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

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

Appearances

*John D. Seiver, Esquire and Geoffrey C. Cook, Esquire***,** on behalf of Florida Cable Telecommunications Association, Inc., et al.; *Eric B. Langley, Esquire, J. Russ Campbell, Esquire, Ralph Peterson, Esquire and Allen M. Estes, Esquire* on behalf of Gulf Power Company; *Lisa Griffin, Esquire, Rhonda Lien, Esquire and James W. Shook*, *Esquire,* on behalf of the Enforcement Bureau

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: January 30, 2007 **Released:** January 31, 2007

Preliminary Statement

1. By delegation, the Chief, Enforcement Bureau initiated this formal hearing[1] to determine whether the respondent Gulf Power Company ("Gulf Power") is entitled to receive compensation above marginal costs for attachments to its utility poles of cable companies Comcast Cablevision of Panama City, Inc., Medicom Southeast, L.L.C., and Cox

[1] *See* 47 C.F.R §0.111(a)(12) (Enforcement Bureau may resolve complaints regarding pole attachments); and §0.111(a)(14) (Enforcement Bureau may issue --- designation orders).

Communications Gulf Coast, L.L.C., the cable companies represented by Florida Cable Telecommunications Association, Inc., (Complainants"). *Hearing Designation* Or*der*, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004, 19 FCC Rcd 18718 (2004) *("HDO").* Gulf Power was assigned the burden of proof on the designated issue:

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

HDO at Para. 11.

Background

2. Complainants filed a complaint against Gulf Power on July 10, 2000, alleging that Gulf Power violated Section 224 of the Communications Act ("Act") [47 U.S.C. § 224] and the Commission's pole attachments rules (47 C.F.R. §§ 1.1401-1.1418) by terminating existing agreements with the Complainants, forcing them to execute new pole attachment agreements with higher pole attachment rates, and refusing to renegotiate new rates in good faith in accordance with the FCC Cable Formula. (47 C.F.R. §1.1409(e)(i).) [2] Gulf Power unilaterally decided that an attachment rate based on the Cable Formula does not provide just compensation, and that an alternative methodology should be employed to arrive at an appropriate *albeit* much high rate.[3]

3. On May 13, 2003, the Enforcement Bureau ("Bureau") granted the complaint. *Florida Cable Telecommunications Association, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C. v. Gulf Power Company, Memorandum Opinion and Order,* 18 FCC Rcd 9599 (Enf. Bur. 2003) ("*Gulf Power Order"*). The Bureau determined that the Cable Formula provided just compensation, relying on Commission holdings that Cable Formula rent plus payment of make-ready expenses exceed just compensation. [4] *Gulf Power Order* at 9602-03. The *Gulf Power Order* also relied on the case of *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied,* 540 U.S. 937 (2003)*("Alabama Power").* *Alabama Power* holds that a utility pole owner is

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[2] The Cable Formula is the Commission's methodology to calculate maximum pole attachment rates. 47 C.F.R. §11409(e)(i). *See Amendment of Rules and Policies Governing Pole Attachments*, *Report and Order,* 15 FCC Rcd 6453, 6457, ¶ 5 (2000), *review denied sub nom., Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, 12110, ¶ 10 (2001).

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

[4] *Gulf Power Order*, 18 FCC Rcd at 9609, ¶ 15 (citing *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.,*16 FCC Rcd 12209, 12223-36, ¶¶ 32-61 (2001) ("*Alabama Power Order*")). Alabama Power believed that the Cable Formula did not provide just compensation but the Bureau disagreed. FCC Rcd 17346 (Cable Serv. Bur. 2000). The Commission upheld the Bureau. *Alabama Power Order*, 16 FCC Rcd at 12212, 12241 (Cable Formula not arbitrary or capricious). On appeal, the Eleventh Circuit upheld the Commission's conclusion that "marginal cost was tantamount to just compensation." *Alabama Power Co. v. FCC*, 311 F. 3d 1357 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003).

constitutionally entitled only to marginal costs under the Cable Formula, unless it is shown by a preponderance of the evidence for 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.*

Gulf Power Order at 9607, citing *Alabama Power*, 311 F.2d at 1370-71. (Emphasis added.)

