

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

FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., *et. al.*

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

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To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**COMPLAINANTS' REPLY PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW IN RESPONSE TO GULF POWER'S PROPOSED FINDINGS AND
CONCLUSIONS OF LAW**

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The Florida Cable Telecommunications Ass'n., 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") respectfully submit the following reply to Gulf Power's Proposed Findings of Fact and Conclusions of Law ("GPPFCL").¹

INTRODUCTION AND SUMMARY

Gulf Power has not met its burden of proving that it is entitled to receive compensation above the marginal costs of hosting Complainants' attachments. *HDO*, ¶¶ 11, 15. In *Alabama Power v. FCC*, the Eleventh Circuit set down the "legal principle" applicable to this case: "[I]n takings law, just compensation is determined by the *loss* to the person whose property is taken." 311 F.3d 1357, 1369 (11th Cir. 2002) (emphasis added). The Court pointed out that, as a general rule, the FCC "Cable Rate (which provides much more than marginal cost) necessarily provides just compensation." *Id.* at 1370-71. In order for a utility pole owner to prove the *exception* to this rule and seek additional compensation above the marginal costs of hosting attachments, the utility must prove, for "each pole" for which it makes such a claim, a "missed opportunity" (due to "full capacity") to lease pole space to a "buyer waiting in the wings" or put such pole space to a quantifiable "higher valued use" of Gulf Power's own and a resulting loss. *Id.* at 1370-71 (requiring proof of loss and the amount of loss). In this case, however, Gulf Power has failed to present any proof that it incurred any missed opportunity or suffered any loss due to the presence of, or rents paid for, Complainants' attachments.²

¹ Complainants' Reply herein tracks the paragraphs of Gulf Power's proposed findings. Complainants will use the same abbreviations for frequent citations used in their proposed findings. Complainants' Proposed Findings of Fact and Conclusions of Law will be referred to as "CPFCL;" Ms. Kravtin's testimony will be cited as "Compls. Ex. A;" and Mr. Harrelson's testimony as "Compls. Ex. B."

² In their proposed findings Gulf Power many times fails to cite any facts from the record or precedent from supporting law. *See, e.g.*, GPPFCL, ¶¶ 4, 9, 10, 11, 30, 42, 64-65.

COMPLAINANTS' RESPONSES

1. The Eleventh Circuit made clear that, even if a utility proves that it has specific poles that are at “full capacity,” it would also have to identify a loss resulting from such rivalry, in the form of either a “buyer waiting in the wings” who could not be accommodated or a higher valued use that the utility had to forego. 311 F.3d at 1370-71 (“this result is in accordance with the economic reality that there is no ‘lost opportunity’ foreclosed by the government unless the two factors are present”). Even if Gulf had identified poles at “full capacity” (which it has not), it has not identified any loss in the form of a buyer of space that could not be accommodated or a foreclosed opportunity. Compls. Ex. A, Kravtin Testimony, p. 50.

2. Gulf Power errs in suggesting that Complainants rely on “excerpts” of the Eleventh Circuit’s *Alabama Power* opinion. That characterization better describes Gulf Power’s position. Complainants adhere to the entirety of the *Alabama Power holding*, which states:

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.

Id. at 1370-71 (emphasis added). The Eleventh Circuit repeated that payment of the marginal costs of pole attachments meets the test of putting the aggrieved party “in the position it was in before the taking occurred (and no better)” unless “the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use.” *Id.* at 1372. This hearing was held to see if Gulf Power could “satisfy the *Alabama Power Decision*’s standard.” *HDO*, ¶ 5 n.21.

It has not.

3. Resolution of Gulf Power's claims in this case depends entirely on whether Gulf Power can show that it had to exclude another, higher valued attachment of a third party or its own (a "missed opportunity" caused by "full capacity") **and** incurred a quantifiable and actual loss. It's that simple. Gulf's proposed "approach" – that performing any "make-ready" work on a pole means it is and was at "full capacity" (for every year preceding and every subsequent year) and that Gulf can then charge every past, present and future attacher on that pole an unregulated rate of its own choosing – is inconsistent with, and seeks to avoid, the constitutional requirement of proof of loss. *See* 311 F.3d at 1369, 1370-71. As even Gulf itself notes, make-ready is regularly used to "accommodate additional attachments." Therefore, unless make-ready can **not** be performed, its availability ensures the opposite of the "zero sum" or "rivalrous" situation denoted by the Eleventh Circuit's term "full capacity," which exists when a "government taking forecloses an opportunity to sell space to another bidding firm." *See* 311 F.3d at 1370; Compls. Ex. A, p. 32 ("[t]he economic realities of make-ready and full capacity cannot rationally coexist"); Compls. Ex. A, pp. 29-33; Compls. Ex. B, 6-8.

4. Gulf Power has not identified a single pole that meets the Eleventh Circuit's definition of "rivalrous" – where "use by one entity" actually "diminish[es] the use and enjoyment of others. 311 F.3d at 1369. Compls. Ex. B, pp. 29-33. More importantly, the Court also required proof of a lost opportunity, *Id.* at 1370-71, and since Gulf has none, *see* Compls. Ex. A, p. 50, it does not have "a proven claim."

5. The long-standing principle of takings jurisprudence that applies in this case is that "just compensation is determined by the loss to the person whose property is taken." *Id.* at 1369. This "legal principle" is not "narrow," "result driven," or "impossible to apply." *See*

GPPFCL, ¶ 5. Thus, it is Gulf, not Complainants, who try to depart from this principle by seeking a huge annual increase in pole rents without proving that it has suffered a loss.

6. Gulf is flatly wrong in arguing that “crowding” is the same as “full capacity.” As Patricia Kravtin explained,

For a facility to be at full capacity, it must be a situation where a user (be it an airplane, automobile, employee, or attachments) would actually be excluded from the facility because of a true capacity constraint or scarcity with respect to the underlying infrastructure.

Compls. Ex. B, p. 26. Similarly, Gulf witness Michael Dunn admitted that a “rearrangeable pole would not be at full capacity.” Dunn Cross, April 24, 2006 Tr., pp. 726-27. Mr. Bowen further testified that “[i]t would be impractical to distinguish between rearrangement and change-out....” Gulf Power Ex. B, p. 27. In light of these admissions, the Osmose data, which did not consider make-ready measures such as re-arrangement or change-outs, has no probative value. Compls. Ex. B, pp. 9-14.

