

54. Complainants also submitted fifty exemplar poles, along with measurements and engineering analysis. Although Complainants' expert attempted to cast the objective data in a different light, the numbers tell the tale – the vast majority of the poles identified by Complainants are rivalrous (requiring rearrangement or a change-out before an additional attachment could be made). Complainants' engineering expert agreed that if Gulf Power's approach to crowding were adopted, a "very high percentage" of the poles discussed in his report would be crowded. Harrelson Cross, 5/1/06 Tr., pp. 1796-97. According to Harrelson's analysis, the actual number is 87% (85 of 98 poles require make-ready). This squares with Gulf Power's evidence concerning structured, systemic and exemplar pole crowding. This also squares with Gulf Power's witnesses who concluded that a large percentage of the network is crowded. GP Ex. A (Dunn Direct), pp. 21-22; GP Ex. B (Bowen Direct), pp. 24-38; Dunn Re-Direct, 4/24/06 Tr., pp. 844-50.<sup>10</sup>

**D. Gulf Power's Construction Specifications Are An Appropriate Consideration In The Make-Ready Analysis**

55. Complainants' engineering witness took issue with Gulf Power's use of its construction specifications as part of its pole capacity analysis. Compl. Ex. B (Harrelson Direct), pp. 9-11; 44-45. Before addressing Complainants' engineering witness' assertions in this area, it must be emphasized that any dispute over Gulf Power's specifications, or for that matter their history of enforcement in that area, is a sideshow. Gulf Power's specifications and NESC requirements were relied upon by both Gulf Power and Complainants as representative of

<sup>10</sup> One of Complainant's representatives admits that three of the thirteen poles he analyzed are "full." GP Ex. 86 (O'Ceallaigh pole analysis identifying three poles as "full" and nine of thirteen poles as requiring make ready). Complainants' engineering expert testified, however, that he did not even talk to this Mr. O'Ceallaigh regarding the determination that certain poles were "full" prior to testifying as he "didn't see any value" in having such a discussion. Harrelson Cross, 4/27/06 Tr., pp. 1714-28. Mr. Harrelson went even further, opining that Mr. O'Ceallaigh's analysis of the poles was "irrelevant." *Id.*, p. 1726.

the spacing requirements on utility poles. GP Ex. 40 (Osrose Statement of Work); Harrelson Cross, 4/27/06 Tr., p. 1610-18; GP Ex. 76 (Harrelson Draft and Outline); GP Ex. 77 (Harrelson Draft Report); GP Ex. 88 (Harrelson e-mail regarding measurements). The specifications accordingly are most relevant because they reveal the limited and rivalrous nature of the space occupied by Complainants and all other attachers to Gulf Power's poles. The specifications also shed light on Gulf Power's higher valued uses for its own pole space. Spain Cross, 4/26/06 Tr., p. 1279; GP Ex. B (Bowen Direct), p. 39; GP Ex. 12, Plates C-3, C-4, C-8.

56. Although the specifications are relevant, this proceeding is not designed to either penalize the Complainants for failure to abide by the applicable specifications or to find fault with Gulf Power's enforcement thereof. This proceeding is not intended to opine upon the legitimacy of the individual specifications or to determine whether Gulf Power is behind, consistent with, or ahead of the rest of the industry in terms of their construction standards. However, to the extent Complainants assert that Gulf Power's use of its specifications in the crowding analysis should fail because of their engineering expert witness, Complainants have failed.

57. Complainants' engineering expert criticized Gulf Power's specifications as being "decades old," "unreasonable" and "contrary to industry standards." *See, e.g.*, Compl. Ex. B (Harrelson Direct), pp. 44-45; Harrelson Cross, 4/27/06 Tr., pp. 1653-57; 1692-94. On this point, the Complainants' expert should have consulted with his own clients. For their part, Complainants themselves have no quarrel with Gulf Power's construction standards. The specifications (in one form or another) have been a part of Gulf Power's attachment agreements since at least 1978. GP Ex. A (Dunn Direct), p. 11; GP Ex. 9 (1978 Agreement between Gulf Power and Comcast). The specifications were a part of contract discussions every five years

since that time. GP Ex. A (Dunn Direct), p. 11. Mr. Dunn testified that while he was Distribution Manager and Project Service Manager, a time period covering some sixteen (16) years, no attaching entity (including the Complainants) took issue with any of Gulf Power's specification plates. *Id.*, p. 12-15. No Complainant has ever filed an FCC proceeding at any time challenging any of Gulf Power's construction standards as being unreasonable or unfair. In fact, after termination in 2000, when Gulf Power distributed to Complainants its "mandatory access agreement," Comcast returned detailed handwritten comments to Gulf Power which took issue with various substantive provisions of the proposed agreement, but none of the specification plates was marked for discussion or suggested revision. GP Ex. 10.

58. One of Complainants' own representatives summed it up best when he dubbed Gulf Power's construction specifications "the bible for pole attachments" and explained that they are consistent with the NESC and his company's (Cox's) own internal requirements. GP Ex. 67 (O'Ceallaigh Depo.), p. 54-55; *see also, id.*, pp. 39-40 (emphasis added).

59. Complainants' engineering expert also asserted that Gulf Power is lax about enforcing compliance with the NESC and/or its own construction standards. Compl. Ex. B (Harrelson Direct), pp. 44-45. Again, it must be emphasized that this issue is not directly material to the findings in this matter. However, to the extent Complainants desire to impugn the rivalry analysis on this point, they again have missed the mark. The evidence demonstrates that Gulf Power has a program in place to ensure compliance, incorporates contractual assurances from attaching entities as part of that program, and also layers into its compliance program audits mandated by the Florida Public Service Commission. GP Ex. A (Dunn Direct), pp. 15-20; GP Ex. B (Bowen Direct), pp. 17-19; Dunn Re-Direct, 4/24/06 Tr., pp. 866-70; *see also* GP Exs. 4 (CATV Permitting Procedure); 5-8 (various documents regarding attachers'

compliance with the NESC and Gulf Power specifications); 11-12 (same) and 14-30 (same). Despite concluding that Gulf Power's program was "lax," Complainants' engineering expert admitted that he did not conduct any research concerning Gulf Power's past practices with regard to ensuring that code violations are fixed once they are identified. Harrelson Cross, 5/1/06 Tr., p. 1781.

