

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

In the Matter of
Florida Cable Telecommunications
Association, Inc.; Comcast Cablevision of
Panama City, Inc.; Mediacom Southeast,
L.L.C.; and Cox Communications Gulf
Coast, L.L.C.,
Complainants,
v.
Gulf Power Company,
Respondent.
File No. PA 00-004

MEMORANDUM OPINION AND ORDER

Adopted: May 12, 2003

Released: May 13, 2003

By the Chief, Enforcement Bureau:1

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a complaint filed by Florida Cable Telecommunications Association, Inc. ("FCTA"); Comcast Cablevision of Panama City, Inc. ("Comcast"); Mediacom Southeast, L.L.C. ("Mediacom"); and Cox Communications Gulf Coast, L.L.C. ("Cox") against Gulf Power Company ("Gulf Power") pursuant to section 224 of the Communications Act of 1934, as amended ("Act").2 In short, FCTA, Comcast, Mediacom,

1 Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes, 17 FCC Rcd 4672 (2002).

2 47 U.S.C. § 224. See Complaint, File No. PA 00-004 (filed July 10, 2000) ("Complaint"). On March 13, 2001, the original complainants endeavored to add Time Warner Cable ("Time Warner") as a complainant. Supplement, File No. PA 00-004 (filed Mar. 13, 2001) ("Supplement"). Gulf Power objected to the amendment, claiming, inter alia, that Time Warner had suffered no cognizable injury as of the date the Complaint was filed, and that the amendment constitutes an attempt by Time Warner unlawfully to obtain a refund retroactive to January 1, 2001 (the effective date of the higher annual pole attachment rate Gulf Power charged Time Warner). Gulf Power Company's Motion to Strike the Complainants' Supplement or, in the Alternative, Motion to Dismiss, File No. PA 00-004 (filed Apr.

(continued...)

Cox, and Time Warner (collectively, the “Cable Operators”) challenge Gulf Power’s imposition of a rate increase under new pole attachment agreements that allegedly exceeds the rates the Cable Operators paid under prior pole attachment agreements by “more than 514 percent (and in one case as high as 550 percent).”³ As explained below, we find Gulf Power’s proposed rate of \$38.06 to be unjust and unreasonable. We further reject Gulf Power’s argument that the Commission should abandon its reliance on the rate formula contained in its rules,⁴ and order the parties to negotiate new contracts using that formula as a guide for determining a reasonable rate. Until that time, the Cable Operators may remain attached to Gulf Power’s poles at the rates contained in their former agreements.

II. BACKGROUND

2. The Cable Operators provide cable services throughout communities in Florida.⁵ The Cable Operators, or their predecessors-in-interest, and Gulf Power have had longstanding relationships governed by voluntary pole attachment contracts.⁶ For the year beginning July

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11, 2001) (“Motion to Strike”) at 3-7. We deny the Motion to Strike. The Commission has recognized that a state association, on behalf of its members, can facilitate negotiations with a utility and, when the negotiations reach an impasse, coordinate the filing of a complaint. *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4397-98, ¶¶ 78-80 (1987) (“*Hardware Order*”), *aff’d*, Memorandum Opinion and Order, 4 FCC Rcd 468 (1989). Indeed, the Commission’s rules expressly provide that a state association may bring a complaint on behalf of its cable operator members. 47 C.F.R. § 1.1404(a). When a state association is a lead complainant, the Commission allows similarly-situated aggrieved complainants to join in a complaint against a utility, because it promotes administrative efficiency. *Hardware Order*, 2 FCC Rcd at 4397-98, ¶¶ 78-80. It would be a waste of resources to require a similarly-situated cable operator to file a separate complaint simply because a utility delayed in providing notice to that cable operator of precisely the same rate change. Gulf Power does not argue that Time Warner is situated differently from the other cable operators, beyond the fact that Time Warner did not receive notice of Gulf Power’s rate change until October 26, 2000. (Gulf Power did “reserve[] the right to file additional pleadings,” if the Commission allows Time Warner to be added as a party. Motion to Strike at 6 n.6. Gulf Power has had numerous and adequate opportunities to supplement the record, however. Having failed to do so on this issue, the record is now closed.) As indicated below, the refund we order to be paid to Time Warner accrues from the date on which Time Warner was added to the proceeding – *i.e.*, March 13, 2001.