7. The Eleventh Circuit defined “nonrivalrous” as meaning that “use by one entity does not necessarily diminish the use and enjoyment of others.” 311 F.3d at 1369. Gulf errs in arguing that this definition does not apply to poles. As *Alabama Power* noted just two paragraphs after discussing make-ready, “space on a pole” “may be, for practical purposes, nonrivalrous.” *Id.* Unlike Gulf Power’s attempted analogies to land, make-ready is the reason why poles are, with very limited exception, Compls. Ex. B, pp. 6-11, essentially non-rivalrous.

8. Gulf Power’s contention that pole capacity should be determined by poles’ “current” condition is farcical. GPPFCL, ¶ 8. Current when? In 2000, when Gulf initiated its rate increases? In 2006, at the time of the hearing? Or sometime in between? Gulf never defines what it means by “current” because trying to do so would highlight the constantly

changing nature of its poles and how make-ready is used, when necessary, to “provide space” for new licensees. Compls. Ex. 2, p. 5. The Presiding Judge noted in April 2005 that Gulf could not identify any poles at “full capacity” before the completion of the Osmose audit. *Status Order*, FCC 05M-23, p. 1. Subsequently, Gulf only presented data from Osmose based upon an observation on one day in the spring of 2005; it has no data for 2000, 2001, 2002, 2003, 2004, 2006, or, indeed, the other 364 days of 2005. Compls. Ex. B, pp. 11-13. Indeed, since the Osmose survey, a number of poles Osmose reviewed have been changed out to taller poles or had extensions bolted to the top. *See, e.g.*, Compls. Ex. 6, pp. 8-9; pp. 52-54. Because, as Mr. Bowen admitted, Gulf’s pole network is “variable” in nature, CPFCL, ¶ 49, “full capacity” depends upon a concrete instance of someone’s being excluded over a period of time – not a hypothetical inability to accommodate other parties on one particular day within a 7-year span.

9. Gulf has *not* established (let alone even offered cites to the record in this paragraph) that space on its poles is “nonrivalrous.” It incorrectly uses the term “finite space” to suggest that poles are not regularly changed to accept new attachments. GPPFCL, ¶ 9. In fact, Gulf’s own permitting procedure provides for payment of make-ready costs to re-arrange or change-out poles. Compls. Ex. 2, p. 5. Gulf’s Rex Brooks admitted that only in “limited cases” is there a situation where, because of “engineering practice you could not change the height of the pole.” Compls. Ex. 85, Brooks Dep., pp. 45-46. As Complainants’ expert, Ms. Kravtin, pointed out, “the ability to perform make-ready work on a pole provides direct evidence of the nonrivalrous condition of the pole.” Compls. Ex. A, p. 32. In this case, Gulf Power has “not presented any evidence to suggest it has not been able to accommodate all entities [including itself] seeking to attach to its poles because of the presence of a cable company” Compls. Ex. A, p. 42.

10. Whether or not a particular Gulf Power pole is at “full capacity” is not, as Gulf Power contends (without supporting citation), “an analysis of inches.” Instead, as Complainants’ expert witnesses explained, an analysis of pole capacity must ask whether there is any physical, regulatory, or other reason why Gulf cannot use its historical and regular practice of make-ready to accommodate another attachment. See Compls. Ex. A, pp. 28-33; Compls. Ex. B, pp. 9-14. In this case, Gulf Power has failed to identify any such circumstance. Compls. Ex. A, p. 42. And Gulf Power’s claim that, for example, a separation of less than 52” between power and communications equals “full capacity” would mean that in the make-ready process an attacher would have to exceed the 40” required separation and make room for the next attacher – even if there wasn’t any new attacher for that space and despite the law requiring that the next attacher (or pole owner) pay for making added space available for the next attacher or the pole owner’s own uses. Tr. 7/6/06 at 2189; 47 U.S.C. § 224(i).

11. Even if Gulf had been able to identify poles that were truly at “full capacity,” that would not be enough to make pole space “congruent with” land. As *Alabama Power* required, the utility would still have to prove a loss. 311 F.3d at 1370. Furthermore, if Gulf had identified “full capacity” poles as to which it had actually suffered a “lost opportunity,” the concept of “fair market value” would still not be applicable to this case. 311 F.3d at 1368; *Alabama Power Commission Order*, ¶ 55. Instead, Gulf would have the “burden of proving loss, as well as the amount of any loss,” and that would be the limit of any claim for “just compensation.” 311 F.3d at 1370. In this case, Gulf established no “market” for pole space – it only showed that it has the leverage and monopoly control to impose higher rates in some instances where new communications service providers need access to poles in order to do business. See Compls. Ex. 77, pp. 1, 5; see also Compls. Ex. A, pp. 13-14, 59-60. This makes sense as the Court would

have referred to a “hypothetical” buyer of space and not a buyer “waiting in the wings” if fair market value was to be the applicable valuation standard. 311 F.3d at 1370. Because it did not, Gulf’s reliance on “hypothetical” buyers and “fair market” valuations is entirely misplaced.

12. Just as “fair market value” has no application to utility pole space, Gulf’s proposed “replacement cost” cannot be a “proxy” for “fair market value.” As explained in Complainants’ Proposed Findings of Fact and Conclusions of Law, Gulf Power’s “replacement cost” methodology is not based upon “loss to the owner,” *see* CPFCL, ¶¶ 81, 83, 494-499; was developed before *Alabama Power*, CPFCL ¶¶ 86-89, 94-97; has no relation to capacity on Gulf’s poles or whether Gulf incurred a loss related to Complainants’ attachments, CPFCL, ¶¶ 79, 91, 92, 139-41, 147, 500-07; and has been deemed by the Commission to be “particularly unsuited” to valuing pole space, CPFCL, ¶ 514. Gulf’s “replacement cost” calculations are not at all “similar to” the FCC Cable Rate Formula. Gulf’s calculations apply four times the “space factor” from FCC regulations and, under the rubric of using “present day pole costs,” seek to charge more than twice the actual pole investment incurred by Gulf Power for poles containing Complainants’ attachments. *See* CPFCL, ¶¶ 109, 112-15, 132-34. The Commission has already explained that it is not appropriate to use “forward-looking” costs in regulating pole attachments.³ And the *Alabama Power* court never suggested that some modification to the FCC formula using “present day pole costs” was appropriate in any situation – only that something more than marginal costs (which the court noted were already more than compensated under the federal formula) could be appropriate *if* the loss factors were satisfied.