60. Complainants also did not dispute their obligation to comply with both the NESC and Gulf Power's construction specifications. Harrelson Cross, 4/27/06 Tr., pp. 1610-18; GP Ex. 76 (Harrelson Draft and Outline); GP Ex. 77 (Harrelson Draft Report). Gulf Power requires that the attaching entity accept responsibility for attaching consistent with the NESC and Gulf Power's specifications. With respect to the NESC, the attachment agreements themselves provide that:

Notwithstanding the issuance of an attachment permit, Licensee [the attacher] shall at no time make or maintain an attachment to Gulf' pole or substitute pole space if the spacing on the pole, the ground clearance, or other characteristics of the attachment are not in strict conformity with the [NESC] and any other applicable codes, rules, or regulations of any governing body having jurisdiction."

GP Ex. 7, Section 3.

With respect to Gulf Power's specifications, the agreements provide the following:

Licensee [the attacher] shall also comply with Gulf's specifications for construction . . . . Attached hereto are drawings marked Plates 1 through 11 inclusive which are descriptive of required construction under some conditions and are to serve as construction guidelines by may not apply in all situations. These drawings may be changed from time to time by Gulf and do not supercede any applicable [NESC] requirements, except to the extent that they are more stringent than the Code.

*See, e.g.*, GP Ex. 7, Section 6.

61. Aside from the attachment agreements themselves, the responsibility of the attacher to comply with NESC and Gulf Power construction specification is reinforced at various times throughout the relationship. GP Ex. A (Dunn Direct), p. 17-18; *see also* 5-8; 11-12 and 14-30 (various documents regarding compliance with the NESC and Gulf Power specifications). Gulf Power also has a multi-layer process in place that, under normal circumstances, is designed to ensure compliance by attachers. GP Ex. A (Dunn Direct), p. 18.<sup>11</sup> Complainants' engineering expert also concurs that attachers have an obligation to comply with Gulf Power's standards, since he admittedly testified to that very obligation in other cases. Harrelson Cross, 5/1/06 Tr., pp. 1767-79. In summary, Mr. Harrelson's efforts to discredit Gulf Power's construction standards and joint use practices are unpersuasive and contrary to the great weight of the evidence.

**V. Gulf Power Is Entitled To The Fair Market Value Of The Pole Space Taken By Complainants**

**A. Once Gulf Power Establishes That Its Pole Space is Rivalrous, The Inquiry Turns to Valuing the Pole Space.**

62. The second major question that must be resolved is the amount of compensation Gulf Power is due for Complainants' attachments to rivalrous poles. The Hearing Designation Order frames the issues as: "Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators and, if so, the amount of any such compensation." Hearing Designation Order, September 27, 2004 (DA 04-3048), p. 11. The first part of this question was answered when Gulf Power proved that its pole space is rivalrous on any pole that would require make-ready in order to accommodate an

<sup>11</sup> Of course, given the recent hurricanes with which Gulf Power has had to deal, its programs have been anything but normal for some time. *Id.*, p. 18-20.

additional attacher. The second part of the issue requires a determination of amount of compensation due. Under traditional takings law, at this point the case is about valuing Gulf Power's pole space. Memorandum Opinion and Order, May 26, 2006 (FCC 06M-14), p. 4 ("...that evidence, will be considered in deciding, *inter alia*, ultimate issues of pole capacity and 'fair market value' of poles space on Gulf Power's utility poles allegedly taken by cable attachments of Complainants").

63. As novel as the first question was, the compensation question is, in many respects, as difficult given the parties' widely different views of what level of compensation is due for rivalrous pole space. Fortunately, the parties at least agree that valuation is the "endgame." Complainants' economist, Ms. Kravtin, testified as follows:

As I understand, APCo [v. FCC] is asking for – well, it sets forth conditions of full capacity. And then, if you satisfy that, you move on to proving lost opportunity. For the purpose of making a valuation of what, then, the utility could seek to recover in excess of marginal costs. *Ultimately, we have to come to a valuation.* That would be the endgame here. What is a valuation? So in order, from an economic standpoint, to come to what that valuation would be, you have to have data to examine to make that valuation.

Kravtin Cross, 4/27/06 Tr., 1524-25 (emphasis added).

**B. Before Valuation, The "Essential Facilities" Overlay Must Be Removed.**

64. Before analyzing the parties' positions on valuation, it is important to debunk one myth that Complainants have injected into this case. The myth appears to be a historical vestige of pole attachment disputes: that utility poles are "bottleneck" or "essential" facilities for cable attachments. The supposition behind regulation of pole attachments (and in turn, the rate which Gulf Power claims is unjust, especially for rivalrous poles) is that utility pole networks are "essential facilities" for cable operators. In the regulatory and judicial decisions preceding this

case, it appears as though the original “essential facilities” justification for regulation was recycled.<sup>12</sup>

65. Here, Complainants attempt to again recycle this historical conclusion without supporting evidence. In opening statement, Complainants counsel alluded to “all the pronouncements you see in the law about . . . poles being essential facilities”. Compls. Opening, 4/24/06 Tr., p. 674. Complainants’ economic expert testified that “Gulf Power has a monopoly ownership over an essential facility to the cable operators.” Kravtin Cross, 4/26/06 Tr., p. 1342. Yet, Complainants’ counsel acknowledged that he “can’t speak from personal knowledge” and Ms. Kravtin conceded that she performed no independent research to determine whether the historical perception concerning essential facilities was still (if ever) true. Compls. Opening, 4/24/06 Tr., p. 674; Kravtin Cross, 4/26/06 Tr., pp. 1347-51. Instead, Ms. Kravtin appears to rely upon the parroted institutional supposition:

[I] describe in my testimony ... the economic conditions that make something an essential facility, and I believe those hold here in this case for Gulf Power, and that there has certainly been no evidence presented by Gulf Power that would override considerations of that facts that it happened in other regulatory proceedings addressing these very issues.