³ Complaint at 2, at 5, ¶ 15. Pursuant to 47 C.F.R. § 1.1403(d), and simultaneously with the filing of the Complaint, the Cable Operators filed a Petition for Temporary Stay of Gulf Power’s announced termination of access to its poles unless the Cable Operators paid the higher rate. Petition for Temporary Stay, File No. PA 00-004 (filed July 10, 2000) (“Petition for Temporary Stay”). The parties filed multiple submissions pertaining to the issues raised in the Petition for Temporary Stay. *See* Gulf Power Company’s Answer to Petition for Temporary Stay, File No. PA 00-004 (filed July 21, 2000) (“Answer to Petition for Temporary Stay”); Motion of Gulf Power Company to Dismiss Complaint and Complainants’ Petition for Temporary Stay for Lack of Jurisdiction, File No. PA 00-004 (filed July 21, 2000); Opposition to Motion to Dismiss, File No. PA 00-004 (filed July 31, 2000) (“Motion to Dismiss”); Motion to Strike; Letter dated August 16, 2000 to Magalie Roman Salas, Secretary, FCC, from Brian M. Josef, counsel for Cable Operators, File No. PA 00-004 (filed Aug. 16, 2000). Because this Order disposes of the substantive issues raised in the Petition for Temporary Stay, we dismiss it and the filings relating to it as moot.

⁴ *See* 47 C.F.R. § 1.1409(e)(1).

⁵ Complaint, Exhibit 2 (Schedule of Parties, Poles and Communities); Supplement, Exhibit 2 (Schedule of Parties).

⁶ Complaint at 4, ¶ 11.

1999 through June 2000, the Cable Operators paid annual pole attachment rates ranging from \$5.00 to \$6.20 per pole.⁷ In mid-2000, Gulf Power sent the Cable Operators notices that their annual pole attachment rates would increase to \$38.06.⁸

3. On July 10, 2000, the Cable Operators filed their Complaint with the Commission. The Cable Operators allege that Gulf Power violated section 224 of the Act by unilaterally terminating existing pole attachment agreements, forcing the Cable Operators to execute new pole attachment agreements, and refusing to negotiate in good faith concerning the terms and conditions of those new agreements.⁹ According to the Cable Operators, Gulf Power's actions "represent an unprecedented break in the established course of dealing" that the parties had maintained, pursuant to which attachers would remain on Gulf Power's poles during the course of negotiations toward new pole agreements.¹⁰ The Cable Operators maintain that, under the Commission's rules, Gulf Power is entitled to charge an attachment rate between \$4.16 and \$4.93 per pole.¹¹ Nevertheless, the Cable Operators assert that they are willing to accept the "moderately higher rates in the \$5.00 to \$6.20 range" provided for in their prior contracts with Gulf Power.¹² The Complaint, *inter alia*, asks the Commission (1) to declare that Gulf Power has acted unreasonably, and that the proposed \$38.06 rate is unlawful; (2) to establish an annual pole attachment rate for cable operators in Florida in an amount not greater than the former contract rate (not to exceed \$6.20 per pole); and (3) to order Gulf Power to cease and desist from terminating the prior pole attachment agreements, negotiate in good faith regarding new agreements, comply with the Commission's rules regarding any rate increase, and refund the Cable Operators any amounts they have paid in excess of proper rates, plus interest.¹³

4. On August 9, 2000, Gulf Power filed a Response, which, in addition to denying all of the Complaint's material allegations, argues that the Commission lacks jurisdiction over the Complaint.¹⁴ Moreover, the Response asserts that the Commission's "cable rate" does not result in just compensation, because it excludes compensation for the value derived from space on poles that cannot be used for attachments, fails to allow recovery of all costs associated with the "taking," and inappropriately is based on embedded costs.¹⁵ Finally, the Response argues

⁷ See Complaint, Exhibit 3 (Pole Attachment Agreements between Cox and Gulf Power), Exhibit 4 (Pole Attachment Agreements between Comcast and Gulf Power), Exhibit 5 (Pole Attachment Agreements between Mediacom and Gulf Power); Supplement, Exhibit 5 (Pole Attachment Agreement).