4. Complainants challenged Gulf Power's charging an annual per pole rate of $38.06, an amount exceeding the Cable Formula rate by over 500%, and an amount which the Bureau found to be "unjust and unreasonable."[5] *Gulf Power Order* at 9600, 9608. The *Gulf Power Order* also held that Gulf Power "had submitted no evidence . . . that would satisfy the test set by the Eleventh Circuit." *Id.* at 9607. *See* Para. 3 above. However, because its complaint was filed prior to the Eleventh Circuit's decision, Gulf Power requested and was granted an opportunity to present evidence under the *Alabama Power* regimen. Accordingly, the Bureau has ordered a hearing before an Administrative Law Judge to determine "[w]hether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators." *HDO* at Para. 11.

5. After five days of hearings, Proposed Findings of Fact and Conclusions of Law and Reply Proposed Findings of Fact and Conclusions of Law were filed by Complainants and by Gulf Power.[6]

Arguments

Gulf Power

6. Gulf Power contends that it only need show that poles to which Complainants' cables are attached are crowded, and that there is no need to prove that its poles are at full capacity, which is the standard of proof required by the *Alabama Power* court. *Alabama Power*, 311 F.3d at 1370-71 (proof required that "pole is at full capacity"). Gulf Power would lower the standard of proof to showing merely crowded poles requiring make ready to accommodate another attachment. Gulf Power argues that crowded poles can be rivalrous when a rearrangement of existing equipment and attachments is required in order to accommodate another attacher. It is recognized that a rivalrous condition may occur when possession by one

[5] In 1999 – 2000, Complainants were paying annual rates under the Cable Formula of $6.20 per pole, when Gulf Power announced the rate would increase to $38.06. *Gulf Power Order* at 9600. *Cf. Alabama Power,* 311. F 3d at 1366 (including labor costs and pro rata share of unusable portion of pole, the rate sought was $38.81 compared with $7.47 paid under the Cable Formula).

[6] Each Gulf Power exhibit cited will be referred to as (GP Exh. ____). Each cited exhibit of Complainants will be referred to as (Compls. Exh. ____). Hearing transcripts will be cited by witness name and transcript page (Dunn, Tr. _____).

corresponds to the loss of another.

Complainants

7. Complainants contend that a showing of full capacity requires proof that Gulf Power could not accommodate another attacher on specific poles. Complainants argue that Gulf Power offered no evidence of a particular pole for which it had to turn away some entity because Gulf Power could not accommodate another attachment due to a pole's full capacity. Therefore, Gulf Power has not proven a lost opportunity as to any entity which is waiting in the wings for space on a pole, and has not shown proof that an opportunity for higher valued use was lost to space occupied by a cable attachment. Michael Dunn, a former key employee of Gulf Power, testified at hearing that Gulf Power needed to show full capacity and a buyer waiting in the wings. (Dunn, Tr. 748-49.) Gulf Power's economic expert testified to the two-pronged test: proof of poles at full capacity and a showing of either a buyer in the wings or a higher valued use by Gulf Power. (Spain, Tr. 1155-56.) Another key employee, Ben Bowen, admitted as to fifty selected poles, that he did not determine whether there was another party waiting in the wings seeking to attach to any particular pole. (Bowen, Tr. 1028.) Therefore, for failure of proof, Gulf Power is not entitled to pole rent that exceeds the Cable Formula. (Compls. Exh. A *passim*.)

Fact Findings

Pole Attachments

8. Gulf Power owns approximately 225,000 wooden distribution poles, and 150,000 of these are joint use poles. (GP Exh. B at 6.) A joint use pole is one to which one or more entities other than Gulf Power are attached. (*Id* at 1.) For the usual main line attachment, the wire is secured to the pole with a three-bolt clamp. *Id*. An attachment which is a service drop is a line leading into a customer's house or place of business. *Id.* If a main line attachment is on a pole, that attachment occupies at least one foot of space. *Id*. If a cable company has a service drop as well, the actual usable space occupied could be significantly more than one foot. *Id.* Complainants also attach other fixtures and appliances to Gulf Power's poles, and sometimes bond to Gulf Power's grounding. *Id.* Complainants attach coaxial, fiber, and service drops to approximately 100,000 of Gulf Power's poles. (GP Exh. B at 13.)

Contracting

9. Complainants entered into standard written agreements with Gulf Power. (GP Exh. A at 8; GP Exh. B at 9-10.) These agreements expired in 2000 and Gulf Power announced its intention to cease voluntary attachment relationships. (GP Exh. A at 8; GP Exh. B at. 9.) Since that time, attachments have remained on Gulf Power's poles pursuant to the1996 Telecommunication Act's mandatory access, but the parties have not agreed on new rental terms governing the attachments. (GP Exh. B at 9-10.) Pending final determination, Complainants' attachments remain in place at rates set under former agreements. *Gulf Power Order* at 9609.