Kravtin Cross, 4/26/06 Tr., p. 1351.

66. This case cannot be decided based upon unsupported and recycled historical presumptions. The only factual evidence presented on this issue indicates that Gulf Power’s pole network is **not** an essential facility to the cable operators. Most notably, the Complainants can

<sup>12</sup> See, e.g., *Alabama Power v. FCC*, 311 F.3d at 1361 (“Certain firms have historically been considered to be natural monopolies – bottleneck facilities that arise due to network effects and economies of scale.”) (“[a]s the owner of these ‘essential facilities’”).

(and regularly do) build their plant underground versus overhead.<sup>13</sup> Mediacom testified that at least 80% of its new construction in 2003, 2004 and 2005 was underground. GP Ex. 68 (Routh Depo.), pp. 128-29. Roughly 40% of Mediacom's total plant is underground. *Id.*, pp. 50-51. Cox testified that 60% of its total plant in Ft. Walton is underground; 40% of its plant in Pensacola is underground. GP Ex. 67 (O'Ceallaigh Depo.), pp. 13-14. Brighthouse conceded that underground construction was an option. GP Ex. 66 (Burgess Depo.), p. 80. Comcast testified that 15% of its plant is underground. GP Ex. 69 (Smith Depo.), pp. 38-39. Complainants' own experts admitted that cable companies have options. Harrelson Cross, 4/27/06 Tr., pp. 1568-70; Kravtin Cross, 4/26/06 Tr., p. 1352. Complainants have done nothing to rebut this compelling evidence.

67. More compelling is that Complainants' analysis as to whether to build overhead or underground is based more on a "business case" rather than being driven by physical barriers or insurmountable economic barriers. Mediacom testified that its decision to build overhead versus underground is "based purely on a business case." GP Ex. 68 (Routh Depo.), pp. 65-66. Cox testified that when it is evaluating new construction, a "site inspector determines whether or not it would be worth Cox's while to attach to the existing overhead distribution [facilities]" and that the site inspector's opinion is based on cost. *Id.*, 67 (O'Ceallaigh Depo.), pp. 23-24. Cox further testified: "It's just a business case from Cox's perspective." *Id.*

68. Moreover, the cost difference between standard overhead (sometimes called aerial) construction and underground construction is not drastic. For Mediacom, the average cost per mile of overhead construction (which assumes existing pole plant) is \$14,000-\$15,000; the

<sup>13</sup> Complainants also have the option to install wireless technology, Kravtin Cross, 4/26/06 Tr. p. 1354, as well as construct their own poles. Compls. Ex. 85A (Brooks Cross-Designations), p. 73.

average cost per mile of underground construction is \$22,000. GP Ex. 68 (Routh Depo.), p. 69. For Brighthouse, the “internal estimate” is “right around \$28,000 for aerial plant and in the 38 to \$40,000 [range] for underground.” GP Ex. 66 (Burgess Depo.), p. 33. For Comcast, “[u]nderground construction is about \$30,000 a mile, \$30,035.65 to be exact. . . . Aerial construction 17,000 and some odd few dollars a mile for aerial.” GP Ex. 69 (Smith Depo.), p. 41. As Gulf Power’s valuation expert, Mr. Spain, testified, these increased initial construction costs (albeit slight) are offset by the decreased risk of loss often associated with underground construction. GP Ex. F (Spain Direct), p. 10; *see also* GP Ex. A (Dunn Direct), pp. 28-29 (“unless, of course, the cable company chose to go underground, which in many instances reduces the risk of loss or damage in a variety of ways.”).

69. These are not the type of economic barriers (if they can be considered barriers at all) that invoke the concerns addressed by the essential facilities doctrine. The only evidence presented by Complainants which even remotely touches this issue is Ms. Kravtin’s generic testimony that utilities have control over essential facilities to cable operators. Compl. Ex. A (Kravtin Depo.), p. 8. Ms. Kravtin testified: “While an attacher may have the option of going underground in certain cases, that is typically at an expense much greater than the utility’s actual costs of accommodating the attacher on its existing pole network.” *Id.*, p. 9. But this testimony is belied by the testimony discussed above, and misses the point insofar as it presumes that an attacher is entitled, in every instance, to the cheapest construction option. Notably, Ms. Kravtin did not rely on the price difference between overhead and underground construction or consider the relative benefits of the different options. If an economic entry barrier existed at all, the difference between overhead and underground construction would be the likely dwelling place. On cross examination Ms. Kravtin testified:

Q: Well, the cable operator has an option, don't they?

A: Well, we discussed that yesterday at length. There are options. There are always options. Whether those options are economically and practically feasible is another question.

Kravtin Cross, 4/26/06 Tr., p. 1507. However, Ms. Kravtin conceded that she did not know the difference in cost between overhead and underground construction generally, let alone with respect to the Complainants. *Id.*, pp. 1418-19.

70. Ms. Kravtin's generic testimony regarding Gulf Power's alleged monopoly ownership of an essential facility, in conjunction with her admitted lack of knowledge or research regarding the underlying facts, is not sufficient to overcome the import of the testimony presented by Gulf Power and Complainants' own witnesses. In this case, the evidence shows that Gulf Power's pole network is **not** an essential facility to the Complainants. This conclusion is not merely academic. The essential facilities doctrine is the underpinning of the regulatory regime from which the policy-based, favorable Cable Rate was born. 311 F.3d at 1361-63. That Gulf Power's facilities are not essential severely undermines one of Complainants' main positions in this case – that the Cable Rate is “gracious plenty” even in situations where a pole is rivalrous, crowded or at full capacity.