⁸ Complaint at 5, ¶ 15 & Exhibit 9 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Cox), Exhibit 10 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Comcast); Exhibit 11 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Mediacom); Supplement, Exhibit 9.

⁹ Complaint at 7, ¶¶ 22-23.

¹⁰ Complaint at 5, ¶ 4, at 7, ¶ 24.

¹¹ Complaint at 7 n.4.

¹² Complaint at 7 n.4.

¹³ Complaint at 8-9, ¶ 29.

¹⁴ Gulf Power Company's Response to Complaint, File No. PA 00-004 (filed Aug. 9, 2000) ("Response") at 9-13, ¶ 4.

¹⁵ Response at 38-48.

that the price Gulf Power proposes to charge for attachments is supported by standard appraisal and valuation principles.¹⁶ On the same day, Gulf Power filed a motion seeking confidential treatment of competitively-sensitive, proprietary data relating to its “operating options, costs and practices,” arguing that such data should be protected from disclosure to anyone other than members of the Commission’s staff.¹⁷ According to Gulf Power, most of the confidential information is contained in its FERC Form No. 1 for the year ending December 31, 1999, and neither the Federal Energy Regulatory Commission (“FERC”), nor the Florida Public Service Commission, has compelled disclosure of that information.¹⁸

5. The Cable Operators filed a Reply on August 29, 2000.¹⁹ In addition to taking issue with Gulf Power’s arguments that it properly terminated its contracts with the Cable Operators,²⁰ the Reply contends that the Commission’s regulations provide just compensation for attachers’ use of Gulf Power’s poles.²¹

III. ANALYSIS

A. The Commission Has Jurisdiction to Resolve the Complaint.

6. We begin by addressing two threshold jurisdictional issues. First, Gulf Power argues that the Complaint must be dismissed, because the Commission lacks jurisdiction to regulate rates for pole attachments that are used to provide Internet service, irrespective of whether the Internet service is provided on a stand-alone or co-mingled basis.²² This argument easily is answered by the United States Supreme Court’s decision in *National Cable Telecommunications Association v. Gulf Power Company*, which held that section 224 vests the

¹⁶ Response at 48-52.

¹⁷ Gulf Power Company’s Motion for Confidential Treatment of Commercial and Financial Information, File No. PA 00-004 (filed Aug. 9, 2000) (“Motion for Confidential Treatment”) at 2. *See also* Gulf Power Company’s Motion for Leave to File Motion for Confidential Treatment of Commercial and Financial Information, File No. PA 00-004 (filed Aug. 9, 200) (“Motion for Leave to File Motion for Confidential Treatment”) at 2.

¹⁸ Motion for Confidential Treatment at 2, 5. On September 14, 2000, FERC denied Gulf Power’s request for confidential treatment of “certain information in Gulf Power Company’s 1999 Form 1 filing,” because FERC “does not consider the Form 1 information confidential.” *See* Letter dated November 9, 2000 to Magalie Roman Salas, Secretary, FCC, from Brian M. Josef, counsel for Cable Operators, File No. PA 00-004 (filed Nov. 9, 2000) (attachment). Gulf Power’s FERC Form No. 1 reports now are available on the Internet. *See* <http://www.ferc.gov>. Moreover, this Order does not rely on any other of the purportedly confidential information, because that information relates to Gulf Power’s proposed alternative “reproduction cost methodology,” which we reject. *See* paragraph 16, *infra*. *See also* Motion for Leave to File Motion for Confidential Treatment at 3 (“In addition [to the FERC Form 1 information], some of the confidential information supporting the replacement cost methodologies being submitted by Gulf Power is from Gulf Power’s internal documents . . .”). For these reasons, we deny the Motion for Confidential Treatment as moot.

¹⁹ Reply, File No. PA 00-004 (filed Aug. 29, 2000) (“Reply”).

²⁰ Reply at 6-20.

²¹ Reply at 20-57.

²² Response at 9. *See also* Motion to Dismiss at 3-4; Motion to Strike at 3-7.

