**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C., | ) | |
| Complainants, | ) | |
| v. | ) | EB Docket No. 04-381 |
| Gulf Power Company, | ) | |
| Respondent. | ) | |

# HEARING DESIGNATION ORDER

**Adopted: September 24, 2004** **Released: September 27, 2004**

By the Chief, Enforcement Bureau:

## I. INTRODUCTION

1. Pursuant to the Commission's rules,[1] we initiate a hearing in connection with a Petition for Reconsideration and Request for Evidentiary Hearing filed in the above-captioned complaint proceeding.[2] As explained more fully in this Hearing Designation Order ("HDO"), the hearing will determine whether the respondent, Gulf Power Company ("Gulf Power"), is entitled to receive compensation above marginal cost for any attachments to its poles belonging to the complainants, Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C. (collectively, "Cable Operators").

## II. BACKGROUND

2. On July 10, 2000, the Cable Operators filed a complaint[3] against Gulf Power alleging that

[1] *See* 47 C.F.R. §§ 1.1411 (in pole attachment complaint proceedings, the Commission "may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings"); 0.111(a)(12) (the Enforcement Bureau may resolve complaints regarding pole attachments filed under 47 U.S.C. § 224); 0.111(a)(17) (the Enforcement Bureau may issue orders taking appropriate action in response to complaints, including hearing designation orders).

[2] Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, File No. PA 00-004 (filed June 23, 2003) ("Petition").

[3] Complaint, File No. PA 00-004 (filed July 10, 2000) ("Complaint") at 7, ¶¶ 22-23. The Cable Operators originally filed the complaint with the Commission's former Cable Services Bureau. Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, Order, 17 FCC Rcd 4672 (2002).

Gulf Power violated section 224 of the Act[4] and the Commission's pole attachment rules[5] by unilaterally terminating its existing pole attachment agreements with the Cable Operators, forcing the Cable Operators to execute new pole attachment agreements that contained much higher pole attachment rates, and refusing to renegotiate new rates in good faith in accordance with the Cable Formula.[6] Gulf Power subsequently filed a response arguing that the Commission lacked jurisdiction over the Complaint, that a pole attachment rate derived through use of the Commission's Cable Formula would not provide just compensation, as required by the Fifth Amendment to the United States Constitution ("just compensation"), and that an alternative cost methodology should be employed in order to arrive at an appropriate pole attachment rate.[7]

3. On May 13, 2003, the Enforcement Bureau granted the Complaint.[8] Specifically, the *Gulf Power Order* determined that the Commission had jurisdiction to decide the issues raised in the Complaint, that the Complaint was ripe for resolution, and that the Cable Formula provides Gulf Power with just compensation.[9] In reaching the third conclusion, the *Gulf Power Order* relied on the Commission's previous holding that the Cable Formula, along with the payment of make-ready expenses, provides remuneration that exceeds just compensation.[10] The *Gulf Power Order* further quoted the Eleventh Circuit's recent explanation in the *Alabama Power Decision* that a utility pole owner is constitutionally entitled only to marginal costs unless certain conditions are present:

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[4] 47 U.S.C. § 224.

[5] 47 C.F.R. §§ 1.1401-1.1418.

[6] The "Cable Formula" is the methodology that the Commission developed to calculate the maximum allowable pole attachment rate that a specific utility may charge a cable operator providing cable services. *See Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6457, ¶ 5 (2000), *review denied sub nom., Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12110, ¶ 10 (2001). *See also Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC2d 1585 (1978); Second Report and Order, 72 FCC2d 59 (1979); Third Report and Order, 77 FCC2d 187 (1980), *review denied sub nom., Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4397-98, ¶¶ 78-80 (1987), Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 468 (1989).

[7] Gulf Power Company's Response to Complaint, File No. PA 00-004 (filed Aug. 9, 2000) ("Response") at 9-13, 38-52.

[8] *See Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C. v. Gulf Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 9599 (Enf. Bur. 2003) ("*Gulf Power Order*").

[9] *Gulf Power Order*, 18 FCC Rcd at 9602-03, ¶¶ 6-8; 9603-05, ¶¶ 9-10; 9607, ¶ 15.