10. The contracting process is controlled by Gulf Power, and attaching parties are referred to as licensees. To illustrate the process, Mr. Dunn negotiated an agreement with a

cable company that was executed on January 1, 1997. (GP Exh. A at 8; GP Exh. 7.) Gulf Power rearranged other attachers in order to accommodate the cable licensee. (GP Exh. 7 at 10.) The contract term ran to December 31, 2001. Before attaching a cable, the licensee needed to submit a permit with construction drawings for Gulf Power's approval and the licensee had to pay all make ready costs. The licensee paid an annual per pole rent of $6.20 from 1997 through 2000, and the rental rate was to be recalculated for 2001 under the Cable Formula.

11. The agreement also provided that when two or more entities desire to attach to the same pole location, the first entity applying gets preference if space is available. If a licensee wishes a higher position on the pole, it pays the make-ready costs associated with any reattachment. (GP Exh. 7 at 9.) If a pole is too short or otherwise inadequate and a rearrangement would involve moving other attachers, then the licensee would be required to pay all expenses, including reimbursing the owners of changed facilities on the pole. (GP Exh. 7 at 10.) Installation would be at licensee's expense, and when required by Gulf Power, the licensee must remove, relocate, replace or renew its facilities, transfer to a substituted pole, or perform other work required by Gulf Power. If Gulf Power performs any of the work, the licensee pays for the cost of work plus 15%. (GP Exh. 7 at 13.) These expenses paid by attachers are over and above the Cable Formula, showing that Gulf Power is not operating at a financial loss in complying with the Cable Formula.

Structural Character of Poles

12. Poles have both usable space and unusable space. (GP Exh. B at 13-14, 41; GP Exh. 70 at 121-23.) Unusable space includes: (1) the portion of the pole which is underground; and (2) the portion of the pole above ground required to support minimum mid-span clearances. (GP Exh. B at 13-14, 41.) A forty-inch workers safety zone also is required between the lowest electrical wire and the highest communications wire. (GP Exh. 38.) (Compls. Exh.12, *National Electrical Safety Code* (NESC) §238E.) But this safety space does not prevent additional attachments or alternative uses.

13. The typical pole is approximately forty feet tall, having one set of power lines, one cable attachment, and one telephone attachment. (Dunn, Tr. 739, 814-15.) In order to simultaneously accommodate power, cable and telephone attachers consistent with Gulf Power's needs, utility lines must be reduced from 8.5 feet to 7.5 feet on a standard 40 foot pole. (GP Exh. A at 25-26.) Eighteen feet of clearance above ground is needed, and forty inches of separation is required between the highest communication wire and the lowest electric wire. (Bowen, Tr. 1050; GP Exh. 40; GP Exh. B at 29.) An attachment is placed higher than eighteen feet in order to achieve clearance at mid-span. (GP Exh. 40; GP Exh. B at 21.) After the buried portion and required clearances, there is generally 28.5 feet of space that is unusable. (Dunn, Tr.832-33; GP Exh. A at 25-26; GP Exhs. 35-37.) This results in 11.5 feet of usable space for attachers. (GP Exh. A at 25-26; GP Exh. B at 25.) (*See* GP Exh. 35, forty foot pole diagram.) Mr. Dunn considers poles having power, cable and telephone attachments to be typical of the poles in issue. (GP Exh. A at 25-26.)

14. There is no evidence that rearrangements of equipment and attachments on these typical poles cause full capacity or such a degree of crowding that an added cable could not be

arranged, or that there were lost opportunities. Rather, the record establishes that routine changes are made when there are physical obstructions, or to observe safety standards which are conditions requiring correction having nothing to do with capacity. (Dunn, Tr. 754-56.) Those changes are in the public interest, and such modifications do not detract from the mandate under the Telecommunications Act to make space available for cable attachers on utility poles.

Make Ready

15. Make-ready in connection with joint use poles is any rearrangement of equipment and attachments "in order to make room on either an existing pole or a new, different pole for a new attacher." (GP Exh. A at 15.) Gulf Power prepares a work order to determine cost of any make ready. Once cost is determined the work can be completed. (GP Exh. A at 16.) Spacing on the pole must be in conformity with NESC requirements. (GP Exh. A at 17.) (GP Exh. 38 at 2; NESC § 238E.) But compliance with safety has never rendered a pole at full capacity, and Mr. Dunn knew of no instance of denying access to a pole simply "because another cable operator was there." (Compls. Exh. 86 at 129.)