**C. Complainants' Interpretation Of The Standard In *Alabama Power v. FCC* Is Not Supported By Fact, Law, Or Practicality.**

71. Complainants argue that the regulated Cable Rate more than compensates Gulf Power for its pole space – even on rivalrous poles – unless Gulf Power can show that it missed out on a specific, identifiable opportunity to sell the specific space occupied by Complainants to another identifiable attacher at a higher rate, or that it had a specific, identifiable and quantifiable higher valued use for that exact space in its own operations. Compls. Ex. A (Kravtin Direct), pp.

45-49. Complainants layer onto these hurdles the requirement that Gulf Power must show that a definite price and term had been negotiated with a potential attacher, and that due diligence revealed that the prospective attacher had the financial wherewithal to meet its obligations under the phantom contract. Kravtin Cross, 4/27/06 Tr., pp. 1524-27. As for higher valued uses, Complainants contend that Gulf Power must come armed with detailed economic analysis concerning specific use on a pole-by-pole basis. Compls. Ex. A (Kravtin Direct), pp. 45-49.

72. Gulf Power contends that once it demonstrates crowding or full capacity, the analysis turns to the proper means of valuing the pole space taken by Complainants. Gulf Power relies upon the pronouncement in *Alabama Power v. FCC* that “if crowded, . . . pole space becomes rivalrous.” 313 F. 3d at 1370. Gulf Power asserts that once pole space is determined to be rivalrous, it becomes congruent with land and, therefore, a traditional takings analysis applies. 311 F. 3d at 1369.

73. Gulf Power argues that the target in any takings analysis is “fair market value” and that the Court should look to market evidence (sales comparisons) and fair market value “proxies” (such as replacement costs) to determine just compensation for the pole space taken by Complainants. *See, e.g.*, GP Ex. F (Spain Direct). Gulf Power further contends that the process for determining the appropriate level of compensation can and should be consistent with Congress’ intended goal for a “simple and expeditious” regulatory regime. Gulf Power contends that the heavy-handed evidentiary burden suggested by Complainants runs afoul of traditional takings jurisprudence and Congressional goals. Gulf Power contends that such burdensome proof requirements would bog the Bureau down with unwieldy and time consuming litigation.

74. To support their extreme proof requirements, Complainants rely principally on two propositions. First, they rely on an isolated portion of *Alabama Power v. FCC* which says

that a power company must show “(a) another buyer of the space waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.” 311 F. 3d at 1370. Second, they rely on jurisprudence which states that the measure of just compensation is “loss to the owner” – most notably a quote from *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961), which says: “[t]he question is, What has the owner lost? not, What has the taker gained?” Complainants use these two propositions as a springboard for arguing that the value of the property at issue (the pole space taken by Complainants) is irrelevant. Complainants instead assert that Gulf Power must show an actual, present, quantifiable lost financial opportunity measured in exact dollars and then, and only then, is there any value to the property in excess of marginal cost.

75. Although Complainants accurately quote isolated language from the authorities they cite, Complainants’ legal spin abandons the entirety of the decisions and the history of just compensation jurisprudence. Complainants create unmeetable burdens for Gulf Power and do not advance this proceeding toward the directive of the Hearing Designation Order and the mandate of the Fifth Amendment: to value Gulf Power’s pole space.

**1. *Alabama Power v. FCC* does not require proof of an actual buyer**

76. Complainants argue that, with respect to “another buyer waiting in the wings” Gulf Power must show, on a pole-by-pole basis (1) that there was an actual, present buyer who wanted the same space occupied by Complainants, (2) that the other buyer had agreed to pay a rent higher than the rent paid by Complainants, (3) that the duration of the relationship with the other buyer would exceed the potential occupancy by Complainants, and (4) that the other buyer had the financial wherewithal to meet its obligations. Compls. Ex. A (Kravtin Direct), pp. 45-47. Under Complainants’ theory, Gulf Power would (before executing a contract) presumably have

to reach an agreement in principal with this other buyer, then at the last minute back-out of the deal and bring the negotiated terms to court. While backing-out of the deal might save Gulf Power from a breach of contract lawsuit, it might still expose Gulf Power to liability (in the nature of promissory fraud) since Gulf Power was negotiating to sell space that it did not have (or presumably intend) to sell. Though it is unnecessary to opine upon the legal ramifications of such conduct, it is enough to say that this cannot be the evidentiary burden the Eleventh Circuit intended.

77. Further, one of the assumptions in Complainants' proposed evidentiary paradigm is that Gulf Power has negotiated a rate higher than what the Complainants themselves pay. There are at least two problems with this assumption. First, Gulf Power's negotiations with potential attachers are constrained by the existing regulatory regime. In other words, a potential attacher is unlikely to agree to pay in excess of the regulated rate since they (like Complainants) are inclined to believe they are entitled to the regulated rate under any circumstances. Complainants' economic expert, Ms. Kravtin, said as much on cross examination:

Q: Would it surprise you to learn that the complainants that are in this courtroom today are paying an electric cooperative between \$17.50 and \$20 [per] pole attachment?

A: No, it would not because those cooperatives are not subject to the section 224 and the cable rate formula.

Q: And that's the only reason it doesn't surprise you?

A: I think that's a pretty major reason.

Kravtin Cross, 4/26/06 Tr., p. 1441.

78. It also appears that Complainants would never concede that any Section 224 attacher who paid an amount higher than the regulated rate did so as a result of arm's-length

negotiations.<sup>14</sup> Gulf Power presented evidence in this case of three telecommunications carriers who are paying, and have paid since year 2001, a per attachment rate of \$40.60. GP Ex. B (Bowen Direct), pp. 22-23. These three telecommunications attachers collectively paid the \$40.60 rate for 2,598 attachments in 2005. GP Ex. B (Bowen Direct), p. 23. Ms. Kravtin dismisses those transactions, testifying, “I do not believe those represent a fair market proxy because of the conditions that those entities operate [under] in negotiating with Gulf.” Kravtin Cross, 4/26/06 Tr., p. 1426.