Commission with authority to regulate pole attachments of cable services providers that also provide access to the Internet.²³

7. Second, Gulf Power argues that the Commission lacks jurisdiction to resolve the Complaint, because the claims at issue are for breach of contract.²⁴ According to Gulf Power, the Complaint does not allege that the contractual provisions themselves are unjust and unreasonable.²⁵ Rather, the Complaint purportedly reflects the Cable Operators' unhappiness over the outcome of the provisions' application: in other words, the "consequences and impact of both their contractual obligations and their having to meet those duties seems unreasonable and unjust" to the Cable Operators.²⁶

8. In enacting section 224, Congress recognized that the Commission's involvement in "regulat[ing] the rates, terms, and conditions for pole attachments" would include review of a utility's pole attachment "*practices.*"²⁷ The terms and conditions of pole attachments consequently include not only the reasonableness of the contract provisions themselves, but also the reasonableness of pole owner practices in implementing contract provisions.²⁸ This case concerns Gulf Power's "unilateral rate increases, with the concomitant threat to dislodge [the Cable Operators'] attachments with the express purpose to make [the Cable Operators] assert [their] mandatory right to access" under section 224(f).²⁹ This type of practice by a utility in administering its contracts with attachers falls squarely within the ambit of section 224.

B. The Complaint Is Ripe for Resolution.

9. Gulf Power maintains that the Complaint is not ripe for resolution, because the Cable Operators have not demonstrated that the parties' negotiations reached an impasse prior to the filing of the Complaint.³⁰ Specifically, Gulf Power argues that it has offered to meet with the

²³ 534 U.S. 327, 333 (2002) ("*Gulf Power*").

²⁴ Response at 10; Motion to Dismiss at 4-6.

²⁵ Response at 12; Motion to Dismiss at 5.

²⁶ Response at 12; Motion to Dismiss at 5-6.

²⁷ See *Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric & Power Co.*, Order, 7 FCC Rcd 2610, 2610, ¶ 4 (Comm. Car. Bur. 1992) ("*Newport News*") (citing S. Rep. No. 580, 95th Cong., 1st Sess. at 14 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 109 [Commission involvement via section 224 was intended to "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."]).

²⁸ *Newport News*, 7 FCC Rcd at 2610, ¶ 4.

²⁹ *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12217, ¶ 19 (2001) ("*APCo Review*"), review denied sub nom. *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power*"), petition for certiorari filed. See, e.g., Response at 15 ("[A]ny of the Complainants herein that desires to keep or place its facilities on Gulf Power's poles will be required to mandate such access under Section 224 of the Act.").

³⁰ Response at 20-21, ¶ 18. See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12111, ¶ 10 (2001) ("*Pole Attachments Reconsideration Order*") (the pole attachment complaint rules apply "when parties are unable to arrive at a

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Cable Operators to “discuss the new pole attachment agreement[s]” and to “explain Gulf Power’s use of replacement cost in an attempt to establish a fair payment . . . that approaches just compensation.”³¹ According to Gulf Power, it is the Cable Operators who have refused to engage in any meaningful negotiations.³² Despite Gulf Power’s protestations, we believe the Complaint is ripe for resolution.

10. Parties are not required to engage in extended negotiations where they appear to be far apart in their analysis of the issues.³³ We believe such is the situation in this case. In the Spring of 2000, Gulf Power advised Cox, Comcast, and Mediacom that they were required to execute new pole attachment agreements providing for a dramatically higher attachment rate in order to remain on Gulf Power’s poles.³⁴ Time Warner received a letter dated October 26, 2000, stating that its pole attachment agreement must be amended to reflect the higher rate.³⁵ Gulf Power has demonstrated that it is unwilling to negotiate a rate less than the demanded rate of \$38.06. Specifically, in its Response, Gulf Power makes clear that it considers the \$38.06 rate to be “just compensation,” and that it will not continue “subsidized pole attachment fees”³⁶ The parties met at various times to discuss the rate increase, and also exchanged correspondence regarding the increase.³⁷ Communications ultimately broke down, prompting the Cable

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negotiated agreement”); *see also* 47 C.F.R. § 1.1404(k) (a pole attachment complaint must include “a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complain[an]t shall state the reason(s) why it believed such steps were fruitless.”).