Osmose Survey

16. Gulf Power presented evidence of a survey of poles known as the "Osmose Study." (GP Exh. 40 at 4, Osmose Statement of Work, was to audit Gulf Power's joint use poles to determine number of "crowded" or "full capacity" poles in the context of this proceeding.) Allegedly to insure objectivity, Osmose was not given information about "what constitutes a pole at full capacity." (GP Reply Finding at 7.) (GP Exh. 43.) In Gulf Power's First Report on Pole Survey dated October 31, 2005, Osmose reported surveying 9,663 poles, of which 7,120 were characterized as "crowded" for a percentage of 73.68 %.

17. Mr. Bowen testified that Gulf Power's definition of crowded that was provided to Osmose meant "an NESC violation, Gulf Power violation, or any other applicable code or one that would not accept another attacher." ---- " [T]hat's the way the Osmose Statement of Work was set out ---- ." (Bowen, Tr. 1015.) Osmose considered a crowded pole as one having vertical clearance violations under the NESC safety code, or clearance over roads that would cause violations if corrected, or a pole that cannot accept an additional attachment due to inadequate clearance space between transformers. (GP Exh. 40 at 4.) Thus, Osmose was not taking into consideration make-ready adjustments or reconfigurations in order to accommodate another attachment. In responding to Osmose's conclusions of crowded, Complainant's engineering expert opined without contradiction, that a utility pole is never at full capacity if make-ready work can accommodate an additional attachment. (Compls. Exh. 1; Harrelson, Tr. 1568.)

Analysis

18. The *Alabama Power* decision held.

> [I]f the government commits a taking, it is under an obligation to put the aggrieved party in the position it was in before the taking occurred (and no better). In unique cases such as this one, marginal cost meets this test – unless, if course, the aggrieved party proves *lost opportunity by showing (1) full capacity and (2) an higher valued use* --- . (Emphasis added.)

311 F.3d at 1371. Thus, to be entitled to charge rent in excess of marginal cost, Gulf Power must prove: (1) a pole's condition of full capacity, and (2) actual loss of a higher valued use as a result of full capacity.

19. Gulf Power hopes to finesse the full capacity requirement by reference to the court's observation that "if crowded, the pole space becomes rivalrous," because in a genuine full capacity situation, "the zero-sum nature of pole space, like land, is the key."[7] 311 F.3d 1369-70. But the court also pointed out that a showing of lost opportunity remains critical, and crowding is not tantamount to lost opportunity. 311 F.3d 1370. So merely pointing to the need for rearrangement of existing attachments and/or compliance with safety codes in order to accommodate new attachments do not meet Gulf Power's burden.[8] Such changes and rearrangements on poles are normal to accommodate new attachments. (Compls. Exh. A at 32; Kravtin, Tr.1516.) And Gulf Power is never out of pocket because when a cable operator needs make-ready work to accommodate an attachment, the attacher pays the costs. (Dunn, Tr. 807-809.) The *Alabama Power* court neither found nor concluded that crowded was equivalent to full capacity. Rather, the court held to the contrary, that where no lost opportunity is shown and marginal costs incident to attaching are paid, "pole space is, for practical purposes, nonrivalrous." 311 F.3d 1369.

20. Gulf Power does not deny that it can accommodate change-outs, but argues that with a change-out the pole space is *ipso facto* crowded and rivalrous. In another rent regulation case, Amtrak was required to pay only incremental costs while forcing its trains on another carrier's line. *Metropolitan Trans. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986). The *Alabama Power* court examines that case and compares the rare occurrence of a crowded train track with crowding on a utility pole:

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[7] An economist explains that "zero sum" may occur in situations where when one entity gains, another entity loses the quantity gained. (Compls. Exh. A at 25.)

[8] The height of poles identified by Gulf Power was barely over forty feet. (GP Exh. 42 (summary of Osmose data) and GP Exh. 43 (Gulf Power's fifty poles). The height of the poles selected by Complainants was over forty three feet, obviously selected because the three additional feet make it more difficult to show poles that cannot be changed-out because of full capacity. (Compls. Exh. 6.) These height differences are irrelevant since Gulf Power failed to show that a cable company was unable to attach whether the pole is forty feet or forty three feet tall, or that Gulf Power was foreclosed from an opportunity.