[10] *Gulf Power Order*, 18 FCC Rcd at 9609, ¶ 15 (citing *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12223-36, ¶¶ 32-61 (2001) ("*Alabama Power FCC Order*")). The *Alabama Power FCC Order* arose from a similar complaint that a cable association filed with the Commission against Alabama Power Company ("Alabama Power"). (Like Gulf Power, Alabama Power is a wholly-owned subsidiary of The Southern Company.) The complaint alleged that Alabama Power unlawfully had terminated existing pole attachment agreements and attempted to impose new agreements containing higher rates. Alabama Power responded that the Cable Formula did not provide it with just compensation. The former Cable Services Bureau rejected Alabama Power's assertions and ordered the parties to re-negotiate in good faith, using the Cable Formula as a guide to establishing a reasonable rate. *Alabama Cable Telecommunications Association v. Alabama Power Company*, Order, 15 FCC Rcd 17346 (Cable Serv. Bur. 2000). The Commission subsequently upheld the bureau's determinations in response to Alabama Power's Application for Review. *See Alabama Power FCC Order*, 16 FCC Rcd at 12209. Alabama Power then appealed to the Eleventh Circuit, which upheld the Commission's conclusions. *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power Decision*"). The United States Supreme Court denied certiorari on October 6, 2003. *Alabama Power Co. v. FCC*, 124 S. Ct. 50 (2003).

> 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. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.[11]

The *Gulf Power Order* concluded that Gulf Power had "submitted no evidence in th[e] proceeding that would satisfy the test articulated by the Eleventh Circuit."[12] Accordingly, because Gulf Power had not used the Cable Formula to determine an appropriate pole attachment rate, and had not provided evidence to satisfy the Eleventh Circuit's standard for justifying compensation above marginal cost for any particular pole, the *Gulf Power Order* granted the Complaint and directed the parties to negotiate new pole attachment rates pursuant to the Cable Formula.[13]

4. Gulf Power subsequently filed its Petition. The Petition observes that the *Alabama Power Decision* was released after the last submission expressly mentioned in the Commission's complaint rules (*i.e.*, the Cable Operators' Reply) had been filed in this proceeding.[14] Moreover, the Petition contends that the *Alabama Power Decision* articulated a new standard for determining whether pole attachment rates amount to just compensation.[15] The Petition asserts, therefore, that the Bureau improperly applied the *Alabama Power Decision*'s standard to the facts in the *Gulf Power Order*, because the Bureau did so without notifying the parties or giving them an opportunity to submit new evidence bearing on the standard.[16] The Petition consequently requests that the Bureau "set this proceeding for a full evidentiary hearing to allow [Gulf Power] an opportunity to present evidence to meet the new standard."[17] The Cable Operators opposed the Petition, arguing that Gulf Power fails to meet the Commission's requirements for bringing a petition for reconsideration or to establish that the *Gulf Power Order* applied a "novel" legal standard, and that the Petition is internally inconsistent and unpersuasive.[18] Gulf Power subsequently filed a reply.[19]

5. On December 19, 2003, Bureau staff deferred ruling on the merits of the Petition pending Gulf Power's filing and service of a submission specifying the kinds of evidence it wished to submit for

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[11] *Gulf Power Order*, 18 FCC Rcd at 9607, ¶ 15 (citing *Alabama Power Decision*, 311 F.3d at 1370-71).

[12] *Gulf Power Order*, 18 FCC Rcd at 9607, ¶ 15. *Cf. Alabama Power Decision*, 311 F.3d at 1372 (Alabama Power "never alleged . . . facts" showing "(1) full capacity and (2) a higher valued use").

[13] *Gulf Power Order*, 18 FCC Rcd at 9608, ¶ 17.

[14] Petition at i, 2-3, 5.

[15] Petition at i, 1-2, 4-7; Gulf Power Company's Reply to Complainants' Opposition to Petition for Reconsideration, File No. PA 00-004 (filed Aug. 13, 2003) ("Reply to Opposition to Petition") at ii, 1-4.

[16] Petition at i, 5-7, 10-12. *See* Reply to Opposition to Petition at ii, 1-3, 6-7.

[17] Petition at 10. *See also* Petition at i, 10-12. The Petition also asserts that the *Alabama Power Decision*'s standard improperly departs from Commission policies and practices regarding pole attachment cost recovery, and that the *Alabama Power Decision*'s standard has no basis in just compensation jurisprudence. Petition at i, 7-10. *See* Reply to Opposition to Petition at ii, 2. Gulf Power subsequently acknowledged, however, that "[o]nce the rule in [the *Alabama Power Decision*] becomes final, either through denial of certiorari review or an ultimate ruling on the merits by the Supreme Court, it will be binding upon the FCC – it will set the standard." Reply to Opposition to Petition at 5-6. As noted above, after Gulf Power filed the Petition, the United States Supreme Court denied certiorari in *Alabama Power*, and the Eleventh Circuit's decision became final. *See* note 10, *supra*.

[18] Opposition to Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, File No. PA 00-004 (filed July 25, 2003) ("Opposition to Petition").