79. In essence, the burden Complainants propose can never be met. Gulf Power (and all pole owners) would constantly be “chasing its tail” in search of just compensation. This cannot be the intent of *Alabama Power v. FCC*, especially in light of the Eleventh Circuit’s specific expectation that a utility would, under certain circumstances, be entitled to just compensation: “a power company whose poles are not ‘full’ can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full, can seek just compensation.” 311 F. 3d at 1371.

80. Finally, *Alabama Power v. FCC* never refers to the buyer “waiting in the wings” as an actual buyer. Instead, *Alabama Power v. FCC* makes reference to the type of buyer urged by Gulf Power – the hypothetical buyer – where it explains that the typical measure of just compensation is fair market value: “Typically, fair market value is used. Fair market value is established by determining what a ‘willing buyer would pay in cash to a willing seller’ at the time of the taking.” 311 F. 3d at 1368 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)). Complainants’ economic expert agrees that the “general appraisal method” of fair

<sup>14</sup> If Complainants are instead demanding that Gulf Power produce evidence of a negotiated deal with a non-Section 224 attacher, then this even further complicates (and invalidates) the evidentiary burden proposed by Complainants, since the vast majority of potential attachers (excluding incumbent local exchange carriers) are covered by Section 224.

market value focuses on the hypothetical buyer and seller. *Kravtin Cross*, 4/26/06 Tr., pp. 1407-09. As Gulf Power noted in its opening statement at trial, requiring proof of an actual buyer at a negotiated price could severely disrupt settled takings law. The “actual buyer” standard urged by Complainants would turn takings law on its head.<sup>15</sup>

81. For example, if the government condemned a person’s house, but the owner was unable to prove the existence of an actual other buyer (in whatever time frame was allowed by the government), then Complainants would relegate the homeowner to his costs of moving plus the amount actually paid for the house whenever it was purchased (even if the current cost of the home was significantly higher). To this, Complainants would argue that pole space is decidedly different from land, and that the analogy therefore does not apply. But *Alabama Power v. FCC* addresses this very point, saying: “By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself), the analogy to land becomes more appropriate. In the ‘full capacity’ situation, it is the zero-sum nature of pole space, like land, that is key.” 311 F. 3d at 1370. If the “analogy to land becomes more appropriate” once there is a showing of full capacity (rivalry) on some or all of Gulf Power’s poles, then the next step in the analysis (as with the taking of land) is a determination of value – what is the value of the pole space taken by Complainants?

<sup>15</sup> To the extent actual buyers waiting in the wings (wherever the “wings” may be located) are required, Gulf Power proffered its permit records as evidence of continued demand for its pole space. GP Ex. 4. Complainants’ engineering expert also admitted increased demand for pole space. GP Ex. 70 (Harrelson Depo.), pp. 129-30.

## 2. Gulf Power Proved Higher Valued Uses

82. *Alabama Power v. FCC* also discusses the potential for a utility to have a “higher-valued use” of the taken pole space in its own operations. 311 F. 3d at 1370. Unfortunately, this criteria is even less defined than the “buyer waiting in the wings” criteria. Complainants, consistent with their vision of a virtually unmeetable burden of proof, contend that any demonstration of a higher-valued use for a pole space must be pole-specific and include, in essence, a present business plan for the pole space. This cannot be what the Eleventh Circuit envisioned. If it was, the parties would become mired in pole-by-pole mini-trials over the validity and feasibility of the proposed alternative use of the associated pole space, and the economic benefits.

83. Gulf Power presented convincing evidence of higher valued uses for its pole space. Ben Bowen testified that Gulf Power builds its overhead distribution system “[t]o serve its electric ratepayers” and that “[t]hough not every pole has a transformer immediately after the pole is installed, nearly all 40 foot poles (or greater) can and should be able to support a transformer.” GP Ex. B (Bowen Direct), pp. 5, 22-26. Mr. Bowen testified, that installation of transformers and street lights are higher-valued uses for Gulf Power’s pole space. Bowen Cross, 4/25/06 Tr., pp. 1114-15. Mr. Bowen also testified:

Once the Complainants attach to our poles, it is difficult to get them off. Gulf Power needs to make use of the space where Complainants are attached (like installation of transformer or street light) we have to perform some type of make-ready. We are not able to put this space to higher valued uses, including exclusion of anyone we don’t want on our poles.

GP Ex. B (Bowen Direct), pp. 38-39. Complainants do not attempt to rebut Gulf Power’s evidence. Instead, Complainants argue that Gulf Power’s evidence just isn’t good enough. As

set forth above, Complainants' interpretation of the "higher-valued use" criteria is impractical, unusable and at odds with the law.

84. Finally, Complainants miss the self-proving higher valued use present in this record – exclusion. *Alabama Power v. FCC* explicitly recognizes this fact:

Perhaps fearing that electric companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. See *Southern Company v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002) ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act.").

311 F. 3d at 1363-64. The *Alabama Power v. FCC* Court's judicial notice of the potential higher value of exclusion is reflected in this case. Ms. Kravtin testified on cross-examination:

Q: Ms. Kravtin, do you view an electric utility like Gulf Power as a potential competitor to the complainant cable operators?

A: Yes. Certainly Gulf Power and other electric utilities can be competitors in the provision of communication services.

Q: They can have their own cable network or their own telecommunications network, couldn't they?

A: Yes.

Kravtin Cross, 4/27/06 Tr., pp. 1505-06.

**D. Gulf Power's Replacement Cost Methodology is an Acceptable Proxy For Just Compensation.**

85. This is a takings case. *Alabama Power v. FCC* noted that "[t]ypically fair market value is used" but that "[t]here is not an active, unregulated market for the use of 'elevated communications corridors,' however, and so an alternative to fair market value must be used."