³¹ Response at 20-21, ¶ 18. *See also* Second Affidavit of Michael R. Dunn, File No. PA 00-004 (filed Aug. 9, 2000) (“Second Dunn Affidavit”) at 2-3, ¶ 3; Third Affidavit of Michael R. Dunn, File No. PA 00-004 (filed Aug. 9, 2000) (“Third Dunn Affidavit”) at 3, ¶ 4.

³² Response at 21, ¶ 18. *See also* Second Dunn Affidavit at 3, ¶ 5; Third Dunn Affidavit at 3, ¶ 4.

³³ *See, e.g., Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia*, Memorandum Opinion and Order, 85 FCC 2d 243, 244 n.2 (1981) (Commission considered complainant’s representation that its differences with the utility over pole attachments rates were so great that negotiations would be futile to be “satisfactory” for purposes of the pole attachment rules”).

³⁴ Complaint at 5, ¶ 15 & Exhibit 9 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Cox), Exhibit 10 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Comcast); Exhibit 11 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Mediacom).

³⁵ Supplement, Exhibit 9. There is no indication that Time Warner attempted to negotiate with Gulf Power, although Gulf Power does not raise this as an issue. As discussed *supra* note 2, as a matter of administrative efficiency, we will allow Time Warner to participate in this proceeding, but the refund ordered in this case will accrue from the date on which Time Warner was added to the proceeding – *i.e.*, March 13, 2001.

³⁶ Response at 21, ¶ 18.

³⁷ *See* Complaint at 6, ¶¶ 17-18, Exhibit 7 (Declaration of L. Keith Gregory) at 3-5, ¶¶ 7-13, Exhibit 12 (June 2, 2000 Letter from J. Christopher Redding to Michael R. Dunn re: Pole Attachments), Exhibit 13 (June 28, 2000 Letter from Bruce Glickman to Michael R. Dunn re: Pole Attachment Agreement), Exhibit 14 (June 16, 2000 Letters from Michael R. Dunn to J. Christopher Redding and Thomas R. Nathan re: Pole Attachments), Exhibit 15 (July 7, 2000 Letter from J. Christopher Redding to Michael R. Dunn re: Cox Communications Pole Attachment Agreement); Reply at 11-12; Response at 17-22, ¶¶ 15-18.

Operators to file this Complaint.³⁸ Based on our review of the record, we believe that further negotiations between the parties are likely to be fruitless without the Commission's intervention.

C. Gulf Power Has Failed to Justify Its Imposition of a \$38.06 Annual Pole Attachment Rate.

11. Section 224 imposes upon all utilities, the duty to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”³⁹ This directive ensures that “no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.”⁴⁰

12. In a pole attachment complaint proceeding, the complainant bears the burden of establishing a *prima facie* case that the rate, term, or condition of attachment at issue is not just and reasonable, or that the denial of access violates section 224(f) of the Act.⁴¹ Toward that end, a complaint must include data and information in support of the claim.⁴² Nonetheless, the Commission will not dismiss a complaint if the requisite information is not available from public records or from the utility after reasonable request.⁴³

13. The Cable Operators have met their burden of establishing a *prima facie* case. Specifically, the Complaint, supported by numerous exhibits, alleges that Gulf Power notified the Cable Operators of its desire to have the parties execute new pole attachment agreements containing a \$38.06 pole attachment rate that is significantly higher than the rate the Cable Operators had been paying.⁴⁴ Moreover, the Complaint sets forth the outcome of the Cable Operators' “rate study,” which concluded that, using the Commission's *Cable Formula*,⁴⁵ an

³⁸ Response at 20-21, ¶ 18.

³⁹ 47 U.S.C. § 224(f)(1).

⁴⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16060, ¶ 1123 (1996) (subsequent history omitted).

⁴¹ 47 C.F.R. § 1.1409(b). *See also* 47 C.F.R. § 1.1409(d) (“The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case . . .”).

⁴² 47 C.F.R. § 1.1404(g).

⁴³ 47 C.F.R. § 1.1406(b).

