changes in pole rate methodology that Gulf Power incorporates in its “replacement cost” calculations, such as the amount of space occupied, the average number of attaching entities, pole height presumptions, inclusion of lightning arresters and grounding equipment, and other increased expenses are not related to a replacement cost methodology and have been previously rejected by the Commission. Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 57; *Pole Fee Order*, 15 F.C.C.R. 6453 at ¶¶ 38-40.
519. The Commission has previously rejected electric utilities’ arguments that additional FERC accounts not included in the FCC Cable Rate Formula, such as FERC accounts 580, 583, and 590, should be included. *Pole Fee Order*, 15 F.C.C.R. 6453 at ¶¶ 39-40, 58-61. In this case, Gulf Power fails to provide any valid basis for continuing to include such accounts in its replacement cost calculations. See Gulf Power Ex. E, Davis Testimony, p. 13.
520. Pole owners are not entitled, in a claim for “just compensation,” to an enhanced value or “network value” for pole attachments. Compls. Ex. 48, *Alabama Power Commission Order*, ¶ 57. In this case, Gulf Power fails to provide any valid basis for continuing to assess pole attachment rates based upon its assessment of the value of its network of poles – what it calls its communications corridor. See Gulf Power Ex. F, Spain Testimony, pp. 5-6.
521. The Commission has previously held that utilities may not substitute “replacement costs” in the Commission’s pole attachment rate formulas in lieu of the actual costs reflected in the utility’s regulatory accounts. *In the Matter of Amendment of Commission’s Rules and*

Policies Governing Pole Attachments; Consolidated Partial Order on Reconsideration, 16 F.C.C.R. 12,103 (2001) at ¶15.

522. The Commission has “rejected utilities’ arguments that pole attachment rates should be based on replacement costs” and has “affirmed the use of historical costs in [its] pole attachment rate methodology.” The Commission has found that the continued use of historical costs accomplishes key objectives of assuring, to both the utility and the attaching parties, just and reasonable rates; establishes accountability for prior cost recoveries; and accords with generally accepted accounting principles *Consolidated Partial Order on Reconsideration*, 16 F.C.C.R. 12,103 at ¶15.
523. The FCC Cable Rate Formula accounts for the costs incurred when poles are replaced by utilities in the normal course of their business because the formula uses actual year end asset and expense data from records maintained and publicly reported as part of the utilities’ regulated core electric services. In fact, if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole. *Consolidated Partial Order on Reconsideration*, 16 F.C.C.R. 12,103 at ¶24.
524. “The application of the well-established Cable Formula, with technical adjustments adopted from time to time, is consistent with establishing a just, reasonable, and nondiscriminatory maximum pole attachment rate as envisioned by Congress.” *Consolidated Partial Order on Reconsideration*, 16 F.C.C.R. 12,103 at ¶17.
525. In sum, Gulf Power’s legal arguments, for the application of a “fair market value” standard to pole attachments; for the use of “replacement cost” as a “proxy” for fair market value; and for a valuation of the entire network or system of poles have already

been rejected by the Commission. Compl. Ex. 48, *Alabama Power Commission Order*, ¶¶ 53-58.

4. Gulf Power Has Waived Any Claim To An Annual Pole Rent of \$40.60

526. As discussed earlier, Terry Davis of Gulf Power testified at the hearing that, while Gulf Power is seeking a rate of \$38.06 for the year 2000, it is seeking the rate of \$40.60 for years 2001 through 2006, for all of Complainants' attachments to Gulf Power's poles. Davis Cross, April 25, 2006 Tr., pp. 977-979.
527. However, when Complainants asked for the basis and method of calculating the rate of \$40.60 in discovery, the Presiding Judge ruled that, because Gulf Power failed to provide any response during discovery, "Gulf Power has effectively waived ever charging Complainants a \$40.60 rate" *Discovery Order*, FCC 05M-38, 7 n.7. The Presiding Judge further noted, "Gulf Power does not intend to seek that rate [\$40.60] in this proceeding." *Id.*
528. Accordingly, Gulf Power, independent of all of the other problems with its claims, has waived any right to claim \$40.60 as an annual pole rent in this proceeding. *Id.*