13. *Alabama Power* explicitly recognized that utility poles are “essential facilities. 311 F.3d at 1362. Gulf’s claim that Complainants “have other viable options” is based only

³ *In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 F.C.C.R. 12103, ¶¶ 15-25 (2001)(“*Recon Order*”).

upon “new construction.” See GPPFCL, ¶ 13. As Ms. Kravtin explained, because of legal, economic, and practical barriers, “attachers do not have the option of duplicating the pole networks constructed by the utility” Compls. Ex. B, p. 9 (citing *Alabama Power Commission Order*, ¶ 69). Similarly, Mr. Spain conceded that any attacher is compelled to deal with the pole owner and that attachers cannot replicate Gulf’s pole system. See CPFCL, ¶¶ 250, 269-70.

14. Gulf Power and other utilities have fought pole attachment regulation since its inception. CPFCL, ¶¶ 115-16; Complainants’ Trial Brief, p. 3 n.2. However, the FCC and the Courts have regularly and consistently rejected utility challenges that the FCC Cable Formula rate is “unfairly low.” See *Id.* *Alabama Power* explained that “any implementation of the Cable Rate (which provides for much more than marginal costs) necessarily provides just compensation” unless a utility can prove that it incurred both a missed opportunity and a resulting loss. 311 F.3d at 1370-71.

15. In *Gulf Power v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit ruled that the process for determining pole rental and other payments under the formulas prescribed in Section 224 and FCC regulations satisfies constitutional requirements for paying pole owners just compensation for mandatory attachments.

There is nothing ... 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 utility industry more than the constitutional minimum).

Id. at 1338.

16. Gulf's characterization of the Commission and Eleventh Circuit decisions involving Alabama Power is incomplete and incorrect. The Commission rejected the utility's arguments for higher rates on two distinct grounds: first, that section 224(f) had not changed any actual conditions of the attachments (something Gulf also admitted, *see* CPFCL, ¶ 39) and that compensation already received was just and reasonable; and second, that even if a different analytical framework were used, just compensation is still measured by "loss to the owner," and the three appraisal methods offered up by the utility, including replacement cost, were not appropriate. *Alabama Power Commission Order*, ¶¶ 53-58. On appeal, the Eleventh Circuit followed the Commission's order, focused on the "legal principle" that just compensation is limited to the loss to the owner, and set forth requirements for proving loss. 311 F.3d at 1369.

17. The Bureau's decision found: (1) that the Commission's pole formulas, together with make-ready, provide compensation that exceeds "just compensation"; (2) that to claim an entitlement to additional compensation, a utility has to meet the Eleventh Circuit's test of showing "full capacity" and a lost opportunity of greater value; and (3) all of Gulf's challenges to specific aspects of the Cable Rate Formula were without merit. *Memorandum Opinion and Order*, ¶¶ 15-16.

18. Gulf Power has to maintain its pole system for its own "core business" of "the distribution of electricity to ratepayers."⁴

19. Gulf's poles range in size quite broadly, from 30 feet on up to 100 feet. Gulf Power Ex. 54, p. 1. Gulf's 2004 ledger shows that only about 31 percent of Gulf's approximately 224,000 wood poles were 40 feet in height, and that Gulf had significant numbers

⁴ Gulf is compensated for the expenses it incurs in maintaining its poles at rates approved by the Florida Public Service Commission. *See, e.g., Notice of Proposed Agency Action Order Requiring Each Electric Investor-Owned Utility to Implement Eight-Year Pole Inspection Cycle and Requiring Reports*, Order No PSC-06-0144-PAA-EI, Docket No. 060078-EI (Feb. 27, 2006).

of poles that were comprised of 30, 35, and 45-foot poles. Gulf Power Ex. 54, p. 1; *see also* Compls. Ex. 56, pp. 15-16. While Gulf contends that Mr. Dunn said that a “typical” joint-use pole was 40 feet “or taller,” Gulf did not identify, either by specific numbers or general percentages, the heights of the poles to which Complainants are attached. *Alabama Power* required proof of loss for “each pole.” 311 F.3d at 1370.

20-21. Complainants, or their predecessors-in-interest, originally obtained the vast majority of their attachments to Gulf Power poles not through mandatory access but through longstanding relationships governed by voluntary pole attachment contracts. *Memorandum Opinion and Order*, ¶ 2. In June of 2000, Gulf threatened to terminate all Complainants’ rights of attachment unless Complainants agreed to sign new contracts that, in addition to invoking section 224(f), required payment of annual pole attachment rates 500 to 600 percent higher than the rates then in effect. *Id.*, ¶ 3. In the Bureau’s order of May 13, 2003, it found that new rates proposed by Gulf were unreasonable and ordered that the parties’ prior pole attachment agreements be continued pending good faith negotiations that were to be “in accordance with the Commission’s rules.” *Id.* (Ordering Clauses, ¶¶ 3, 6). Gulf has chosen to litigate, not negotiate.

22. Cable television attachments occupy one foot of usable space on a utility pole. *See Fee Order*, ¶ 16. Gulf contends that cable attachments “could” occupy more, but it did not submit any evidence in this proceeding of any instance in which Complainants’ attachments actually occupy more than one foot of usable space. *See, e.g.*, Gulf Ex. 42. Indeed, Gulf used one foot of usable space for cable attachments in its “replacement cost” calculations. Gulf Ex. 52, p. 7.

23. Gulf correctly describes the Eleventh Circuit’s explanation of the concept of a “nonrivalrous” good. It errs, however, in suggesting that rivalry is the only important part of

Alabama Power's analysis. The baseline "legal principle" is that just compensation is limited to the loss incurred by a property owner. 311 F.3d at 1369.