[19] Reply to Opposition to Petition.

further consideration in response to the *Alabama Power Decision*'s standard and explaining the significance of that evidence.[20] After carefully reviewing the parties' submissions, we conclude that Gulf Power should be afforded the opportunity to present the evidence delineated in its Description of Evidence during a hearing before an Administrative Law Judge ("ALJ").[21]

## III. PROCEDURAL DESIGNATIONS

### A. Procedural and Evidentiary Rules

6. This proceeding shall be governed by sections 1.201 through 1.364 of the Commission's rules of practice for hearing proceedings, to the extent practicable for the adjudication of this issue.[22] The ALJ may, in his discretion, require the parties to submit all or any portion of their case in writing if he determines that such written submissions would contribute significantly to the disposition of the proceeding.[23]

### B. Discovery

7. Discovery shall be conducted in accordance with sections 1.311-1.325 of the Commission's rules.[24]

### C. Burdens of Proceeding and Proof

8. Because Gulf Power is the moving party with respect to the Petition,[25] it 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.[26]

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[20] Letter to J. Russell Campbell, Ralph A. Peterson, and John Seiver from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, File No. PA 00-004 (Dec. 19, 2003) ("December 19 Letter Ruling"). *See* 47 C.F.R. § 1.106(k)(2). Gulf Power thereafter submitted its proffer of evidence (Description of Evidence Gulf Power Seeks to Present in Satisfaction of the Eleventh Circuit's Test, File No. PA 00-004 (filed Jan. 8, 2004) ("Description of Evidence")), to which the Cable Operators filed a response. Response to Description of Evidence Gulf Power Seeks to Present in Satisfaction of the Eleventh Circuit's Test, File No. PA 00-004 (filed Feb. 6, 2004) ("Cable Operators' Response to Description of Evidence").

[21] We disagree with the Cable Operators that the Petition is inappropriate because the *Alabama Power Decision* purportedly did not establish a new legal standard. Opposition to Petition at 9-13. Consequently, we believe that consideration of the facts Gulf Power intends to proffer in an effort to satisfy the *Alabama Power Decision*'s standard is "required in the public interest." 47 C.F.R. § 1.106(c)(2). We also find that the Petition is not inconsistent with Gulf Power's legal arguments in its appeal of the *Alabama Power Decision*. *See* Opposition to Petition at 13-14. We express no 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. *See* Opposition to Petition at 14-16; Reply to Opposition to Petition at 6-7; Description of Evidence; Cable Operators Response to Description of Evidence.

[22] 47 C.F.R. §§ 1.201-1.364.

[23] *See* 47 U.S.C. §§ 154(i), 154(j). *Cf. High Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000) (written body of evidence in 47 U.S.C. § 208 complaint proceeding "created the record necessary to make the just and reasonableness determination contemplated by 47 U.S.C. § 201(b)").

[24] 47 C.F.R. §§ 1.311-1.325.

[25] *See* Petition at ii, 2, 10-12; Gulf Power's Reply at ii, 4-8.

[26] *See* 47 C.F.R. § 1.255(a) (at hearings on a petition, the petitioner shall open and close); *Alabama Power Decision*, 311 F.3d at 1370 ("the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking") (quoting *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948)).

### D. Bureau Participation

9. The Enforcement Bureau shall be a party to the proceeding and will determine its level of participation, as appropriate. Pursuant to section 1.47(c) of the Commission's rules,[27] the Bureau shall be served with documents in the same manner as other parties.

## IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 224, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, 405, and sections 0.111, 0.311, 1.106, and 1.1411 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.106, 1.1411, that Gulf Power's Petition IS GRANTED to the extent indicated in this HDO;

11. IT IS FURTHER ORDERED, that the above-captioned proceeding IS DESIGNATED FOR A HEARING before an ALJ, at a time and place to be specified in a subsequent Order, upon the following issue:

> 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.

12. IT IS FURTHER ORDERED, that to avail themselves of the opportunity to be heard and the right to present evidence, the designated parties, pursuant to section 1.221(c) of the Commission's rules,[28] SHALL FILE in triplicate, within twenty (20) days of the mailing of this Order by the Secretary, a WRITTEN NOTICE OF APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issue specified in this Order.

13. IT IS FURTHER ORDERED, that this hearing will be governed by the rules of practice and procedure pertaining to the Commission's Hearing Proceedings, 47 C.F.R. §§ 1.201-1.364, subject to the ALJ's discretion to regulate the hearing.

14. IT IS FURTHER ORDERED, that all Discovery shall be conducted in accordance with 47 C.F.R. §§ 1.311-1.325, subject to the ALJ's discretion.

15. IT IS FURTHER ORDERED, that Gulf Power shall have both the burden of proceeding with the introduction of evidence and the burden of proof on all issues.

16. IT IS FURTHER ORDERED, that the Enforcement Bureau shall be a party to the proceeding.

17. IT IS FURTHER ORDERED, that the Secretary of the Commission shall cause to have this Order published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

[27] 47 C.F.R. § 1.47(c).

[28] 47 C.F.R. § 1.221(c).