311 F. 3d at 1368. Unlike in *Alabama Power v. FCC*, in this case there is evidence of an

unregulated market for pole attachments. Gulf Power presented evidence that at least three *telecommunications carriers (Adelphia, KMC and Southern Light)* are voluntarily paying an annual per attachment charge of \$40.60. GP Ex. B (Bowen Direct), pp. 22-23. Complainants have not offered any evidence to suggest that this represents “hold-up” value or monopoly extortion other than the unsupported conclusions of Ms. Kravtin.<sup>16</sup>

86. Gulf Power also presented evidence regarding its “joint use” relationships with three incumbent local exchange carriers – Bellsouth, Sprint and GTC. Of the three ILECs, GTC is most analogous to a cable attacher in that, unlike Bellsouth and Sprint, GTC does not own a significant number of poles to which Gulf Power is attached. GP Ex. B (Bowen Direct), pp. 21-22. GTC pays a per pole annual rate of \$29.70 as well as giving other consideration to Gulf Power in the joint use agreement, such as agreeing to accept 45% of liability arising out of the poles. GP Ex. 34 (GTC Agreement). Complainants argue that since GTC contracts for three feet of usable space on a pole (as opposed to the presumed one foot of usable space occupied by a cable attacher), the rate, when divided by three, does not differ significantly from what the Complainants have been paying. But this argument neglects one of Gulf Power’s principal positions in this case with respect to space allocation – that the cost of the unusable space on a pole should be born equally by all parties attached to the pole. Since the vast majority of space on any given pole is unusable, a reduction in the GTC rate to account for the differing levels of usable space occupancy (as between GTC and the Complainants) is not significant.

87. Gulf Power also established that Complainants themselves pay significantly more to certain electric cooperatives for identical pole attachments. Mediacom, Brighthouse and Cox

<sup>16</sup> Although Complainants suggest these limited transactions do not constitute a sufficient market, their economist testified that a market can consist of just one buyer and one seller. Kravtin Cross, 4/26/06 Tr., pp. 1440-41.

each have attachment agreements with Choctawhatchee Elec. Cooperative, Inc. ("CHELCO") under which they pay CHELCO rates between \$15 and \$17.50 per attachment (increasing to \$20 in 2007 for Mediacom and Cox). GP Ex. 66 (Burgess Depo.), p. 19; GP Ex. 67 (O'Cealleigh Depo.), p. 16, 132-33; GP Ex. 68 (Routh Depo.), p. 23; GP Exs. 57, 58 & 59. Brighthouse also pays Florida Public Utilities an annual attachment rate in excess of \$18. GP Ex. 66 (Burgess Depo.), p. 20. Gulf Power's valuation expert testified concerning his research into the unregulated dealings between electric cooperatives and municipal pole owners, on the one hand, and attachers, on the other. Spain Re-Direct, 4/26/06 Tr., pp. 1263-68. Mr. Spain found "rates in the co-op world were typically in the mid to high teens, frequently as high as about \$20" with an "average somewhere in the mid teens." *Id.*, p. 1264. Importantly, these unregulated, negotiated transactions apply to every pole to which the attachers gain access – not just rivalrous poles. Complainants presented no evidence that these rates were the product of extortion, or otherwise unreliable as comparable sales. Cox even testified that these were "negotiated" rates. GP Ex. 67 (O'Callaigh Depo.), p. 133. With respect to the rates paid to CHELCO and Florida Public Utilities, Brighthouse testified:

Q: Are we are talking about attachments that are identical to the ones that you are attaching to Gulf Power's poles?

A: Yes.

GP Ex. 66 (Burgess Depo.), p. 81. Cox testified:

Q: Are the attachments that Cox makes to poles owned by Choctawhatchee Electric any different than the attachments Cox makes to Gulf Power poles?

MR. SEIVER: Objection to the form

THE WITNESS: No.

BY MR. LANGLEY:

Q: Any physically different?

A: No.

GP Ex. 67 (O'Cealleigh Depo.), p. 16.

88. This is significant evidence bearing on the question of what amount of compensation is due Gulf Power for rivalrous poles. These unregulated negotiated rates exceed the Cable Rate by many multiples. Although instructive, the evidence concerning comparable transactions is still somewhat limited. As such, consistent with the Eleventh Circuit's analysis, a fair market value proxy is appropriate. 311 F. 3d at 1368.

89. Gulf Power submitted the only expert valuation testimony in the case through Mr. Roger Spain. Ms. Kravtin did not hold herself out as a valuation expert and did not purport to testify as a valuation expert. Kravtin Cross, 4/26/06 Tr., p. 1340. Mr. Spain testified that the most accurate proxy for determining the value of the pole space taken by Complainants is a replacement cost methodology, and that the replacement cost methodology urged by Gulf Power is "consistent with the cost methodology for estimating fair market value." GP Ex. F (Spain Direct), pp. 7, 13-15. Kravtin does not dispute Mr. Spain's valuation testimony.<sup>17</sup> Instead, she rejects (as do Complainants in their arguments) the fair market value standard altogether on the grounds that there is no indication that a market could appropriately function. Even if this were true (a proposition which is belied by the market evidence in this case), it would miss the point. Gulf Power does not contend that a vibrant market for pole space exists. Nor does Mr. Spain rely principally on sales comparables in rendering his opinion. Rather, Mr. Spain testified that, while comparable unregulated sales were instructive as corroborative evidence, they should not

<sup>17</sup> Since she is not a valuation expert, and holds no certifications in the fields of asset valuation or appraisal, she would have been in a poor position to engage Mr. Spain in the art of valuation.

be the principal focus in valuing the pole space taken by Complainants. *Id.*, p. 7. Mr. Spain instead opined that a replacement cost methodology was most appropriate: “As a general rule, the cost approach is the most appropriate method for a valuation of an in use asset. The cost approach is frequently used to value unique assets for which there is no quantifiable income stream.” *Id.*<sup>18</sup>