24-25. Gulf says it uses the terms "crowding" and "full capacity" synonymously. This is not true. When it was asked in an interrogatory, Gulf drew a very clear distinction between crowding and full capacity, saying that a "crowded" pole had "room" for "one additional communications attachment" while a "full" pole did not. Compl. Ex. 56, p. 2. Gulf's own distinction is important because, at the same time in April 2005 that Gulf answered this interrogatory, Gulf only asked Osmose to evaluate crowding, not full capacity. See CPFCL, ¶¶ 150-52. Only later did Gulf witnesses claim that "crowding" and "full capacity" are the same. Gulf cites Complainants' witnesses in support, but Ms. Kravtin and Mr. Harrelson both made clear that, while poles may be congested at a moment in time, they are not at "full capacity" unless, taking account of routine make-ready procedures, space cannot be made for another attachment. Compl. Ex. A, pp. 26-29; Compl. Ex. B, pp. 8-11. Ultimately, Gulf's attempt to make "crowding" the same as "full capacity" is a side-show. The real test, which Gulf did not meet, is whether Complainants' presence on a pole actually deprived another (including Gulf itself) of the ability to attach to that pole and caused a lost opportunity. Compl. Ex. B, p. 28.

26-28. It is Gulf Power, not Complainants, who put forth an unrealistic and "hypothetical" view of pole capacity by claiming, without presenting evidence of a "buyer waiting in the wings" or a "higher valued use," that a pole is at "full capacity" merely if make-ready needs to be done in order to address a code violation. As Gulf's own permitting procedure states, make-ready is used to "provide space" for licensee's attachments. Compl. Ex. 2, pp. 3-5. It is an integral part of the way Gulf, and indeed all utilities, handle pole attachments. Compl. Ex. B, pp. 9-14. Mr. Dunn agreed that a pole that could be re-arranged to accommodate more

attachments is not full, and Mr. Bowen testified that it was impractical to distinguish between re-arrangements and pole change-outs. CPFCL, ¶ 71; Gulf Power Ex. B, p. 27. As noted above in response to Gulf's paragraph 8, Gulf never explains what the "current" time means when it refers to poles, and never submitted any evidence pertaining to any period or span of time pertaining to its poles' capacity. CPFCL, ¶¶ 156-59. The fact that Gulf spent two months (April and May of 2005) and up to \$100,000 paying Osmose to identify safety violations doesn't change the fact that that survey, because it ignored make-ready and contained other defects, has no probative value. CPFCL, ¶¶ 160-72.

29. Gulf's reliance upon *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), is inapposite, because that case merely ruled that "when it is agreed [by pole owner and attacher] that capacity is insufficient," a utility may not be **required** to provide an attacher with access to a pole. *Id.* at 1347. *Southern Company* emphasized that the term "insufficient capacity" was not defined by statute and was ambiguous, and it specifically found that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient." *Id.* at 1348. By contrast, in *Alabama Power*, the issue was whether there is proof of both "full capacity" as determined by a "missed opportunity" and a consequent loss of a higher valued use. 311 F.3d at 1370-71. The FCC has always made clear that make-ready is part of determining available capacity. Complainants' Trial Brief, p. 14 n.23. Accordingly, under *Alabama Power*, the question of whether capacity is "full" such that the pole owner suffered a missed opportunity must be answered by taking account of Gulf Power's incorporation of make-ready in its permitting procedure and its "historical willingness to accommodate attachers by performing make-ready." *See* Compls. Ex. 2, pp. 3-5; CPFCL, ¶ 60.

When *Alabama Power* and *Southern Company* are considered together, proof of “full capacity” must involve a situation where “it is agreed” by the parties (owner and attachers) that the pole owner, taking account of Gulf’s customary use of make-ready, cannot accommodate an additional attachment and has actually incurred a “missed opportunity.” *See Complainants’ Response to Gulf Power’s Interrogatories* (April 18, 2005), pp. 16-18. Gulf has introduced no evidence of any such instance. Instead, the evidence supports the opposite finding – that Gulf has no record of any instance in which it was prevented from accommodating either a third-party attachment or its own attachments because of the presence of Complainants’ cable attachments. *See CPFCL*, ¶¶ 53, 54, 62, 63, 67, 90, 227-28, 230, 334, 347.

30. As described above in response to Gulf paragraphs 9 and 24-25, Gulf has not identified a single pole at full capacity (where Complainants’ use caused Gulf to incur a missed opportunity), let alone proven that “its network of poles” is at “full capacity.”

31. A pole may be a “tangible piece of property,” but that is not the issue. The relevant point is that Gulf does not treat a pole as having “a finite amount of space upon which attachments can be made.” *GPPFCL*, ¶ 31. Instead, its permitting procedure provides either that attachment can be made without make-ready, or, if necessary, with make-ready, “to provide space for [a] [l]icensee’s attachments.” *Compls. Ex. 2*, pp. 3-5. Thus, a pole is only unable to accommodate a new attacher for purposes of determining exclusion, or a “missed opportunity,” if make-ready cannot be performed, and Gulf did not identify any such instance in this case. *CPFCL*, ¶¶ 53-67.

32-35. Gulf departs from the FCC Cable Rate Formula by using 28.5 feet of “unusable space” to obtain a “space allocation” factor in its “replacement cost” calculations of 28-29 percent, some four times the space allocation used by the Commission. *CPFCL*, ¶¶ 129-134.

This is inappropriate, because Gulf incurs expenses for “unusable” space regardless of whether Complainants are attached or not, and because the FCC formula already includes what the Commission has found is an appropriate allocation of costs, based upon the entire pole. *See Fee Order*, ¶¶ 16-24; *Reconsideration Order*, ¶¶ 46-54; *Alabama Power Commission Order*, ¶ 60 (utility’s claims a “complete mischaracterization”). Gulf’s arguments concerning the 40-inch “safety space” have also been repeatedly rejected by the Commission. *See Fee Order*, ¶¶ 20-22; *Reconsideration Order*, ¶ 51. Finally, Gulf Power’s focus on the “typical” joint use pole and its claim that the height of such a pole is 40 feet is irrelevant to the issues in this case. *Alabama Power* requires proof of full capacity (exclusion) and a loss for “*each pole*” for which Gulf has a claim. Gulf never proved it had to exclude someone (or itself) or that it suffered a loss. CPFCL, ¶¶ 62-63, 67, 139-41, 147, 333-34, 347.⁵

36. Gulf’s claims about the usable space on a “typical” pole, like its claims about unusable space on a hypothesized generic pole, are irrelevant to meeting *Alabama Power*’s requirements, as explained in the previous paragraph. *See* FCC 05M-49, ¶ 6 (Oct. 12, 2005). More generally, Gulf has not submitted evidence based upon a survey of all poles that would warrant reversal of the Commission’s repeated rejection of the utility’s industry’s claims that average usable space is 13.5 feet. *See Fee Order*, ¶¶ 16-19; *Reconsideration Order*, ¶¶ 46-51; *Alabama Power Commission Order*, ¶ 60.