D. Conclusion

529. This hearing was designated by the Enforcement Bureau to give Gulf Power a chance to present evidence of both "full capacity" and "lost opportunity" for specific poles in accordance with the Eleventh Circuit's *Alabama Power* requirements. *HDO*, ¶ 3. But Gulf Power has instead used the same replacement cost" methodology that it developed in the year 2000, two years before the *Alabama Power* opinion, and Gulf seeks to apply the rates it has calculated under that very same methodology to every single pole attachment that Complainants have on Gulf Power poles. *See* Compl. Ex. 86, Dunn

Dep., p. 55; Davis Cross, April 25, 2006 Tr., p. 928; Dunn Cross, April 24, 2006 Tr., p. 831.

530. *Gulf Power's replacement cost methodology is calculated without any reference to whether a particular pole containing Complainants' attachments is at "full capacity."* As Gulf witness Terry Davis admitted, Gulf's replacement cost methodology would, if allowed, apply to any pole that a cable operator is on regardless of whether or not it could host another attachment. Davis Cross, April 25, 2006 Tr., pp. 909, 912. Another Gulf witness, Michael Dunn, confirmed that Gulf's alleged "just compensation" rate "had nothing to do with a particular pole or its particular condition." Compl. Ex. 86, Dunn Dep. Tr., p. 159. Finally, Gulf Power's expert, Roger Spain, agreed that there was "no connection" "between the \$40.60 rate [proposed by Gulf] and whether there's available capacity or not on Gulf poles." Compl. Ex. 90, Spain Dep. Tr., p. 150.
531. Moreover, the evidence that Gulf Power introduced in the hearing did not provide proof of poles that are at "full capacity." As discussed above, "full capacity" requires a showing that Gulf could not accommodate another attacher on particular poles – that it had to exclude someone. See Compl. Ex. B, Kravtin Testimony, pp. 26-27. Gulf Power never presented any such evidence. To the contrary, several of Gulf Power's witnesses admitted that they knew of no instance in which they could not accommodate another party or where they denied access to a third party because of a cable operator's attachments. See Compl. Ex. 86, Dunn Dep. Tr., p. 129; Compl. Ex. 85, Brooks Dep. Tr., pp. 45-46. Indeed, after admitting in its interrogatory answers that "crowded" is not the same as "full capacity," Compl. Ex. 56, pp. 2-3, Gulf Power proceeded to submit examples of what it called "crowded" poles that require make-ready to correct safety

violations, see Gulf Ex. 42, or to successfully accommodate an additional user such as *Knology*, see Gulf Ex. 43, but never introduced evidence of a pole where it had to turn someone away and suffered, as the Eleventh Circuit said, a “foreclosed” or “missed” opportunity.

532. Furthermore, Gulf Power has presented in this proceeding no proof of actual loss, either in the form of a “missed opportunity” to lease space to a buyer “waiting in the wings” or to put space occupied by Complainants attachments to a specific “higher valued use.” Terry Davis admitted that Gulf Power’s replacement cost rates are not based upon any loss of money. Davis Cross, April 25, 2006 Tr., p. 994. Instead, she said that Gulf’s replacement cost rates are based upon its view that cable operators should take on a greater share of the expenses associated with maintaining and operating a pole. Davis Cross, April 25, 2006 Tr., p. 993. In particular, both Mr. Dunn and Ms. Davis testified that Gulf’s replacement cost methodology is based upon the cost “for the attacher to construct an independent system of poles...” and “what it would cost that cable company to go out and put up the poles themselves.” Gulf Power Ex. A, Dunn Testimony, p. 28; Davis Cross, April 25, 2006 Tr., p. 913; Compl. Ex. 88, Davis Dep., pp. 125, 162-63. Indeed, Ms. Davis’ testimony is consistent with that of Gulf’s expert, Mr. Spain, who agreed that Gulf’s replacement cost rates, instead of being based upon costs actually incurred by Gulf and caused by or attributable to Complainants attachments, were instead based upon “the cost the cable company would pay to go out and put up the poles themselves.” Compl. Ex. 90, Spain Dep. Tr., p. 161. Mr. Spain also noted that there were no specific losses he had observed or quantified that Gulf Power had incurred due to Complainants’ attachments. Spain Cross, April 26, 2006 Tr., p. 1215.