90. Based on the evidence in this case, while perhaps not perfect, a replacement cost methodology hits closer to the mark than the Cable Rate for determining the fair market value of the space taken by Complainants on Gulf Power’s poles. As stated by Terry Davis (an accountant with Gulf Power who spent several years in Gulf Power’s Rates and Regulatory department): “The replacement cost methodology ... seeks to reflect today’s costs both in terms of investment and operating expenses.” GP Ex. E (Davis Direct), p. 5. Mike Dunn testified that replacement costs are “more appropriate than historical or embedded costs” because “[h]istorical or embedded costs have little to do with the value of the property at the time a taking occurs.” GP Ex. A (Dunn Direct), pp. 27-28. Since just compensation is “measured at the time of the taking,”<sup>19</sup> something approximating current costs is appropriate. The Commission has even noted the benefits of a forward looking cost methodologies for pole attachments. *See* footnote 3, *supra*. A cost-based approach is familiar to the Bureau, and has the added benefit of being based on incontrovertible cost data.

<sup>18</sup> Mr. Spain also shared that several states that regulate pole attachments have departed from the FCC Cable Rate in many of the same ways urged by Gulf Power, including use of a replacement cost methodology. Spain Re-Direct, 4/26/06 Tr., pp. 1264-68.

<sup>19</sup> 311 F. 3d at 1368 (citing *United States v. Miller*, 317 U.S. 369, 373 (1943)).

91. Gulf Power's proposed replacement cost methodology follows the same basic formula as the Cable Rate:

$$\textit{Investment} \times \textit{Carrying Charge} \times \textit{Space Allocation Factor}$$

The main differences are in the investment and space allocation factors. GP Ex. E (Davis Direct), p. 6; GP Ex. A (Dunn Direct), pp. 26-32; GP Exs. 1-3 (Dunn Affs.). Specifically, Gulf Power's replacement cost methodology uses the previous year's actual cost data (as a proxy for "current" costs) and allocates the unusable space on the pole equally among the average number of attachers per pole. *Id.*

92. Complainants' main general objections to Gulf Power's replacement cost methodology are that (1) it produces an annual rate that is many times higher than the Cable Rate, (2) the same methodology has been rejected previously by the Commission, (3) it constitutes monopoly rents, (4) it relies on system averages, rather than a pole-by-pole computation, and (5) it unlawfully seeks to extract "value to the attacher." The fact that the replacement cost methodology yields a rate many times higher than the Cable Rate is inconsequential. This could just as easily demonstrate that the "favorable" Cable Rate is unfairly or artificially deflated. The fact that the Commission has previously rejected a replacement cost methodology is inconsequential. To the extent the Commission commented on similar methodologies in the past, it certainly was not in the context of *Alabama Power v. FCC* or the evidence presented in this case. This is the first time the Commission has endeavored to interpret or apply *Alabama Power v. FCC*. Most importantly though, *Alabama Power v. FCC* (the controlling precedent) did not reject this methodology. To the contrary, the court stated, "[a]t first blush, the power companies appear to have a solid argument" and "we might ordinarily be sympathetic to this argument." 311 F. 3d at 1367-68. What "complicated" Alabama Power's

case in *Alabama Power v. FCC* was “one known fact, one unknown fact, and one legal principle” – not an underlying inapplicability of any particular methodology. 311 F. 3d at 1368.

93. Complainants’ concern about monopoly rents is likewise unfounded, and unsupported by the evidence, since neither the Commission nor a reviewing court will allow monopoly rents. Gulf Power does not have unfettered discretion to charge whatever rent it pleases, even on those poles for which fair market value is owed. The evidence also shows that Gulf Power’s replacement cost methodology is conservative, rebutting Complainants’ argument of monopoly rent. *See GP Ex. F (Spain Direct)*, pp. 15-18. The use of system averages in determining the value of pole space taken by Complainants does not undermine Gulf Power’s replacement cost methodology. To the contrary, it makes the methodology more appealing in that it is consistent with the Commission’s existing practices of using system averages and presumptions and (most importantly) that it will not mire the Commission in countless pole-by-pole mini-trials.

94. Complainants’ “value to the attacher” objection is a bit more nuanced and a subtle effort at obfuscation. Complainants are correct in arguing that the proper measure of just compensation is loss to the owner, rather than gain to the taker. 311 F. 3d at 1369. There very well may be circumstances where those two concepts are not congruous. But *Alabama Power v. FCC* seems to contemplate that in the rivalrous pole scenario (such as in the case with land), the two concepts would indeed be congruous. 311 F. 3d at 1370 (“In the ‘full capacity’ situation, it is the zero-sum nature of pole space, like land, that is key.”). If Gulf Power were really trying to extract “value to the attacher,” its proposed methodology would not be based on any type of cost allocation. Instead, it would seek to charge Complainants \$1 less than their next cheapest alternative. This is not what Gulf Power’s replacement cost methodology is designed to capture;

*it is designed to capture the value of the space taken by Complainants. Here, where the replacement cost methodology is an accepted (if not preferred) means of valuing a unique, in-use asset, the “value to attacher” mantra is unfounded.*

95. Finally, in many ways, Gulf Power’s replacement cost methodology is conservative. As Mr. Spain testified, Gulf Power’s calculation does not capture the value of the most desirable poles to which attachers take access (cherry-picking) and fails to account for other items a standard valuation would quantify. GP Ex. F (Spain Direct), pp. 15-18.

**E. Gulf Power’s Departure From the Cable Rate is Supported By the Evidence.**

96. Complainants contend that the Cable Rate is more than just compensation in the absence of proof of an actual buyers or quantifiable higher-valued use, as discussed above. Ms. Kravtin generally endorsed the Cable Rate as reflecting economically appropriate cost allocation principles. Compls. Ex. A (Kravtin Direct), p. 15-19.