37. Fees paid by the ILECs, BellSouth, Sprint, and GTC, to Gulf Power do not bear upon Gulf’s burden to show that Gulf has suffered a loss due to Complainants’ attachments.

⁵ Even if the Gulf’s claims about a pole height were relevant, they are inconsistent with Gulf’s own evidence, which, as discussed above in response to paragraph 19, show that Gulf has many different pole heights to which Complainants are attached. *See, e.g.,* Gulf Power Ex. 68, Routh Dep., pp. 75-75 (height of pole “could be a 35-foot pole. It could be a 50-foot pole. ... Or somewhere in between”); see also Compls. Ex. 9 (Osrose survey included 30, 35, 40, 45, and 50-foot poles).

38-39. The ILECs' agreements with Gulf Power accord the ILECs the right to use up to three feet of space on Gulf Power poles. But this does not change when a new attacher pays make-ready to change-out to an incrementally taller pole. See Gulf Power Exs. 32-34. Moreover, where an ILEC attaches within its allocated portion of space does not bear upon Gulf's burden to show that it has in fact had to exclude someone (incur a "missed opportunity") because of "full capacity" on one or more poles.⁶

40. Gulf's contention that a "typical" 40-foot pole with three attachers cannot accommodate another attacher is irrelevant to whether Gulf can show that it incurred a "missed opportunity." 311 F.3d at 1370. Gulf uses make-ready to accommodate attachments when necessary "unless there is an engineering or safety reason for not allowing the attachment" and testified as to no such instance. CPFCL, ¶¶ 52-67.

41-42. Gulf's citations to *Alabama Power* do not support its argument that a utility could claim its entire "network" of poles is at "full capacity. When the Court set forth its requirements, it said that "before a power company can seek compensation above marginal cost" of attachments, it must show "full capacity" and a lost opportunity to sell to another or employ its own higher valued use "*with regard to each pole.*" 311 F.3d at 1370-71 (emphasis added). The requirement of proof for "specific poles" is the standard, as stated by the Presiding Judge. See *Status Order*, 05M-23 (April 15, 2005), p. 4.⁷ Of course, Gulf cannot meet the "each pole" standard as to the issue of capacity (let alone loss), since it admitted that, even under its legal claim that any make-ready equals lack of capacity, "there is no way of identifying each instance

⁶ It is also common for ILECs to re-arrange their wires (including lowering their cables or allowing attachments below their cables) as part of the make-ready process to accommodate additional attachers. See, e.g., Compls. Ex. B, pp. 14, 22, 25-26; Compls. Ex. 6, pp. 10, 12; Compls. Ex. 7, pp. 2, 125, 183. Under Section 224(i), the pole owner and existing attachers (including ILECs) are protected from having to bear any of the costs of re-arranging or replacing their attachments when a new attachment is sought.

⁷ Gulf inaccurately suggests that Mr. Harrelson testified that a pole-by-pole analysis is not realistic. In fact, Mr. Harrelson explained that "you can evaluate poles on an individual basis, so long as you look both ways [at the surrounding or connecting poles]." Gulf Power Ex. 70B, Compls. Cross-Designations, Harrelson Dep., p. 335.

where this has occurred.” Compls. Ex. 56, p. 17 (Interrogatory No. 29). As for Osmose, Gulf had said that it would provide data for each of its 150,000 joint use poles, but ultimately Osmose reviewed less than 7 percent of those poles and took measurements of an undetermined smaller percentage. CPFCL, ¶¶ 166-84. Gulf’s claim that it could extrapolate from Osmose’s two months of work to its entire network was rebutted directly by the testimony of Ms. Kravtin, who explained that Gulf’s claims are not supported by any statistical evidence and that they are based upon the fundamental error of defining a pole as “crowded” (not even “full capacity”) when it merely has code violations that are readily correctable. *See* Compls. Ex. A, pp. 49-57; *see also* Gulf Power Ex. 23 (violations to “be corrected” or Gulf will correct and bill the attacher).

43. Complainants and Gulf each identified 50 specific poles in their testimony, but Gulf failed to show that for any such pole, it had to exclude either a third party buyer or a higher valued use of its own and therefore suffered a loss. CPFCL, ¶¶ 334, 347. Mr. Harrelson also testified that none of the 100 poles could reasonably be said, given Gulf’s use of make-ready, to be at “full capacity.” Compls. Exs. 6 and 7.

44. Complainants do not assert that the poles identified by the parties are themselves irrelevant – only that they do not show a single instance of where Gulf incurred: (1) a foreclosed opportunity to lease space to an additional party or use space itself; and (2) suffered a resulting loss. Ms. Kravtin testified as to what Gulf would have had to show to prove a loss. Compls. Ex. A, pp. 30, 46-47.⁸

⁸ Gulf’s suggestion that Complainants formed their opinions before they reviewed the evidence is incorrect. With respect to Ms. Kravtin, Gulf cites only to a March 2005 “outline” which the witness explained she would then develop based on her review of the evidence. Kravtin Cross, April 26, 2006 Tr., p. 1472. Mr. Harrelson’s testimony about Gulf’s lack of proof of “full capacity” is based upon the documents provided by Gulf itself (which, in the case of the ten “Knology” poles was very limited), his personal observations of 39 out of 40 Osmose poles, and Gulf’s regular practice of performing make-ready and its failure to identify a single instance of where make-ready could not be performed. *See* Compls. Ex. B, pp. 12, 31-43, 59-61.