⁴⁴ Complaint at 5, ¶ 15, Exhibit 9 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Cox), Exhibit 10 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Comcast), Exhibit 11 (Cover Letters and Draft Pole Attachment Agreements from Gulf Power to Mediacom); Supplement, Exhibit 9.

⁴⁵ The *Cable Formula* is the methodology the Commission developed to calculate the maximum allowable pole attachment rate a specific utility may charge a cable operator providing cable services. *See Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6457, ¶ 5 (2000) (“*Fee Order*”), review denied *sub nom. Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12107, ¶ 5. *See also Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC2d 1585 (1978) (“*First Report and Order*”); Second Report and Order, 72 FCC2d 59 (1979) (“*Second Report and Order*”); Third Report and Order, 77 FCC2d 187 (1980) (“*Third Report and Order*”).

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appropriate attachment rate ranges from \$4.16 to \$4.93 per pole per year.⁴⁶ Accordingly, we address the question of whether the rates proposed by the Cable Operators are below the statutory just and reasonable rate.⁴⁷

14. Gulf Power does not expressly allege that the rates currently paid under the parties' contracts, which range from \$5.00 to \$6.20,⁴⁸ or the maximum annual rate calculated under the *Cable Formula*, are less than the utility's incremental costs.⁴⁹ Rather, Gulf Power contends that the Commission should abandon the *Cable Formula*, because the formula purportedly does not provide just compensation.⁵⁰ As an alternative, Gulf Power supports application of a "reproduction cost methodology," which is based on a "gross pole investment price arising from the replacement cost of the pole at current prices."⁵¹ According to Gulf Power, the "reproduction cost methodology" includes "all proper FERC accounts," and fully allocates the cost of both usable and unusable space.⁵² The "reproduction cost methodology," Gulf Power contends, produces an annual rate of \$38.06.⁵³ Gulf Power further attempts to shore up the reasonableness of its \$38.06 rate by including an affidavit that discusses various methods of

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and Order"), *review denied sub nom. Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); *Hardware Order*, 2 FCC Rcd at 4387.

⁴⁶ Complaint at 6-7, ¶ 19 & n.4.

⁴⁷ As a threshold argument, the Cable Operators contend that the Commission need not decide whether, utilizing the principle of "just compensation," Gulf Power is entitled to a higher pole rate than that produced by the *Cable Formula*. Reply at 6. According to the Cable Operators, the Commission should find that the "unilateral and coercive character of Gulf Power's termination and rate increase" contravened the parties' twenty-year "custom and course of dealing," which permitted the Cable Operators to keep their attachments on Gulf Power's poles while the parties negotiated new voluntary pole attachment agreements. Reply at 6-7. The Commission has refused to find that voluntary relationships automatically become mandatory relationships (*i.e.*, are "grandfathered") pursuant to the 1996 Act's mandatory access amendments to section 224. In other words, at some point a pole owner reasonably may terminate a voluntary relationship with an attachor without running afoul of section 224, even though the pole owner still must grant access. *See APCo Review*, 16 FCC Rcd at 12218, ¶¶ 20-21. Because we deny this argument by the Cable Operators, we need not resolve whether Gulf Power in fact had a contract with one of the attachers (Cox) and, if so, when that contract (as well as the other contracts) expired. *See, e.g.*, Motion to Dismiss at 5 & n.3; Response at 7, 11-12 & n.4.

⁴⁸ Complaint at 7 n.4.

⁴⁹ *See* 47 U.S.C. § 224(d)(1); 47 C.F.R. § 1.1409(c).

⁵⁰ Response at 34-48, ¶ 28. In making this argument, Gulf Power incorporates its Petition for Reconsideration in CS Docket No. 97-98.

⁵¹ Response at 49. *See* Third Dunn Affidavit at 12-16, ¶¶ 19-24.

⁵² Response at 49. *See* Third Dunn Affidavit at 12-16, ¶¶ 19-24.