> The possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded, the pole space becomes rivalrous. Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.[9]

Alabama Power at 1370. But Gulf Power's argument suffers from a failure of proof that potential users will pay higher rent, or proof of higher valued uses of the space by Gulf Power which were foreclosed by Complainants' cable attachments. Also, Gulf Power always has the ability to adjust poles at the expense of new attachers thus showing that Gulf Power's poles lack full capacity and are nonrivalrous. Most importantly, under the Cable Formula, Gulf Power has not lost any opportunity and therefore, as characterized by the *Alabama Power* court, Gulf Power's utility poles are "for practical purposes nonrivalrous." 311 F.3d at 1369.

21. Gulf Power finally argues that its poles are not essential because there are other options, including underground construction, and that because other options exist, "monopoly rates", "duress" or "essential facilities" are unsubstantiated. This argument amounts to a long-discredited attack on the basis for the Pole Attachment Act which the Commission is not at liberty to ignore, and has nothing to do with the *HDO*. The sole issue as framed by the *HDO* is whether rents are recoverable by Gulf Power that exceed the Cable Formula based on proof of identifiable lost opportunities caused by proven full capacity. Gulf Power has failed to meet this standard of proof and has not met its burden of proof.[10]

Conclusions of Law

[9] *See* 47 U.S.C. § 224(f)(2). [A] utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles --- on a non-discriminatory basis when there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes. It is noted that such conditions can usually be fixed and occur so infrequently as to become *de minimis* to a network. It is always in Gulf Power's interest to locate and correct such problems as soon as possible.

[10] The evidence also fails to prove that Cable Formula rents are insufficient to put Gulf Power in as good a position as it was before any taking of its pole space If it were needed to be shown, replacement cost would be the amount which Gulf Power would charge over and above the Cable Formula rate. (Replacement cost rents range from $38.06 to $64.98 per pole, while rents under the Cable Formula range from $4.61 to $6.30.) (GP Exh. E at 6.) The Commission has already concluded that Cable Formula rates plus payment of make-ready expenses, provides compensation that exceeds just compensation. *Alabama Power Order,* 12 FCC Red 12208, 12223-36. Also, the Commission has twice rejected replacement cost methodology. *In the Matter of Commission's Rules and Policies Governing Pole Attachments, Partial Order on Reconsideration*, 16 FCC Red. 12, 103 at Paras. 15, 17 (2001) (rejected pole attachment rates based on replacement cost), affirming *Fee Order*, 15 FCC Red, 6453, at Para. 10 (2000) (replacement cost methodology rejected). Therefore, if it were necessary to assess damages, replacement cost methodology would not be used.

22. Neither evidence nor reason support Gulf Power's argument that performing any make-ready work on a pole means that it is at full capacity, and that Gulf Power can therefore charge higher unregulated rates. Gulf Power admitted that "a rearrangeable pole would not be at full capacity." (Dunn, Tr. 736-37.) It is only when a "government taking forecloses an opportunity to sell space to another bidding firm that a pole owner may charge rents above the Cable Formula." 311 F.3d at 1370. Through the industry's established remedy of make-ready that is paid for by the attacher, a taking by government mandated cable attachments does not foreclose the opportunity to sell space to another attacher.[11] 311 F.3d at 1370-71. Since Gulf Power failed to show any lost opportunity, it does not meet the criteria for charging rents above the Cable Formula. (Compls. Exh. A at 50.)

23. Gulf Power contends in proposed findings that determining whether or not a pole is at full capacity involves an analysis of inches, and where there is an analysis of inches, rivalry cannot realistically be disputed. (GPFCL at Para. 10) Determining such rivalry by such a deduction would be speculative, while the "too close to call" argument is exceedingly narrow and erroneous. Significantly, when an attacher pays the cost of getting on a pole, Gulf Power stands to earn more. Gulf Power has failed to identify any instance of inability to accommodate a new attacher. (Compl. Exh. A at 42.) Moreover, Gulf Power has offered no evidence of an instance when it was prevented from accommodating an attachment because of cable attachments. To the contrary, Mr. Dunn admitted: "unless there was some engineering or safety reason for not allowing attachment to that pole – if it is within our means to do so, we did so." (Compl. Exh. 86 at 58-59.) Similarly, Mr. Bowen testified that Gulf Power will change-out or rearrange a pole if necessary. (Bowen, Tr. 1078.) Gulf Power has not proven that its joint use poles are at full capacity.