45-46. Gulf's argument that it's wrong to consider make-ready in determining pole capacity is undermined by its multiple admissions: that it is a regular part of its pole permitting process; that Gulf routinely uses make-ready to accommodate new attaching entities and new attachments by existing attachers or by itself; that its practice and policy is to accommodate attachments unless there is an engineering or safety reason not to; that make-ready is paid for only by the party benefiting; that make-ready frequently benefits Gulf Power; that rearrangeable poles are not at full capacity; and that Gulf cannot identify any instance in which it denied an attacher the right to attach because of an inability to provide space. CPFCL, ¶¶ 47-71. Section 224(i) makes clear that the way attachments work is that the last attacher in time pays make-ready, if necessary, either to accommodate a new attachment or to modify an existing attachment. 47 U.S.C. 224(i).

47-50. For the reasons discussed above in response to Gulf's paragraph 29, Gulf's claim that its arguments are more consistent with *Alabama Power, Southern Co.*, and 47 U.S.C. § 224 are incorrect. *Alabama Power* explained that "full capacity" had to mean a "missed opportunity" to sell to another or for the pole owner to use space for a higher valued use, which is exactly what Ms. Kravtin explained when she testified about "one entity's presence on the pole actually depriv[ing] another of the ability to attach to that pole." Compl. Ex. A, p. 28. Gulf has not shown any such exclusion or deprivation.⁹

51. The issue in this case is not simplicity of approach but whether Gulf can show it incurred a lost opportunity to employ a higher valued use by another attacher or itself because of

⁹ Make-ready does not equate to proof of full capacity because make-ready is the means of providing space (capacity) for attachments. Gulf jumps on the word "expand," arguing that if make-ready is necessary to "expand" capacity, capacity was not present before. GPPFCL, ¶ 49. But Gulf misses the point. The point is that if capacity can be made available, whether through re-arrangement or expansion of the pole height in a change-out, then capacity cannot be "full" under *Alabama Power* since there is no exclusion of another and no "missed," "foreclosed," or "lost" opportunity. See CPFCL, ¶¶ 60-71; Bowen Testimony, p. 27 ("impractical" to distinguish between re-arrangement and change-out); see also FCC 05M-50, p. 3 (Oct. 12, 2005).

Complainants' attachments. 311 F.3d at 1370-71. It has not done that. Gulf's suggestion that the need for make-ready by itself justifies a 5 to 10-fold increase in annual pole rents and that an attacher should initiate "a complaint proceeding" at the FCC anytime there is a disagreement about make-ready shows just how ridiculous Gulf's "approach" is – it would transform questions of field engineering into rate disputes.

52. Gulf Power's definition of "crowding" in the Osmose survey is disputed by Complainants - it is defective for several reasons. It's not a definition of full capacity, because it doesn't take account of make-ready, and, as Mr. Dunn admitted, a pole is not at full capacity if the utility can use make-ready to rearrange attachments to cure code violations. CPFCL, ¶¶ 68-71, 150-51, 160. In addition, the code violations listed are transitory – and capable of being fixed. Indeed, Gulf has an obligation to see that they are fixed, and fixing them will affect pole capacity. Compls. Ex. B, Kravtin Testimony, p. 55; Compls. Ex. A, Harrelson Testimony, pp. 9-11. Other deficiencies in the Osmose survey are identified in Complainants' proposed findings. CPFCL, ¶¶ 149-84.¹⁰

53. With respect to Gulf Power's 50 poles, the issue is not whether they require make-ready but whether Gulf had to exclude a third party or itself—that it incurred a missed opportunity. Gulf submitted no such evidence. The ten "Knology" poles and documentation in particular show that Gulf successfully accommodated additional attachments from Knology and incurred no loss. CPFCL, ¶¶ 194-200.¹¹

54. Similarly, Gulf did not submit any evidence that it had to exclude someone or incur a loss with respect to any of Complainants' 50 poles. CPFCL, ¶¶ 228, 334, 347.

¹⁰ Gulf's contention that Mr. Harrelson erred by not performing a pole "loading" analysis is incorrect. The question of "full capacity" hinges upon whether Gulf had to exclude someone (because of pole space or loading issues). Gulf did not prove that it in fact had to exclude itself or any other third party for any reason.

¹¹ Gulf is wrong in claiming that Complainants "did not dispute" that each of the Osmose poles would in fact require make-ready. For example, Osmose erred in classifying at least three of the 40 poles. CPFCL, ¶¶ 185-88.

55-58. Gulf is mistaken that Mr. Harrelson challenged Gulf's specifications generally. He did make the points that some specifications (i.e., plates C-7 and C-11) were incorrect or out of date; that Gulf's control over its poles was relatively lax; that Gulf violated its own standards; and that Gulf failed to acknowledge both its duty to cure code violations and the role of make-ready. Compls. Ex. B, pp. 10, 30, 44-45.

59. Mr. Harrelson provided specific examples to support his conclusion that Gulf's control over its pole attachment process is relatively lax, and that Gulf has regularly issued permits based upon "far fewer requirements than were applied to the Osmose survey." Compls. Ex. B, p. 44-48. He also pointed to Mr. Bowen's admission that "Gulf Power does not check after the attachments are made to see if the attachers did what they were supposed to do." Compls. Ex. B, p. 45.

60-61. Gulf's contention that attachers must comply with NESC and Gulf construction specifications is a truism that has no legal relevance. Notably, however, Gulf failed to show who caused the violations Osmose recorded, CPFCL, ¶ 162, which is significant in light of Gulf's concession that if other attachers were properly permitted and *Gulf* caused a violation, "it would be incumbent upon *Gulf Power* to either change out or rearrange the pole to bring it back into compliance." CPFCL, ¶ 72 (emphasis added).

62-63. As discussed in paragraphs 9 and 11, Gulf could not be more wrong in arguing: that it has identified "full capacity" poles; that it can skip over the requirement of proof of loss to get to valuing damages;¹² or that "fair market value" is applicable to poles. CPFCL, ¶¶ 62-63, 67, 138-41, 147, 227-28, 334, 347, 508-14; 311 F.3d at 1368.

¹² Significantly, Gulf quotes Ms. Kravtin's testimony but ignores the critical point – "proving lost opportunity." GPPFCL, ¶ 63.