97. Gulf Power argues that the Cable Rate suffers from numerous specific deficiencies which render it unfit as a measure of just compensation under the Constitution. GP Ex. F (Spain Direct), pp. 11-13, 15. Among the specific deficiencies Gulf Power cited are: the Cable Rate’s use of embedded or historical costs; the Cable Rate’s exclusion of certain costs from the investment side of the equation (most notably the absence of an allocation for general plant and the absence of any cost for investment in grounds and arrestors); and the fact that the Cable Rate (unlike the Telecom Rate) allocates the cost of the entire pole based solely on the percentage of usable space occupied. *Id.* Moreover, Gulf Power contends that certain of the presumptions embedded in the Cable Rate are at odds with the actual data. GP Ex. A (Dunn Direct), pp. 26-34; GP Exs. 1-3 (Dunn Affs.); GP Ex. B (Bowen Direct), pp. 38-42.

98. *Gulf Power has proven that the Cable Rate is an unreliable and insufficient* measure of compensation for rivalrous poles for at least two reasons. First, the Cable Rate relies upon historical or embedded costs. As *Alabama Power v. FCC* notes, “[t]he appropriate alternative, whatever that may be, rarely countenances the use of historical costs, as several Supreme Court cases make clear.” 311 F. 3d at 1368. In other takings cases, historical costs have been called “the false standard of the past.” *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 (1949). Gulf Power’s valuation expert, Mr. Spain, testified that the “use of historical costs is inconsistent with the accepted application of the cost methodology for estimating fair market value.” GP Ex. F (Spain Direct), p. 11. There is simply no evidence in the record which would support the use of historical costs in determining the proper measure of compensation for Gulf Power’s pole space.

99. Second, the Cable Rate allocates the cost of the entire pole based solely on the percentage of usable space occupied. The Telecom Rate, which applies to physically identical attachments, allocates the unusable space in a more equitable manner. Congress, in creating the Telecom Rate (which was new to the 1996 Act) observed that “the unusable space on a pole is of equal benefit to all attaching parties to the pole.” H.R. Rep. No. 104-204 1995 U.S.C.C.A.N. at 58-59; H.R. Con. Rep. No. 104-458, 206, 1996 U.S.C.C.A.N., at 20.

100. The fact that the Cable Rate does not “fully allocate” the costs associated with the space occupied by cable companies is evidenced by Mr. Kravtin’s strained effort to reconcile the differences between the Cable Rate and the Telecom Rate. Ms. Kravtin testified on direct and cross examination that *both* the Cable and the Telecom Rates “reflects economically appropriate cost allocation principles.” Compls. Ex. B (Kravtin Direct), p. 15; Kravtin Cross, 4/26/06 Tr., p. 1399. Mr. Spain also noted that unregulated pole owners have noted “inherent flaws in the

FCC's" formula and have modified their cost based methodologies in the same manner as urged by Gulf Power's replacement cost methodology. GP Ex. F (Spain Direct), pp. 22-23; Spain Re-Direct, 4/26/06 Tr., pp. 1264-68.

101. It is undisputed that the Telecom Rate is a more complete cost allocation formula. It is undisputed that a cable television will occupy the same space on Gulf Power poles as a telecommunications wire. As such, both cost formulas cannot "reflect economically appropriate cost allocation." Considering the totality of the record evidence in this case, the Cable Rate is not the answer to the second part of the issue set forth in the HDO.

### CONCLUSION

102. The Hearing Designation Order defined the issue set for hearing as:

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

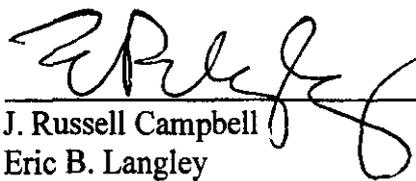
The Hearing Designation Order placed the burden of proof upon Gulf Power. Gulf Power has met its burden of proof on all issues.

103. The totality of the evidence received in this proceeding, applied in the context of *Alabama Power v. FCC*, establishes that Gulf Power is entitled to compensation above marginal costs on "rivalrous" poles – those poles which would require make-ready to host an additional attachment. The precise manner in which the parties determine the number of rivalrous poles to which Complainants are attached can be negotiated by the parties, but the Court strongly encourages the use of statistical samplings or system averages in order to avoid the cost of system-wide surveys by both parties.

104. The amount of compensation due for rivalrous poles should be guided by fair market value or a reasonable proxy thereof. Valuation is not an exact science. The Court does

not presume, in these findings of fact and conclusions of law, to set a specific rate. Complainants must pay for crowded or full capacity poles. Such details are best left to negotiations between the parties – negotiations which appear to have worked for both sides when freed of the constraints (or benefits, depending on perspective) of the regulated rate. The Court does find that, based on the record in this case, the Cable Rate is an unacceptable benchmark. The Court further finds, based on the evidence in this case, that Gulf Power's replacement cost methodology provides the best guidance to the parties for determining the value of the property at issue. The Court further finds that the parties should consider in their price negotiations the so-called "unregulated" transactions in evidence in this case (specifically, Complainants' own agreements with CHELCO and Florida Public Utilities, Gulf Power's agreements with the ILECs, and Gulf Power's agreements with the three telecommunications carriers who, for whatever reasons, do not insist on the regulated rate).

105. If the parties are unable to reach agreement through the negotiations ordered herein, then they may avail themselves of the Commission's complaint procedure to resolve the issues of (1) what number of poles are "rivalrous" as defined in this decision, and (2) the proper quantification of fair market value (with the parameters defined in this decision) for the space taken on those poles. It is the Court's hope, though, that this decision provides enough guidance that further proceedings on these issues will not be necessary. That said, you can take a horse to water, but you can't make him drink.



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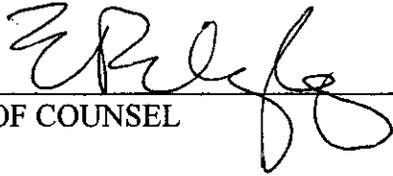
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**Counsel for Respondent**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Proposed Findings and Conclusions of Law has been served upon the following by United States mail and E-mail on this the 30<sup>th</sup> day of June, 2006:

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