24. Gulf Power relies on an inapposite court decision, *Southern Co. v. FCC,* 293 F.3d 1338, 1346-47 (11th Cir. 2002). *Southern Co.* narrowly holds 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. See also Section 224 (f)(2) of the Act*. The decision also holds that the term "insufficient capacity" was not defined by statute, was ambiguous, and that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient*." Id.* at 1348. A finding of whether a pole's "insufficient capacity caused a missed opportunity must consider Gulf Power's "historical willingness to accommodate attachers by performing make-ready*." See interlocutory Order* FCC 05M-50, released October 12, 2005 at 2 (Gulf Power admits to its "historical willingness to accommodate attachers by performing make ready"). Mr. Dunn admitted that he had no knowledge of any instance in which Gulf Power denied any party access to a pole "because another cable operator was there." (Compls. Exh. 86 at 129.) In any event, since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the *Southern Co.* decision is not relevant to any *HDO* issue, and has no decisional

[11] Complainants' expert concluded that through normal and customary make-ready rearrangements, including correcting code violations and pole change-outs, "Gulf Power has historically been able to accommodate an additional attacher." She also concluded that no exclusion on a pole can be said to exist "if the additional attacher is or can be accommodated on the pole." (Compls. Exh. A at 32.) Gulf Power's evidence did not contradict or rebut her opinion. (GP Exh. F *passim*.)

application in this case.

Ultimate Conclusions

25. When capacity is available through rearrangement or expansion of a pole's height, its capacity cannot be full since there is no exclusion of another and no missed, foreclosed, or lost opportunity. Gulf Power erroneously argues that a need to use make-ready to accommodate an attachment constitutes proof of full capacity. To the contrary, make-ready is the means of providing space for attachments on poles already having the capacity to expand, which is the case for practically all of Gulf Power's poles.[12]

26. Had Gulf Power made the requisite showing under the two-part test with respect to a specific pole, it would be entitled to compensation above marginal costs for that pole, whether or not other poles in its network were or were not at full capacity. But Gulf Power has failed to show that any pole is at full capacity and that (1) the Cable Formula has cost it an opportunity to rent space to someone else at a higher rate or that (2) it is prevented from putting the space to a higher valued use within its own operations. Instead, it rails against the fairness of the *Alabama Power* test, overlooking or ignoring that the Enforcement Bureau designated this hearing for the sole purpose of affording Gulf Power an opportunity to present evidence to an Administrative Law Judge under that test. *HDO* at Para. 4-5.

27. The burden of proof is on Gulf Power to prove by a preponderance of the evidence that but for the FCC's mandatory pole attachment regulation, it would be able to rent Complainant's space to someone else at a higher unregulated rate, or use the space for its own higher valued purposes. On the other hand, if space is available for all those who request space, then the cable operator occupies space that would otherwise be vacant. In that case, the regulated rate provides a fair return on investment, and Gulf Power is not entitled to more than marginal or incremental costs as provided by the Cable Formula. The result is that the FCC's regulated rate, which provides for recapturing allocated costs, is found to be entirely just and equitable.

28. Finally, since Gulf Power failed to prove that any pole's utilized capacity makes impossible the attachment of any potential user waiting in the wings, or that Complainant's cable attachments deny Gulf Power an alternative opportunity of higher value, the inquiry under the *HDO* is at an end. Therefore, it is no longer necessary to decide whether the Complainant cable companies are entitled to substitute a longer pole at their own expense since Gulf Power has failed to show that any existing pole to which any Complainant's cable is attached is at full capacity. Nor for that same reason is it necessary to reach the question of what rate other than the Cable Formula would be fair and equitable.

[12] Cf. *Interlocutory Order* FCC 05M-50, *supra*.

Order

IT IS ORDERED that having found that none of Gulf Power Company's poles are proven to be at full capacity, the FCC Cable Formula providing for Gulf Power recovering marginal or incremental (fully allocated) costs is triggered by default.

IT IS FURTHER ORDERED that Gulf Power Company is not entitled to receive any compensation above marginal or incremental (fully allocated) costs for any of Complainants' cable attachments to Gulf Power Company's poles.

FEDERAL COMMNICATIONS COMMISSION[13]

Richard L. Sippel
Chief Administrative Law Judge

[13] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b)/