64-70. Gulf has produced no evidence that would undermine the courts' and the Commission's findings that utility pole networks are "essential facilities" and that utilities have "superior bargaining power." See *NCTA v. Gulf Power*, 534 U.S. 327, 330 (2002); *Alabama Power*, 311 F.3d at 1362; *Southern Co.*, 293 F.3d at 1341; *Alabama Power Commission Order*, ¶ 55. Indeed, Mr. Spain's testimony reaffirms the point. CPFCL, ¶ 269-70. It bears repeating – the issue here is what, if anything, has Gulf lost, not, what options do Complainants have in new construction (i.e., when a developer opens a new subdivision).¹³

71-75. It is not Complainants' "interpretation," but rather *Alabama Power's holding*, as discussed in paragraph 2 above, that requires Gulf Power to prove a missed opportunity **and** a resulting loss. 311 F.3d at 1370-71. The Eleventh Circuit explained that it would be a "flawed analytical step" to simply claim a lost opportunity to charge what the utility "deem[ed] the 'full market price'" of pole space without proving that it was "out any more money than [it] w[as] before the taking." *Id.* at 1369, 1370. Even if Gulf had been able to meet the *Alabama Power* test, the concept of "fair market value" would still be inapplicable. Any additional compensation would be based upon the loss to Gulf and limited to the amount of that loss. See 311 F.3d at 1370.

76-81. Gulf wants to skip over proof of loss because it has none. *Alabama Power* does require proof of an actual buyer – otherwise the court's statements about a "missed opportunity" "to sell space to another bidding firm" and the utility's "burden of proving loss" have no meaning. 311 F.3d at 1370. Moreover, while Gulf complains that it is unreasonable to require a contract or other agreement as proof of "another bidding firm," the Presiding Judge doesn't have to reach that question, because Gulf did not even mention at the hearing any prospective "buyer

¹³ As discussed above in paragraph 13, the deposition excerpts relied upon by Gulf that discuss Complainants' ability in some instances to pay additional costs of underground lines pertain only to "new construction." None of Complainants' witnesses testified that they could duplicate or replace Gulf's poles.

waiting in the wings” who couldn’t be accommodated or any higher valued use that it was prevented from implementing.¹⁴ The fact that three telecommunications companies pay Gulf an annual pole rate of \$40.60 is not proof of a “missed opportunity” or “loss” from a taking but rather of Gulf’s ability to use its “leverage” to extract monopoly pole terms from some new entrants to the communications marketplace, as one of those companies complained in writing, Compl. Ex. 77, and as Ms. Kravtin explained in detail. CPFCL, ¶¶ 280-85, 357. More generally, it’s not accurate to say that the *Alabama Power* requirements of proving “full capacity” (exclusion) and loss of a higher valued use “can never be met.” Ms. Kravtin explained precisely how a utility with a real lost opportunity would prove it. Compl. Ex. A, pp. 30, 46-47. Gulf simply failed to come forward with such proof.¹⁵ It would make no sense to award Gulf additional pole rent even if it can and has accommodated everyone *and* not suffered any loss.

82-84. With respect to proof of a “higher valued use,” *Alabama Power* requires that a power company “must show with regard to each pole that ... the power company is able to put the space to a higher-valued use with its own operations.” 311 F.3d at 1370-71. This cannot be, as Gulf claimed in its interrogatory responses, see Compl. Ex. 56, p. 5, a mere assertion that “any space occupied by a cable company can be put to a ‘higher valued use,’” that space can be “reserved” for other future uses, or that it is desirable to “merely forc[e] the cable companies to develop their own infrastructure,” otherwise the utility has no proof in fact of lost opportunity. No, instead, as the *Klay* and *Alabama Power* decisions make clear, the owner claiming just compensation for a taking must show it actually “suffered a loss,” not merely the opportunity to

¹⁴ Notably, Gulf’s argument that FCC regulations “constrain” their negotiations with attachers conflicts with their claim that it is entitled to a “market” rate.

¹⁵ Gulf’s analogy to the government’s condemnation of a house is faulty. In that circumstance too, there is an actual buyer – the government. But poles are not like land, as *Alabama Power* recognized when it concluded that pole space “may be, for practical purposes, *nonrivalrous*,” that fair market value could not be used, and that to obtain compensation above marginal costs of attachments, a utility would have to prove a loss (either a lost sale/lease to another or a lost higher valued use). 311 F.3d at 1370-71.

charge what it wants. 425 F.3d at 986; 311 F.3d at 1369.¹⁶ Gulf does recite “uses” it believes are valuable, but importantly *none of these have been precluded!* See Tr. 7/6/06 at 2104, 2111.

85-88, 91. As discussed in detail in paragraph 12 above, Gulf’s “replacement cost” methodology and “fair market value” have nothing to do with pole capacity or whether Gulf incurred a loss, and therefore have nothing to do with “just compensation.” Gulf’s efforts to re-work the FCC Cable Rate Formula to increase the space allocation factor by four hundred percent and more than double the pole investment component have been repeatedly rejected by the Commission, *Alabama Power Commission Order*, ¶¶ 58-61; *Reconsideration Order*, ¶¶ 15-25, and are an unconstitutional attempt to dramatically increase Complainants’ share of Gulf’s own overhead costs and thereby have Gulf be placed in a better position than it would be without their attachments. 311 F.3d at 1370 (*citing Metropolitan Transp. Auth. v. ICC*, 792 F.2d at 297). Furthermore, what Complainants, or anyone else, has to pay to unregulated municipal or cooperative electric companies has nothing to do with Gulf’s costs or losses.

89-90, 92. Gulf admitted that it wants “replacement cost” rates for *all* its poles, regardless of pole capacity, and that “replacement cost” has no relation to any actual loss. CPFCL, ¶ 79, 86-92, 139-41, 147. Thus, “replacement cost” is not merely “not perfect,” GPFCL, ¶ 90; it is legally irrelevant and, as the Commission said, “particularly unsuited for valuing pole attachments.” *Alabama Power Commission Order*, ¶ 53. Moreover, the Commission’s rejection of “replacement cost” is not “inconsequential,” since the Commission explicitly considered replacement cost for poles in the context of its being a “technique for determining market value.” *Id.* Why would it apply to existing attachers if there is no demonstrated “lost opportunity?”