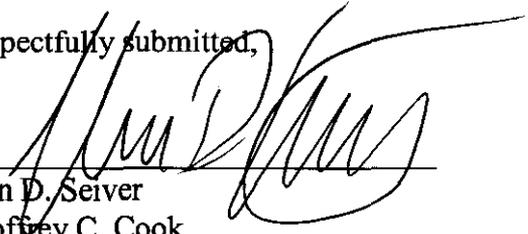
533. Gulf's rationale is clearly inconsistent with the established takings law principle, reiterated in *Alabama Power*, that "just compensation" only incorporates "loss to the owner," not any benefit, or cost savings, to the "taker." 311 F.3d at 1369.
534. With respect to Mr. Spain's testimony about a "fair market value" for pole attachment, Gulf Power also has not produced any evidence or argument in this proceeding why the Presiding Judge should not adhere to the Commission's prior rulings rejecting the use, as applied to pole attachments, of the fair market value standard generally or replacement cost methodology specifically. See Compl. Ex. 88, Davis Dep., p. 118; Compl. Ex. 85, Brooks Dep. Tr., pp. 68-69. *Alabama Power* made clear that the concept of "fair market value" does not apply to utility pole space, 311 F.3d at 1368, and that instead, a claim for compensation above FCC rates must present proof of an actual, measurable loss involving specific poles – either from a missed sale to a third party or from a foreclosed opportunity for the pole owner to employ a particular higher valued use. 311 F.3d at 1370-71. Gulf Power presented no such proof.
535. In sum, as set forth above and as summarized in the "Ultimate Conclusions" that follow, because Gulf Power's claim in this hearing was not based upon, and does not comply with, the "full capacity" and lost opportunity standards of the Eleventh Circuit's *Alabama Power* test, Gulf Power has failed to carry its burdens of proof and persuasion, and has not shown that it is entitled to any compensation above that which it already receives in accordance with the principles set forth in the FCC Cable Rate Formula.

E. Ultimate Conclusions

536. Gulf Power's claim for just compensation in excess of marginal costs in this proceeding is solely based upon a "replacement cost" methodology that has nothing to with actual costs, any losses or missed opportunities.
537. Gulf Power failed in its burden of proof to show that there are or were any actual unreimbursed or unreimburseable costs, losses or missed opportunities for any of its poles on which Complainants have attachments.
538. The replacement cost rates sought by Gulf Power for all poles, regardless of capacity and opportunity to use space itself or rent space to others, are based upon the value or benefit that Gulf believes Complainants receive by not having to build a duplicative set of utility pole lines.
539. The replacement cost rates sought by Gulf power are not constitutionally permissible and are not consistent with or justified by the standards set forth in *Alabama Power* and the *HDO*.
540. The total net costs attributable to Complainants' attachments on any of Gulf Power's poles have been fully reimbursed by make-ready and annual rental payments.
541. Gulf Power already receives compensation in excess of marginal costs in the form of make-ready and annual rent from Complainants for all their attachments to Gulf Power poles and therefore receives all and more than any constitutionally required "just compensation" for Complainants' attachments to Gulf Power's poles.
542. The Osmose pole survey relied upon by Gulf Power does not constitute proof, either specifically or generally, that any poles are at "full capacity." Similarly, the ten poles containing Knology attachments do not represent any condition of "full capacity."

543. Gulf Power never proved any specific higher valued use (higher than what it receives from Complainants), either from a third party or for itself, from which it could not benefit.
544. Gulf Power has failed to introduce any evidence in this proceeding, and thus failed to prove any instance, of where it incurred a "missed opportunity" as the result of Complainants' attachments.
545. Because Gulf Power failed to prove that any of its poles on which Complainants' attachments are located are at full capacity or that Gulf power lost any opportunity on such poles, Gulf power is therefore not entitled to collect any compensation in excess of marginal costs.
546. Because Gulf Power has already collected amounts in excess of marginal costs from Complainants, Gulf Power's claims for any additional compensation must be dismissed.

Respectfully submitted,


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June 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Proposed Findings of Fact and Conclusions of Law*, has been served upon the following by electronic mail and via Federal Express (non-FCC recipients) or hand-delivery (FCC recipients) on this the 30th day of June, 2006:

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