⁵³ Response at 49. *See* Third Dunn Affidavit at 12-16, ¶¶ 19-24.

making market valuations for property and concludes that an appropriate range for an annual attachment rate for Gulf Power's poles is \$40-\$45.⁵⁴

15. We reject Gulf Power's assertion that the *Cable Formula* does not provide just compensation. The Commission has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation.⁵⁵ The Eleventh Circuit Court of Appeals upheld that determination, explaining:

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.⁵⁶

Gulf Power has submitted no evidence in this proceeding that would satisfy the test articulated by the Eleventh Circuit.⁵⁷

16. Finally, we find no merit in Gulf Power's objections to specific aspects of the *Cable Formula*, which the utility has asserted, time and again, before the Commission. First, Gulf Power argues that the Commission's presumptions concerning pole height (*i.e.*, 37.5 feet) and usable space (*i.e.*, 13.5 feet)⁵⁸ do not reflect the "realities of the utility industry" or "Gulf Power's system of poles."⁵⁹ Rather, Gulf Power claims that its average existing pole height is 40 feet (with usable space of 11.5 feet) based upon its claim that its average replaced pole in 1999 is

⁵⁴ Response at 49-51. See Affidavit of Henry J. Wise, MAI, File No. PA 00-004 (filed Aug. 9, 2000) ("First Wise Affidavit"); Second Affidavit of Henry J. Wise, MAI, File No. PA 00-004 (filed Sept. 12, 2000) ("Second Wise Affidavit").

⁵⁵ *APCo Review*, 16 FCC Rcd at 12223-36, ¶¶ 32-61.

⁵⁶ *Alabama Power*, 311 F.3d at 1370-71.

⁵⁷ *Cf. Alabama Power*, 311 F.3d at 1370 ("[N]owhere in the record did APCo allege that APCo's network of poles is currently crowded. It therefore has no claim."). Gulf Power and Alabama Power Company are wholly-owned subsidiaries of The Southern Company. See Complaint, Exhibit 17 (FERC Form No. 1: Annual Report of Major Electric Utilities, Licensees and Others) (filed May 2, 2000). Although Gulf Power was not a party to the Bureau proceeding underlying the Commission's order in *APCo Review*, it filed in the Eleventh Circuit a Petition for Review of the Bureau order. The Court of Appeals dismissed Gulf Power's petition for lack of standing. *Alabama Power*, 311 F.3d at 1366-67. Gulf Power argues that its filing of a Petition for Review in *Alabama Power* divests the Commission of jurisdiction to decide the Complaint in the instant matter. See Motion to Strike at 2-3. That argument – which borders on the frivolous – is moot in light of the Eleventh Circuit's disposition of Gulf Power's Petition for Review in *Alabama Power*.

⁵⁸ See *Fee Order*, 15 FCC Rcd at 6465, ¶ 16.

⁵⁹ Response at 42.

approximately 40 feet.⁶⁰ There is no evidence, however, to support a conclusion that the average height of the poles Gulf Power replaced in 1999 reflects the *system-wide* pole height average.⁶¹ Second, Gulf Power argues that additional capital accounts should be included in the investment calculation for poles and conduits,⁶² as well as in the calculation of the carrying charge rate.⁶³ The Commission has addressed these identical arguments previously,⁶⁴ and Gulf Power provides no new information or argument to persuade us that, in order to ensure just compensation, it is necessary to include additional accounts.

17. In sum, Gulf Power fails utterly to justify its proposed annual pole attachment rate of \$38.06 using the *Cable Formula*. Accordingly, we find that rate to be unreasonable under section 224 of the Act and the Commission's rules. Moreover, Gulf Power offers no persuasive reason why departure from the *Cable Formula* is warranted in this case. Accordingly, we order Gulf Power to allow the Cable Operators to remain attached to Gulf Power's poles at the rates under their former contracts (*i.e.*, \$5.00 to \$6.20), pending satisfactory negotiation of new agreements. We further order the parties to negotiate new agreements in good faith using the *Cable Formula* as a guide to establishing a reasonable rate. To the extent the Cable Operators have paid the \$38.06 rate, we order refunds of the difference between the \$38.06 rate and the rates contained in the parties' prior pole attachment agreements.

IV. ORDERING CLAUSES

1. Accordingly, IT IS ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the relief requested in the Complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

2. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, that the annual pole attachment rate of \$38.06 IS UNREASONABLE and IS TERMINATED, effective upon the release of this Order.