¹⁶ The references to testimony by Mr. Bowen are all in the conditional tense. However, Mr. Bowen also testified that if it needs additional space, then, if necessary, it performs make-ready in order to obtain space. Gulf Power Ex. B, pp. 38-39. Gulf Power did not present any evidence in this proceeding of un-reimbursed costs relating to Complainants’ attachments.

93. Gulf's "replacement cost" methodology is hardly "conservative," since it quite obviously results in rates from \$38 to approximately \$65, or from 600 to 1000 higher than FCC Cable Rate formula rates. CPFCL, ¶ 135. Gulf's admission that it uses "system averages" and that it seeks its exorbitant rates for every pole is demonstrably inconsistent with *Alabama Power's* requirements of proof of a missed opportunity and resulting loss for "each pole" for which a utility seeks additional compensation. 311 F.3d at 1370-71.¹⁷

94-95. Gulf's witnesses admitted that its "replacement cost" rates are based on the unconstitutional notion of value, or gain, to the taker – indeed, that they are specifically based upon the costs of cable attachers' duplicating Gulf's network, even though Gulf admitted that that was not possible. CPFCL, ¶¶ 81, 83, 133, 143, 148, 252, 269-71.¹⁸ Gulf's repeated attempt to analogize to land is not only wrong; it confuses loss with valuation of the loss. If you lose your house, you lose all rights to use your property and can look to comparable transactions for a valuation. But when a cable attacher uses one foot of a Gulf pole, Gulf rarely if ever is prevented from using the pole for its own purposes or from leasing to other third parties. CPFCL, ¶¶ 62-63, 67. Gulf certainly presented no such evidence here. Compls. Ex. A, ¶¶ 334, 47.

96-101. *Alabama Power* states that, without evidence of a proven lost opportunity for "each pole" for which a utility make a claim, "any implementation of the Cable Rate . . . necessarily provides just compensation." 311 F.3d at 1370-71.¹⁹ The Commission has repeatedly rejected Gulf's claims that the Cable Rate Formula does not provide just

¹⁷ Gulf's argument that the Commission uses "presumptions" in arriving at its administrative pole rate formulas is not pertinent to Gulf's *constitutional* claim for compensation over and above such administrative rates, which, as *Alabama Power* held, must be based upon proof of loss. *Id.*

¹⁸ Gulf's contention that attachers have benefited from "cherry-picking," while not proven or quantified, is but one example of its reliance upon a methodology that seeks to recover value to the "taker."

¹⁹ The Eleventh Circuit also concluded that, "[s]ince marginal cost provides just compensation so long as [proof of lost opportunity is] absent, it is irrelevant that the Telecom Rate . . . yields a higher rate." *Id.* at 1371 n.23. Similarly, "other" higher rates are irrelevant unless the express conditions of *Alabama Power* are met.

compensation and that it should use “replacement” costs and include a greater allocation of “unusable” space. *Alabama Power Commission Order*, ¶¶ 57-6; *Reconsideration Order*, ¶¶ 15-25. Mr. Spain, upon whom Gulf Power relies, admitted he was not aware of the Commission’s orders. CPFCL, ¶¶ 240-43.

102-05. Gulf Power has not met its burden of proof for claiming more than its marginal costs – of “show[ing] with regard to each pole” that it has incurred a “missed opportunity” and consequently suffered a loss. 311 F.3d at 1370-71; *Klay*, 425 F.3d at 986. Gulf did not even present evidence of its marginal costs, let alone identify a loss caused by Complainants. CPFCL, ¶¶ 139-47, 238, 334-47. Only such a loss, and not “fair market value,” is relevant to Gulf’s “takings” claim for “just compensation.” 311 F.3d at 1368-69. In its final paragraphs, Gulf moves away from specific “replacement cost” rates,²⁰ and asks only for a finding that the “Cable Rate is an unacceptable benchmark,” a result directly inconsistent with the Eleventh Circuit’s holding that, without proof of loss, it “necessarily provides just compensation.” *Id.* at 1370-71.

CONCLUSION

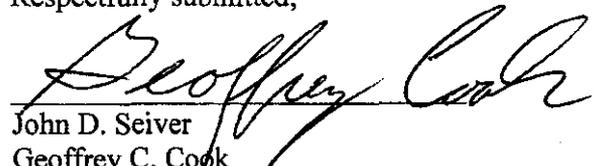
Gulf Power’s position is that any pole that did or will require make-ready is or will be “full” so that, even without evidence of either a lost opportunity to rent space to another attacher or any foreclosed use of its own, the FCC rate formula no longer applies (despite the fact that the formula provides *more* than just compensation); marginal costs can be ignored (including those make-ready costs such as rearrangement or changeout that are fully reimbursed); and a new regime of “fair market value” in the guise of “replacement cost” establishes an appropriate rental. Gulf Power’s position, however, is not consistent with Section 224, *Alabama Power*, or any precedent. Simply stated, Gulf has not shown any entitlement to any additional

²⁰ Gulf’s apparent decision not to seek its replacement cost rates is not surprising, given their origin before *Alabama Power* and their lack of any connection to pole capacity or lost opportunity. *See supra*, ¶ 12, p. 7.

compensation under its takings claim because it has not met the requirements for proof of loss set forth in *Alabama Power*. Indeed, the proof showed that Gulf Power has been, is, and will be more than fully reimbursed for the marginal costs of Complainants' attachments, that it will earn a profit above marginal cost reimbursement under the FCC formula, and that not one single use or attacher was ever foreclosed due to Complainants' presence on any Gulf Power pole.

Gulf power has suggested that this whole proceeding would be a waste if the *Alabama Power* standard means what Complainants say. GPPFCL, ¶¶ 5, 79. However, Gulf Power never lived up to its allegations. Three years ago, Gulf claimed it had proof of "identifiable lost opportunities."²¹ But in discovery and at the hearing, Gulf showed that it had no proof of loss. The bottom line: no loss; no claim. As the Presiding Judge suggested, if Gulf is dissatisfied with the FCC formula and wants to charge "unregulated" pole attachment rates, it should ask Congress, not the Commission, to change the law. Hearing Tr., July 6, 2006, pp. 2050-54.

Respectfully submitted,



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²¹ Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing, p. 11.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Reply Proposed Findings of Fact and Conclusions of Law in Response to Gulf Power's Proposed Findings 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 16th day of August, 2006:

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