⁶⁰ Response at 42-43; Third Dunn Affidavit at 14, ¶ 21 & Attachment E (Gulf Power Company 1999 New Pole Additions and Average Pole Heights).

⁶¹ Gulf Power indicates that it owns 224,555 distribution poles, and that it uses 66,440 distribution poles. Third Dunn Affidavit, Attachment A (Gulf Power Company Response for Data and Information Specified in 47 C.F.R. § 1.1404(g) (Based on December 31, 1999 Data)) at 1. The utility, however, fails to provide information about the various heights of these poles, or even about a statistically-valid sampling of the poles.

⁶² Specifically, Gulf Power argues that, in addition to FERC Account 364, the following capital accounts should be utilized: Account 360 (land and land rights), Account 365 (overhead conductors and devices), Account 368 (line transformers), and Accounts 389-399 (general plant). Response at 41-42; Third Dunn Affidavit at 10, ¶ 16.

⁶³ According to Gulf Power, a "full and perfect price" necessary to provide just compensation must include FERC Account 580 (operation supervision and engineering), Account 583 (overhead line expenses), Account 588 (miscellaneous distribution expenses), Account 590 (maintenance supervision and engineering), and Account 598 (maintenance of miscellaneous distribution plant). Response at 40-41; Third Dunn Affidavit at 10, ¶ 16.

⁶⁴ *APCo Review*, 16 FCC Rcd at 12236, ¶ 61; *Pole Attachment Reconsideration Order*, 16 FCC Rd at 12159-64, ¶¶ 116-28.

3. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, that the rates contained in the parties' prior pole attachment agreements (*i.e.*, \$5.00-\$6.20 annually per pole) ARE CONTINUED, pending further negotiations between the parties.

4. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, that Gulf Power Company SHALL REFUND to Complainants Comcast Cablevision Panama City, Inc., Mediacom Southeast, L.L.C., and Cox Communications Gulf Coast, L.L.C., within thirty (30) days of the release of this Order, that portion of any amounts paid in excess of the rates contained in the parties' prior pole attachment agreements, for the period July 10, 2000 to the present, plus interest to the date of the refund.

5. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, that Gulf Power Company SHALL REFUND to Complainant Time Warner Cable, within thirty (30) days of the release of this Order, that portion of any amounts paid in excess of the rate contained in the parties' prior pole attachment agreement, for the period March 13, 2001 to the present, plus interest to the date of the refund.

6. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that Gulf Power Company and the Complainants SHALL NEGOTIATE IN GOOD FAITH maximum just and reasonable rates for pole attachments, in accordance with the Commission's rules.

7. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the Motion of Gulf Power Company for Leave to File Motion to Dismiss Complaint for Lack of Jurisdiction, File No. PA 00-004 (filed July 20, 2000); Gulf Power Company's Motion for Leave to File a Motion for Confidential Treatment of Commercial and Financial Information, File No. PA 00-004 (filed Aug. 9, 2000); Gulf Power Company's Motion for Leave to File Supplemental Authority, File No. PA 00-004 (filed Sept. 11, 2000); and Motion for Leave to File Comments on Gulf Power Notice of Filing Supplemental Authority, File No. PA 00-004 (filed Sept. 21, 2000), ARE GRANTED.

8. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the Motion of Gulf Power Company to Dismiss Complaint and Complainants' Petition for Temporary Stay for Lack of Jurisdiction, File No. PA 00-004 (filed July 20, 2000); Gulf Power Company's Motion to Strike, File No. PA 00-004 (filed Aug. 7, 2000); Gulf Power Company's Motion for Confidential Treatment of Commercial and Financial Information, File No. PA 00-004 (filed Aug. 9, 2000); Gulf Power Company's Motion to Strike and Reply to Complainants' Opposition to Request for Grant of Motion for Confidential Treatment, File No. PA 00-004 (filed Sept. 6,

2000); and Gulf Power Company's Motion to Strike the Complainants' Supplement or, in the Alternative, Motion to Dismiss, File No. PA 00-004 (filed Apr. 11, 2001) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau