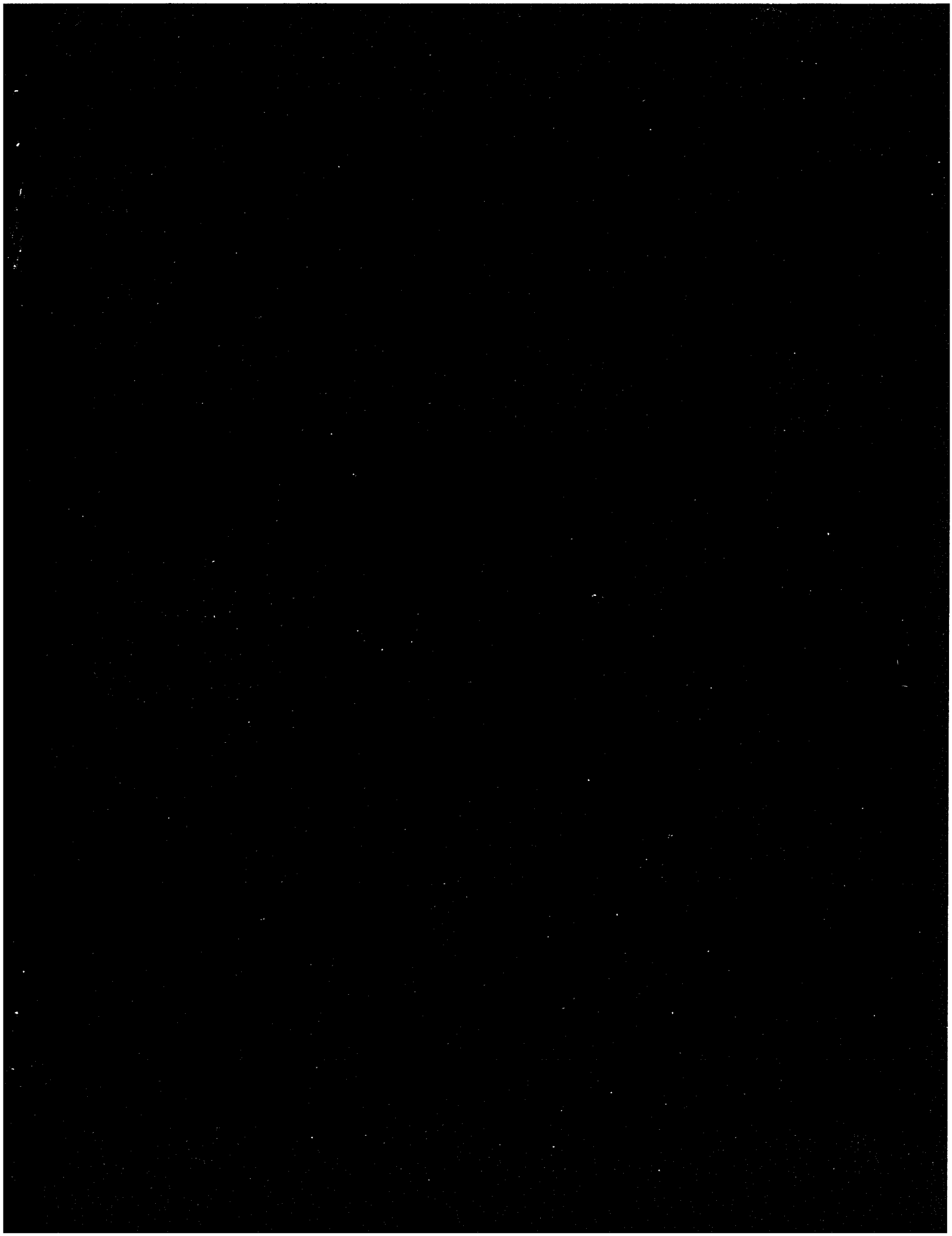

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE and Eleventh Circuit Rule 26.1-1, it is hereby certified that the following persons, corporations, or governmental agencies have been associated with or have an interest in the outcome of this case:

Adelphia

Alabama Cable Telecommunications Association

Alabama Power Company

AT&T Cable Services

Balch & Bingham, LLP

Beggs & Lane LLP

Richard Beeland

Jane Belford

Barry Breithaupt

Jennifer M. Buettner

Ramona Byrd

Cable One

Cable Star, Inc.

Cablevision Services

Cindy Cade

John Russell Campbell

Charter Communications, LLC

Century Cullman Corporation

Gregory M. Christopher

Ford W. Clark

Cole, Raywid & Braverman

Ronnie G. Colvin

Comcast Cable

Comcast Cablevision of Panama City, Inc.

ComLink

Geoffrey C. Cook

Coosa Cable Company

Kathleen Costello

Cox Communications Gulf Coast, L.L.C.

CVI of Alabama, Inc., d/b/a/ Time Warner Cable

Demopolis CATV Company

Peggy A. Dickinson

Empresa Eléctrica del Norte Grande, S.A. (Edelnor)

Anthony C. Epstein

Federal Communications Commission

Florida Cable Telecommunications Association

Lynne Greene Fraker

Shirley S. Fujimoto

William H. Garner

Georgia Power Company

Christine M. Gill

Paul Glist

Bruce Gluckman

Lynn Goldman

John D. Gosch

L. Keith Gregory

M.C. Grigsby

Gulf Power Company

Hidroeléctrica Alicura, S.A.

Mike Hugunin

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Integrated Communication Systems, Inc.

James Cable Partners, LP

Ron Johnson

William Johnson

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Keller and Heckman LLP

Cheryl King

Raymond A. Kowalski

Eric B. Langley

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Jane E. Mago

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MediaCom, LLC

MediaCom Southeast LLC

Mississippi Power Company

Mobile Energy Services Company, L.L.C.

John M. Nannes

Robert B. Nicholson

Northland Cable Properties

James Oglethorpe

Thomas P. O'Neil III

Scott Peden

Ralph A. Peterson

Phoenix Cable T.V.

Leonard J. Rozek

Savannah Electric and Power Company

Daniel K. Shoemaker

William Single, IV

Sky Cablevision, Ltd.

Jeffrey Smith

Jim Smith

Southern Company Capital Trust I

Southern Company Capital Trust II

Southern Electric Generating Company

Southern Electric International Trinidad, Inc.

Southern Investments UK P.L.C.

The Southern Company

Thomas P. Steindler

Steptoe & Johnson LLP

Joann Stone

Robert J. Wiggers

Time Warner cable

Time Warner Entertainment Advance Newhouse

Andrew W. Tunnell

Twin County Cable

Joseph Van Lerner

D.H. Ward, III

WorldCom, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Respondents support the petitioners' request for oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in 14 point CG Times.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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ALABAMA POWER COMPANY, *et al.*
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents

BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

This Court does not have jurisdiction because no final agency decision is before the Court. Petitioners are seeking review of a Cable Services Bureau decision made pursuant to delegated authority. That decision is still undergoing review by the full Federal Communications Commission. 47 U.S.C. § 155(c)(7). See pages 22-23 below and the FCC's pending motions to dismiss.

STATEMENT OF ISSUES

1. Whether this Court has jurisdiction to review a decision of a bureau of the FCC acting under delegated authority where that decision is presently undergoing review by the full Commission and 47 U.S.C. § 155(c)(7) makes exhaustion of administrative remedies a jurisdictional prerequisite.

2. Whether a pole attachment rate that places the utilities in at least as good a position as if no taking had occurred and that represents what a voluntary seller would accept from a willing buyer satisfies the Fifth Amendment requirement for just compensation.

3. Whether the Commission's decision to base the cable rate formula on the historical cost of the utility poles rather than the replacement cost of the poles was a permissible choice given that this methodology provides the utilities with a reasonable rate of return on their investment in the poles and is relatively easy to administer.

4. Whether the cable television pole attachment rate, which provides the utilities with just and reasonable compensation under constitutional standards for both physical takings and ratemaking, was rendered arbitrary and capricious by a later Congressional decision to provide the utilities with a generally higher rental rate for telecommunications pole attachments.

5. Whether the Commission's decision to exclude from the rate base certain cost factors that are only tangentially related to the cost of owning and maintaining the utility poles was an abuse of the agency's broad ratemaking discretion or otherwise denied just compensation.

6. Whether the rate complaint proceeding that afforded the parties an opportunity to be heard on the record and is subject to judicial review was procedurally fair.

COUNTERSTATEMENT

On review in these consolidated cases is a decision of the FCC's Cable Services Bureau to grant a complaint by a group of cable television systems and their trade association (intervenors in this case) against petitioner Alabama Power Company (APCo). The Bureau held that APCo's unilateral decision to raise its annual pole attachment rental rate from $7.47, on which APCo and the cable systems had agreed, to $38.81 per pole was a violation of the Pole Attachments Act. The Bureau terminated the higher rate and ordered the parties to negotiate a new rate using a formula derived from the Pole Attachments Act as a guide to establishing a reasonable rate. *Alabama Cable Telecom. Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346 (2000)(Tab 3 of Record Excerpts)

1. Background: The Pole Attachments Act of 1978

Since the inception of the cable television industry, cable television companies have leased space on existing telephone or electric utility poles or in underground utility conduits for the attachment of cable distribution facilities, *i.e.*, coaxial or fiber optic cable and associated equipment. The cable companies rent a portion of the unused space on the pole or in the conduit for an annual or other periodic fee, plus reimbursement to the utility of all of its incremental or avoidable costs (*i.e.*, the expenses it would not have incurred but for the cable attachment, such as the cost of attaching the wire to the pole). Due to financial,

environmental, and local franchise considerations, the cable operator usually has no alternative but to use existing poles and conduits.[1]

By virtue of their monopoly ownership or control of the poles and conduits, the utilities have had a superior bargaining position, and in the late 1960s the cable companies began to complain that the utilities were demanding unreasonably high attachment rates. The FCC investigated the complaints but concluded that it lacked jurisdiction because the cable attachments did not constitute "communication by wire or radio" within the meaning of the Communications Act.[2] Congress subsequently enacted the Pole Attachments Act of 1978 "in part to curb the extraction of monopoly profits by utilities from cable operators in need of pole space."[3] The 1978 Act did not require the utilities to allow cable attachments, but it authorized regulation of rates where attachments were voluntary.

The Pole Attachments Act authorized the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" in any state that does not regulate the rates,

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1 S. Rep. No. 95-580 at 12-13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-21. *See also Gulf Power Co. v. FCC,* 208 F.3d 1263, 1266 (11th Cir. 2000) (hereinafter "*Gulf Power II*"), *pet. for cert. granted.*

2 *California Water & Tel. Co.,* 64 F.C.C.2d 753, 758 (1977).

3 *Texas Power & Light v. FCC*, 784 F.2d 1265, 1267 (5th Cir. 1986)(footnotes omitted).

terms, and conditions of pole attachments. 47 U.S.C. § 224(b)(1), 224(c).[4] The Act provides that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(d)(1).

Thus, the Act envisions a "zone of reasonableness," the bottom end of which is the utility's incremental or avoidable costs, *i.e.*, a rate that would reimburse the utility for expenses it would not have incurred but for the cable attachment. The upper end of the zone is the fully allocated cost of the attachment, *i.e.*, a proportionate share of the capital and operating costs of the utility pole, conduit, or right-of-way.[5] It can be seen that any rate set above the minimum "avoidable" or "incremental" cost makes a positive contribution to the utility by defraying expenses that otherwise would be borne entirely by the utility and/or its ratepayers.

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[4] Under this "reverse preemption" provision of the Act, the FCC does not regulate pole attachments in 18 states and the District of Columbia where public utility commissions regulate the attachments. These local commissions have elected to base their regulations on the federal model.

[5] *See FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987); S. Rep. No. 95-580, *supra,* at 19, 27.

A principal legislative goal was that the FCC should institute "a simple and expeditious ... pole attachment program which will necessitate a minimum of staff, paperwork, and procedures consistent with fair and efficient regulation."[6] Congress stressed that the provision of space for pole attachments is not a common carrier undertaking, so the panoply of ratemaking procedures does not apply. Rather, the FCC was directed to adopt a "flexible program to adjudicate complaints."[7] Rather than "embark upon a large-scale ratemaking proceeding in each case brought before it," the FCC was instructed to use "rate of return" and "capital cost factors" already on file with other regulatory agencies. *Ibid.* "There is no need for the Commission to make independent determinations as to each element of a utility's annual pole costs ...." *Ibid.* Congress understood the difficulty of assigning various utility expenses to cable-related or non-cable-related accounts, so the Commission was urged to "make its best estimate of some of the less identifiable actual capital costs. Special accounting measures or studies should not be necessary."[8]

The Commission implemented the Act's rate requirements, devising a "Cable Formula" that focuses on the upper end of the zone of reasonableness, *i.e.*, the fully allocated cost of a pole attachment, through a series of

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6 S. Rep. No. 95-580, *supra,* at 21.

7 S. Rep. No. 95-580, *supra,* at 22.

8 S. Rep. No. 95-580, *supra,* at 20.

rulemakings[9] that were fine tuned in response to judicial pronouncements.[10] Employing publicly available accounting data and the last rate of return authorized by the regulatory agency of the state in which the utility company does business, the Cable Formula yields the maximum lawful pole attachment fee.[11]

On appeal from a decision of this Court holding that the Act effects an unconstitutional taking of property without just compensation, the Supreme Court declared in *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987), that the FCC's reduction of a utility's pole attachment fee to the maximum allowable under the Cable Formula "does not effect a taking of property under the Fifth Amendment."

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9 *First Report and Order,* 68 F.C.C.2d 1585 (1978); *see also Second Report and Order,* 72 F.C.C.2d 59 (1979); *Third Report and Order*, 77 F.C.C.2d 187 (1980); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, 4387-4407 (1987), *recon. denied*, 4 FCC Rcd 468 (1989).

10 *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); *see also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to aspects of the pole attachment formula). Following *Alabama Power*, the Commission revised its rules in *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, *supra*, 2 FCC Rcd 4387.

11 *See generally* 47 C.F.R. § 1.1401 *et seq; Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, *supra,* 2 FCC Rcd 4387.

Because cable attachments produce income from an otherwise unproductive and surplus portion of the utility's plant, cable companies had no cause to complain about lack of access – their concern was monopoly rents – and the Act thus did not then address a right of access. S. Rep. 95-580, *supra,* at 16. Access was not an issue in 1978 for the additional reason that utility companies competed to only a very limited extent with cable companies. Restrictions in the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. § 79, *et seq.*, generally prohibited participation by the utilities in the telecommunication industry. Thus, in 1978, the utilities had an incentive to extract monopoly rents from cable companies but little or no incentive to refuse cable company access to their poles, which was a potential source of revenue. The 1978 Act thus did not require utilities to allow access, and the rate formula applied only to those utilities that voluntarily allowed cable attachments.

2. Mandatory Access: The 1996 Amendments to the Act

When Congress began considering broad telecommunication regulatory reforms, the electric utilities lobbied for changes in pole attachment and cable eligibility provisions. They claimed that telecommunication was a logical diversification choice for utilities, and they supported legislation that would allow them to offer telecommunication and related services. At the same time, the cable companies and telecommunications carriers cautioned that, as electric companies moved into the communications marketplace, the utilities must not be

permitted to be a "bottleneck to competition" by dictating terms and conditions for pole attachments to competing cable operators.[12]

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*, Congress accepted both arguments. The 1996 Act authorized expanded competition in telecommunication markets, driven by the theory that competition would bring benefits to consumers and diversity of communications services to communities. The Act sought "to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[13]

To achieve this goal the 1996 Act made numerous amendments to the Communications Act designed to eliminate legal and economic barriers to entry in local and other telecommunications markets. *See, e.g.,* 47 U.S.C. § 253; *AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366, 371 (1999). More specifically for power companies, Congress amended the PUHCA to allow power companies to enter telecommunications businesses from which they previously had been

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12 *Hearings before the Senate Committee on Commerce, Science & Transportation* (1995)(testimony of Richard H. Cutler on behalf of the Small Cable Business Association)

13 *See* Preamble to 1996 Act.

barred.[14] Congress recognized, however, that power companies using this opportunity to enter these markets would gain a new incentive to refuse to enter voluntarily into pole attachment agreements with telecommunications competitors on a nondiscriminatory basis. To address this danger, Congress added a "nondiscriminatory access" provision that requires that any utility that chooses to use its poles, ducts, conduits, or rights-of-way, at least in part, for wire communications must "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." 47 U.S.C. § 224(f)(1). Subsection (f)(2) authorizes a utility to deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). Power companies that do not choose to use their poles for wire communications are not obligated by the Act to provide access to communications carriers, although they may voluntarily do so, as they could under the 1978 Act. *See* 47 U.S.C. § 224(a)(1).

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[14] *See* 15 U.S.C. § 79z-5c (as amended by § 103 of the Telecommunications Act of 1996). The Southern Company, parent company of APCo and Gulf Power Company, now provides telecommunications service "specializing in high-tech fiber optic networks for voice, video, and data markets." *See* "Telecommunications" under "Products and Solutions" at http://www.southernco.com.

The 1996 amendments also expanded the FCC's Pole Attachments Act jurisdiction to include attachments to poles and conduits by all telecommunications carriers, as well as cable television providers, and it established a new rate formula to govern attachments by telecommunications carriers. *See* 47 U.S.C. § 224(a)(4), (e). *See also* pages 35-36 below.

3. Subsequent Judicial Proceedings

a. *Gulf Power I*

APCo and Gulf Power Company, petitioners in this case, and several other utilities[15] brought suit against the United States and the Federal Communications Commission seeking a declaration that the nondiscriminatory access provision of the 1996 amendments to the Pole Attachments Act, 47 U.S.C. § 224(f), is facially unconstitutional because it effects a taking of their property without just compensation and without an adequate process for securing just compensation. The district court agreed that the statute effected a taking of property, but the court granted summary judgment in favor of the federal defendants after concluding the amendment did not necessarily deny the utilities just compensation. *See Gulf Power Co. v. United States,* 998 F. Supp. 1386 (N.D.Fla.1998). The court held, moreover, that the procedure for determining just compensation – starting with a proceeding before the FCC – did not violate

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[15] The other utilities were Georgia Power Company, Duke Power Company, Mississippi Power Company, Ohio Edison Company, and Florida Power Corporation.

the Separation of Powers doctrine because the Commission's decision was subject to judicial review. *See id.* at 1397-98.

The utilities appealed to this Court which upheld the district court's conclusions. The Court agreed that while the 1996 Act authorizes a taking of the utilities' property, the statute is not facially unconstitutional because the statute provides an effective procedure for awarding just compensation that does not violate the Separation of Powers doctrine. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-13 (11th Cir.1999) ("*Gulf Power I*"). The Court explained: "Had the Act eliminated all possibility of judicial review and made the FCC the final arbiter of a utility's compensation, we would be faced with a different situation, but the Act does not do that. Instead, as we have explained, the Act merely provides that the FCC has the first cut at fashioning the compensation a utility receives for the taking of its property." *Id.* at 1337.

The utilities also argued in *Gulf Power I*, as they do in this case, that the Cable Formula is constitutionally inadequate because it provides the same compensation for mandatory access as for voluntary access, citing Judge Tjoflat's dissenting opinion in *Consolidated Gas Co. v. City Gas Co.*, 912 F.2d 1262, 1314-19 (11th Cir. 1990). The Court declined to reach that issue, holding that "this issue is not ripe for decision [because] it would require sheer speculation for us to conclude that the actual rates ordered by the FCC will fail to provide just compensation." *Gulf Power I*, 187 F.3d at 1338.

b. Gulf Power II

The utilities then sought review in this Court of an FCC decision implementing the 1996 amendments to the Pole Attachments Act. The utilities presented a variation of their facial attack on the constitutionality of the rate formula, contending that the Cable Formula establishes a maximum pole attachment rent that is below constitutional just compensation. The Court observed that this was essentially the same argument found unripe in *Gulf Power I* and declared that the argument was still unripe because the utilities again failed to demonstrate that the formula will deny just compensation in all cases. *Gulf Power II,* 208 F.3d at 1272. The Court agreed with the utilities, however, that the FCC lacks statutory authority to regulate pole attachments that are used for cable television service commingled with Internet service or that are used for wireless communications. *Id.* at 1273-78. The Supreme Court has granted petitions for writ of certiorari filed by the FCC and the National Cable Television Association to review those two holdings. *National Cable Television Assn. v. Gulf Power Co.,* 121 S.Ct. 879 (2001)(mem.)

c. Southern Company

The FCC announced in a separate order a number of flexible guidelines – "rules of general applicability" – pertaining to the terms and conditions of the statute's nondiscriminatory access requirement, dealing with such matters as system-wide access, access to transmission facilities, reservation and expansion of capacity, access by third-party workers, and facility modification. The utilities are challenging these guidelines in the pending case of *Southern*

Company v. FCC, 11th Cir. No. 99-15160 *et al.* (argument scheduled Aug. 28, 2001).[16]

4. The Staff Decision Under Review

For some 20 years APCo voluntarily rented excess space on its poles to cable television companies at a negotiated rental rate based on the Cable Formula. Specifically, just before the instant proceedings commenced APCo was charging $7.47 per pole per year, which was slightly above the formula's maximum rate but was acceptable to the cable companies.[17] Then, in June 2000, APCo announced that it was unilaterally rescinding all existing agreements with the cable companies, and it told the companies that if they wished to maintain their existing attachments they would have to begin paying an annual rate of $38.81 instead of $7.47. The cable companies complained to the FCC. *See Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346 (CSB 2000)(Tab 3 of Record Excerpts).

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[16] The utilities did not challenge the FCC's finding that "a utility that is itself engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage" or the corollary rule prohibiting a utility from "favor[ing] itself over other parties with respect to the provision of telecommunications or video programming services." *Implementation of the Location Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd 15499, 16071, 16073 ¶¶ 1150, 1157 (1996).

[17] According to the utilities themselves, the Cable Formula produced a maximum allowable rate of $6.30. *See* APCo brief at 9 n.7.

APCo did not attempt to justify the new rate under the Cable Formula. *Id.* at ¶ 4. Instead, it asserted that the Cable Formula had been rendered constitutionally deficient by the mandatory access provisions of the 1996 amendments to the Pole Attachments Act. Its relationship with the cable companies was now an involuntary one, APCo argued, which entitles it to a much higher level of compensation than allowed under the Cable Formula. *Id.* at ¶ 5.

APCo also moved to dismiss the complaint, citing this Court's jurisdictional pronouncements in *Gulf Power II, see* page 13 above, because the cable operators were allegedly using the pole attachments to provide cable service commingled with Internet service. Therefore, APCo contended, the FCC had no jurisdiction over the complaint. *Id.* at ¶ 4.

The FCC's Cable Services Bureau, under delegated authority, was charged with the responsibility of administering the Cable Formula. Acting on the complaint, the Bureau disallowed the higher rate proffered by APCo, and it ordered APCo to continue to make access to its poles available at the previously negotiated rate of $7.47 pending further negotiations. *Id.* at ¶¶ 7, 13-17. The Bureau also denied APCo's motion to dismiss because the Court's mandate in *Gulf Power II* had not been issued pending the filing of petitions for writ of certiorari. Until the mandate issues, the Bureau said, the pole attachment rules

were still in effect and the Commission's jurisdiction over the complaint was intact. *Id.* at ¶ 4.[18]

On September 11, 2000, APCo filed an application for review of the staff decision by the full Commission, which is pending. A few days later, APCo and Gulf Power Company, which was not a party to the Alabama complaint proceeding, filed the instant petitions for review. The two utilities also asked this Court to stay the Bureau's order pending judicial review.

By separate motions dated October 18, 2000, the FCC moved to dismiss both petitions for review. The Commission noted that the petitions seek review of a staff decision issued pursuant to delegated authority whereas judicial review may be sought only of final agency action. 47 U.S.C. § 155(c)(7). The Commission noted also that Gulf Power, which was not even a party to these proceedings and was not cognizably aggrieved, does not have standing to file.

The Court denied the utilities' motions for stay but it declined to rule on the Commission's motions to dismiss. By order dated January 3, 2001, the Court said that the motions to dismiss "are carried with the case."

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[18] As mentioned above, the Supreme Court has granted the petitions for writ of certiorari. The mandate in *Gulf Power II* therefore remains stayed pending final disposition by the Supreme Court. Rule 41(d)(1), Federal Rules of Appellate Procedure.

5. The Standard of Review

The Constitution does not dictate a single approach to determining just compensation, so in deciding whether the statutory rate provides just compensation within the meaning of the Constitution in this case, the Court should apply a deferential standard that gives weight to the legislative judgment as to what constitutes a just and reasonable rate. This deferential standard applies when an agency interprets the terms on which Congress authorized a taking. *National Railroad Passenger Corp. v. Boston & Maine*, 503 U.S. 407, 421-22 (1992). Such deference is consistent with the role of the courts as the "ultimate" arbiter of the constitutional requirement. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327 (1893); *Gulf Power I*, 187 F.3d at 1333. However, even if the Court accepts APCo's argument that the Court should apply a *de novo* standard of review in deciding whether the statutory rate provides just compensation (APCo brief at 21 n.15), the result is the same because the statutory formula satisfies any constitutionally applicable standard.

To the extent that APCo argues that the Court should review *de novo* the FCC's interpretation of the Act, it is incorrect. The FCC's interpretation of the Act is reviewed under a deferential standard where, as here, the language of the statute does not speak to the precise methodology that should be employed to implement the Congressional intent. Where the meaning of statutory language is not clear, the Court defers to the agency that administers the statute if the agency's interpretation is reasonable." *Habersham Mills v. FERC*, 976 F.2d

1381, 1383 (11th Cir. 1992) (per curiam); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

The Bureau's adjudication of the complaint may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the Court presumes the validity of agency action and may reverse only if the agency's decision is not supported by substantial evidence or if the agency has made a clear error in judgment. *See, e.g., Motor Vehicle Mfgrs. Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 44 (1983); *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

Both petitions for review must be dismissed. APCo seeks review of an order of the FCC's Cable Services Bureau taken under delegated authority, but under the Communications Act and Hobbs Act a petition for review may only be filed within a 60-day period that starts with the date the full Commission issues an order reviewing the staff decision. No such decision by the Commission has not yet been issued, so APCo's petition for review is incurably premature. For the same reason the petition of Gulf Power must also be dismissed, but in addition, the Communications Act and Hobbs Act permit petitions for review of an agency decision only by parties to the agency proceeding unless the nonparty first files a petition for reconsideration at the agency. Gulf Power did not file such a petition, but instead it sought direct review of the Bureau decision.

As to the merits, the electric utilities in this case treat the mandatory access provision of the Pole Attachments Act as a windfall that supposedly gives them the constitutional right to quintuple the rent they charge for pole attachments. They are not so entitled. The constitutional requirement of just compensation ensures that property owners are placed in as good a position after a taking as they were before the taking. Here, the attachers pay all the up-front costs of the mandatory attachment, so the annual rent calculated by the FCC's formula represents pure profit to the utilities. This was true when the pole attachments were voluntary and it is still true while the attachments are mandatory. The utilities are at least in as good a position economically now as they were before the attachments became mandatory.

For more than 20 years the utilities voluntarily rented space on their poles at a regulated rate that was held to be constitutionally sufficient by the Supreme Court in *Florida Power*. If the pole attachments were not mandatory, the utilities would still be able to rent space on their poles, but only at the regulated rate. Therefore, the loss to the utilities occasioned by mandatory access is not their right to a "market rate," as they claim, but is instead the right to lease space at the regulated rate. This is the same rate they are receiving anyway under the statutory scheme that was upheld in *Florida Power*.

Because the regulated rate satisfies the constitutional standard for just compensation, the utilities are not constitutionally entitled to a modification of the formula that would result in a higher rent. Nor is the Commission's methodology arbitrary and capricious:

1. The use of historical cost of the poles results in "just and reasonable" compensation to the utilities and is more consistent with the language and purpose of the Pole Attachments Act, which envisioned a simple and expeditious calculation of rates. The use of forward-looking costs would entail the sort of large-scale ratemaking proceeding that Congress directed the FCC to avoid.

2. The utilities claim that the rate paid by cable television attachers avoids payment of the attachers' "fair share" of the unusable part of the utility pole. The claim is based on a mischaracterization of the formula. The cable operators in fact pay a share of the cost of the entire pole in direct proportion to the amount of usable space occupied by the attachment. The fact that some telecommunications attachments command a higher rate under the statutory formula than the rate paid for cable television attachments is not of constitutional significance and represents a permissible legislative judgment.

3. The FCC allows the utilities to put into the rate base only those accounts that have a sufficient nexus to the cost of owning and maintaining the utility poles. The Commission understands that some accounts it disallows contain costs that have some relationship to the cost of pole attachments, just as it knows that certain other accounts that overstate the expenses attributable to the poles are allowed. It all washes out. Greater precision could be accomplished only with a full-scale ratemaking proceeding.

Under this Court's prior precedent rule, a panel of this Court may not overrule the holding of an earlier panel in *Gulf Power I* that the Constitution allows the FCC to make the initial determination of just compensation so long as

that determination is subject to judicial review. In any event, the holding in *Gulf Power I* was a correct application of controlling Supreme Court precedent.

The FCC's jurisdiction over the complaint in this case was not affected by this Court's decision in *Gulf Power II*. The mandate in that case was stayed at the time, and it continues to be stayed pending the disposition of writs of certiorari. The holding in *Gulf Power II* is binding within this Circuit notwithstanding the stay, but the parties to that case are not bound to act in accordance with that holding so long as the stay of mandate is in effect.

The utilities' miscellaneous procedural arguments are without merit:

1. Their claim that they may be deprived of retroactive compensation if they prevail in this case is devoid of analysis and ignores the authority of the Court to require an agency to correct any errors it may find.

2. The complaint proceeding afforded the utilities the right to a hearing, but they failed to identify any substantial and material questions of fact that would warrant a hearing.

3. The Bureau's focused analysis of the record and explanation of its decision was commensurate with the delegated responsibility to administer the Cable Formula. The Bureau was not required to use the complaint proceeding as an opportunity to reexamine settled Commission policy.

ARGUMENT

I. BOTH PETITIONS FOR REVIEW MUST BE DISMISSED.

We will not burden the Court with a recapitulation of the arguments made in the motions to dismiss where we argued that judicial review may be sought only of final agency action. Rather, because we anticipate that the Commission will issue a final and reviewable decision on APCo's application for review in the near future, we take this opportunity to note that a Commission decision will not make moot the pending motions to dismiss. Both petitions for review of the Bureau decision must still be dismissed.

The statutory time frame within which petitions for review may be filed is a window that opens when the agency issues a final decision and closes on the statutory deadline, here 60 days from the date of issuance. 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342, 2344. The window will not open in this case until the Commission issues its decision on review of the Bureau order. 47 U.S.C. § 155(c)(7). Petitions for review filed before the window opens, as in this case, are *incurably* premature and must be dismissed, just as petitions filed after the window closes are untimely and must be dismissed.[19]

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[19] *International Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999); *Brotherhood of Railway Carmen v. Pena*, 64 F.3d 702, 703 (D.C. Cir. 1995); *Waterway Comm. Systems, Inc. v. FCC*, 851 F.2d 401, 405-06 (D.C. Cir. 1988)(discussing effect of similar language in 28 U.S.C. 2344 and 47 U.S.C. § 402(a).

The petition for review filed by Gulf Power is doubly defective. Petitions for review may be filed only by parties to an agency proceeding unless the non-party first files a petition for reconsideration with the agency.[20] Gulf Power did not file such a petition, but instead, as mentioned, sought direct review of the decision of the FCC's Cable Services Bureau. Gulf Power's petition must be dismissed for this additional reason.

II. THE POLE ATTACHMENT FEE ALLOWED BY THE FCC IN THIS CASE SATISFIES THE CONSTITUTIONAL REQUIREMENTS OF JUST COMPENSATION AND REPRESENTS REASONED AGENCY DECISIONMAKING.

This Court declined in *Gulf Power I* and *Gulf Power II,* in the absence of a concrete rate complaint to determine whether the Cable Formula produces a pole attachment rate that satisfies the Fifth Amendment requirement of just compensation. If and when the Court's jurisdiction is properly invoked in this controversy, that is, when the FCC has issued a final and reviewable decision, the Court will have before it an appropriate case in which to make that determination, and it should rule that an annual rate of $7.47, the maximum allowable by the order in this case, affords the utility all the compensation to which it is constitutionally entitled. As we explain below, the $7.47 rate

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[20] *See* 28 U.S.C. § 2344; 47 U.S.C. § 405(a)(1); *Erie-Niagara Rail Steering Committee v. Surface Trans. Bd.*, 167 F.3d 111 (2nd Cir. 1999) and cases collected *id.* at 112.

provides just compensation under any accepted rational measure, and the decision to adhere to that measure represents reasoned agency decisionmaking.

A. The Element Of Mandatory Access Does Not Change The Constitutional Sufficiency Of The Cable Formula Rate.

The utilities assert that, although $7.47 may satisfy the constitutional requirements for traditional ratemaking, ordinary ratemaking principles govern voluntary ventures only. They claim that the mandatory access provision added to the Pole Attachments Act in 1996 requires a "paradigm shift" from ordinary ratemaking principles to "a more rigorous standard for just compensation ...." APCo brief at 13, 21; *see* American Electric Power Service Corp. ("AEP") brief at 12-14. They calculate their entitlement to at least $38.81 per pole per year. A few observations are sufficient to demonstrate the emptiness of the utilities' theory.

First and preliminarily, the Supreme Court has held that the Takings Clause does not prevent Congress, through just and reasonable rate regulation, from preventing exploitation of monopoly power. When no fair market exists, as in this case, sellers may not engage in profiteering under cover of the Constitution and extract whatever they can get. *United States v. Cors,* 337 U.S. 325 (1949). Accordingly, the law of this Circuit is that a "bottleneck" seller

such as APCo is not entitled to the "hold-up" value of its property.[21] *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979).[22]

Next and more specifically, as explained in the counterstatement, the cable attachments occupy surplus capacity on the utility poles, space that would otherwise generate no income at all. The utilities' core business or income producing ability is not affected in any way by the mandatory access requirement.[23] Indeed, because the attachers separately pay up front all the make-ready costs of the attachments, the annual pole rents represent pure profit

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[21] The utility intervenors argue that poles are "almost never bottleneck facilities" despite the congressional judgment to the contrary. AEP brief at 18 n.9. *See* legislative history at page 10 above. That argument is inconsistent with the utilities' admission that no market value can be determined here. APCo brief at 29; AEP brief at 18. If the utilities can demonstrate to Congress that the Pole Attachments Act has outlived its usefulness, they may seek a political remedy; in the meantime, the Court must defer to the legislative judgment, necessarily reaffirmed in the 1996 amendments to the Pole Attachments Act, that zoning, environmental, and other considerations make the construction of multiple networks of poles and ducts impractical at best.

[22] *See United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1039 n.1 (11th Cir. 1988)(recognizing as precedent decisions of the Fifth Circuit issued before 1981.

[23] The mandatory access provision applies only to excess capacity not needed for electric service, and a utility may deny access where there is insufficient capacity and for reasons of safety, reliability, and generally acceptable engineering purposes. 47 U.S.C. § 224(f)(2). Access need not be afforded at all if the utility does not use its poles for telecommunications services. 47 U.S.C. § 224(a)(1).

to the utilities that can be used to defray expenses that would otherwise be borne entirely by the utility and its ratepayers. Thus, in a real economic sense, even at the regulated rate, the utilities are in at least as good a position as if no attachments had occurred.

Moreover, if Congress had not imposed a mandatory access requirement, the utilities could lease surplus space voluntarily – but only at the same regulated rate, a rate the Supreme Court upheld as constitutional in *FCC v. Florida Power Corp.*, *supra,* 480 U.S. at 253-54. Because the pole owner would charge the statutory rate if it voluntarily leased surplus capacity, the Constitution does not give it the right to charge a higher rate for the same space when it is the subject of mandatory access. The Supreme Court and this Court have squarely held that the maximum price set by statute for a voluntary sale of property establishes its value for just compensation purposes. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 125-28 (1950); *United States v. 320.0 Acres of Land, supra,* 605 F.2d at 818 & n.128.

Put differently, under the utilities' own view, one generally acceptable measure of just compensation is "what a willing buyer would pay to a willing seller." APCo brief at 29; AEP brief at 14.[24] Here, that price has already been

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[24] The Supreme Court "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

established to be the regulated rate. As described above at page 14, for nearly two decades before the 1996 amendments made the attachments mandatory, the utilities were quite willing to lease excess capacity to the cable systems at the regulated rate calculated under the same methodology that applies today.[25] The transition from voluntary attachment to mandatory attachment has not changed the intrinsic value of the space rented to the cable systems or in any way increased the magnitude of the utilities' "loss," if the conversion of empty pole space from fallow to income-producing, or limiting utilities to a reasonable rate, can be called a loss.

In this case, then, there is no difference of constitutional significance between the regulated pole attachment rate approved by the Supreme Court in *Florida Power,* 480 U.S. at 254, and the "just compensation" rate triggered by the mandatory access provision. Because the same Cable Formula applies to both mandatory and voluntary access, the rent calculated under this formula puts the utilities in the same position they would occupy if their decision to lease surplus capacity were still voluntary, as it was before the 1996 amendments.

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[25] The utilities may not have *liked* the regulated rate, and may therefore object to the characterization of themselves as a "willing seller," but the fact remains that they voluntarily accepted the regulated rate from the cable companies in this case for some 20 years.

B. The FCC's Administration Of The Cable Formula Is A Reasonable Interpretation of Congressional Intent And Is Consistent With Constitutional Requirements.

Congress directed the FCC to institute an expeditious program for determining just and reasonable pole attachment rates, employing a minimum of staff, paperwork, and procedures consistent with fair and efficient regulation. Rather than "embark upon a large-scale ratemaking proceeding in each case brought before it," the Commission was instructed to use rate of return and capital cost factors already on file with other regulatory agencies.[26] Congress understood that there may be some difficulty in determining whether a particular capital or expense item incurred by the utility is attributable to the ownership and maintenance of the utility poles. "For example, maintenance expenses of utility pole crews may be difficult to assign where the same crew performs functions other than maintaining utility poles. Likewise, general office salaries and expenses may not be susceptible to clear attribution to pole maintenance categories."[27] Nevertheless, Congress said, special accounting measures or studies should not be necessary because the majority of cost and expense items attributable to utility pole plant were already established and the information was

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[26] Sen. Rep. No. 95-580, *supra*, at 21.

[27] Sen. Rep. No. 95-580, *supra,* at 20.

already a matter of public record. Congress told the FCC to "make its best estimate" of some of the less readily identifiable costs.[28]

The formula the Commission devised calculates the maximum pole attachment rate by focusing on the upper end of the permissible statutory range of rates, the fully allocated cost of the pole attachment, which is defined as "the percentage of the total usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole ...." 47 U.S.C. § 224(d)(1). The "actual capital costs" are the depreciated cost of the poles. The "operating expenses" consist of the utility's administrative, maintenance and depreciation expenses, a return on investment, and taxes. As directed by Congress, the Commission relies on investment and expense data the utilities maintain in their accounting records and report publicly on an annual basis. The formula also relies on rebuttable presumptions regarding pole height, usable space available, the amount of usable space occupied, and the identification of pertinent cost accounts.[29]

The utilities say that the regulated rate is constitutionally deficient, or is at least arbitrary and capricious, because the Commission uses historical cost in

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[28] Sen. Rep. No. 95-580, *supra,* at 19-21.

[29] *See generally Amendment of Rules and Policies Governing Pole Attachments*, *supra,* 15 FCC Rcd 6453; *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, *supra,* 2 FCC Rcd 4387; 47 C.F.R. § 1.1401 *et seq.*

calculating the cost of the pole rather than replacement cost, and because the rate allegedly fails to consider the cost of the unusable part of the pole and certain allegedly pertinent operating expenses. *See* APCo brief at 23-37; AEP brief at 9-11, 14-23. We established in the preceding section that the utilities are not constitutionally entitled to more than the regulated rate for voluntary attachments, so they cannot be constitutionally entitled to cost factors and computations that would raise the regulated rate for mandatory attachments beyond that which is just and reasonable. If the utilities are to succeed in their challenge to the absence of certain cost factors, they must demonstrate that the absence represents arbitrary and capricious decisionmaking or violates a constitutional imperative. They have not done so.

*1. **Historical Cost of the Poles.*** The utilities fault the Commission for using the actual historical cost of the poles in calculating the fully allocated cost of the attachment to that pole. They insist that the Commission should instead ascertain and plug in to the formula the replacement cost of the pole. APCo brief at 30-33; AEP brief at 14-17, 19-22.

Preliminary, we note that the utilities rely entirely on cases and treatises that discuss government condemnation in which property is confiscated and disposed of and must eventually be replaced by the property owner. A pole attachment does not displace the utility from its own use of the pole. *See* 47 U.S.C. § 224(f)(2). Because the utility's interest in the property is not destroyed and need not be replaced, requiring the use of replacement cost as a measure of compensation is not required, as cases have held where, as here, no one would

think of replacing the property taken. *See United States v. Toronto H & B Nav. Co.*, 338 U.S. 396, 403 (1949).

The issue, however, is not whether the use of replacement costs may *ever* be constitutionally required, or whether historical costs may *in some circumstances* be inappropriate. None of the cases cited by APCo or AEP holds that a methodology based on replacement costs is the *only* constitutionally acceptable methodology. To the contrary, the Supreme Court has made clear that the Taking Clause does not incorporate a one-size-fits-all approach and that different methods may be appropriate in different circumstances. *United States v. Cors*, *supra,* 337 U.S. at 332 ("The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula.").

The question, rather, is whether it is constitutionally permissible for Congress and the FCC to use historical costs in the circumstances presented here. Even if the Court reviews this issue *de novo*, it is permissible to use this methodology because, as we have shown, historical costs have consistently been used to determine the maximum rate for voluntary access; the Supreme Court in *Florida Power*, 480 U.S. at 254, has rejected a constitutional challenge to the use of historical costs in the context of pole attachment rates; and a formula using historical costs puts utilities in as good a position as they would be in if utilities voluntarily leased access, and in a better position than if there were no pole attachments at all.

The FCC's decision to use historical costs is more consistent with the language and purpose of the Pole Attachments Act than an interpretation using forward-looking costs. First, § 224(d)(1) requires the Commission to use "actual capital costs" in calculating the utility's costs, and this language clearly indicates that Congress expected the Commission to use costs as recorded in books of account and not an estimate of capital costs for a replacement network of poles.

Second, Congress instructed the FCC to develop a regulatory framework that may be applied "simply and expeditiously" with "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[30] Switching to a methodology based on forward-looking economic costs would cause significant disruption and impose significant costs on attachers and the FCC. Such a change would require the Commission to develop a new formula that would likely involve complicated pricing investigations, precisely the sort of formal ratemaking proceedings that Congress directed the FCC to avoid. The continued use of historical cost and readily available data, in contrast, is conducive to success in private negotiation, which has long been a cornerstone of the FCC's pole attachment regulatory program and which has deflected countless disputes that would otherwise have to be settled by the FCC.[31]

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30 S. Rep. No. 95-580, *supra*, at 21.

31 *See Amendment of Rules and Policies Governing Pole Attachments, supra,* 15 FCC Rcd at 6460-61.

APCo correctly notes that the FCC uses a "forward-looking" cost methodology in its interconnection pricing rules for incumbent local exchange carriers ("ILECs"). APCo brief at 33 n.20.[32] However, the Commission has a rational basis for choosing different pricing methodologies in different contexts. In the *Universal Service Order* and *Local Competition Order,*[33] the Commission explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the pertinent objectives of the 1996 Act. Those objectives were to stimulate competition in local telecommunications markets, to ensure the efficient use of existing network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a given local market. A forward-looking methodology was particularly important in that context because the agency had determined that a firm considers forward-looking costs, not historical costs, in making decisions

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[32] APCo fails to distinguish reproduction costs from forward-looking costs, which are not necessarily the same. Reproduction costs are incurred when property is replaced with identical property, whereas the version of forward-looking costs adopted in the interconnection context represents the most efficient property that will perform the same function.

[33] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87 (1997) (*sub. history omitted)*; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1997) (*sub. history omitted).*

about entry, expansion, and price.[34] In addition, Congress had expressed no preference for historical costs in that context, and indeed had directed the Commission to determine costs "without reference to a rate-of-return or other rate-based proceeding." *See* 47 U.S.C. § 252(d)(1)(A)(i). In fact, use of historical costs in this context would be extremely complicated.

By contrast, the predominant legislative goal for the Pole Attachments Act was to establish a relatively simple mechanism whereby unfair pole attachment rates and practices could be reviewed and sanctioned. That goal has been well served for nearly 25 years under a regime that evaluates rates on the basis of historical costs, consistent with Congress' expectations.

*2. **Unusable Pole Space.*** The utilities claim that the Cable Formula does not require attachers to pay their fair share of unusable pole space and argue that cable operators should be required to pay the same rate as telecommunications attachers in order to provide just compensation to the utility. APCo brief at 23-28. It is difficult to comprehend how a failure to compensate the utilities for the unused and unusable portion of their poles amounts to a loss of constitutional dimensions.

In any event, the utilities mischaracterize the formula. While under certain circumstances the statutory formula for telecommunications attachments will

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[34] *Local Competition Order*, 11 FCC Rcd at 15813, 15817, 15846, ¶¶ 620, 630, 679.

produce a higher rate than the formula for cable television attachments, both rates are based on a calculation of the costs associated with the entire pole. The statute and the implementing regulations make this plain.

The rate for cable television attachments is prescribed in 47 U.S.C. § 224(d), which states: "[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility *attributable to the entire pole* ...." (emphasis added) Section 1.1409(e)(1) of the Commission's rules, 47 C.F.R. § 1.1409(e)(1), expresses the rate mathematically:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

In other words, the cable operators pays a share of the cost of the entire pole in direct proportion to the amount of usable space occupied by the cable attachment.

The structure of the telecommunications rate, which is being phased in over a five year period commencing February 2001, 47 U.S.C. § 224(e)(4), 47 C.F.R. § 1.1409(e)(2), is more complicated. That rate, too, calculates the costs associated with the entire pole, but the rate varies with the number of attachers. 47 U.S.C. § 224(e)(2) first specifies a calculation of the costs of a portion of the unusable part of the pole: "A utility shall apportion the cost of providing space on a pole ... other than the usable space among entities so that such

apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities." 47 U.S.C. § 224(e)(3) then specifies the calculation of the cost of a portion of the usable part of the pole, which is different from the usable space costs calculated under the 224(d) formula, that must be added to the unusable space costs: "A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity." The telecommunications rate equals the usable space costs plus the unusable space costs. 47 C.F.R. § 1.1409(e)(2). The mathematical expression of the telecommunications rate is:

$$\text{Maximum Rate} = \frac{\text{Usable Space Occupied}}{\text{Pole Height}} + \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{\# of Attachers}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

The legislative history does not explain why Congress chose a different rate formula for telecommunications attachments when it amended the Pole Attachments Act in 1996, but it can be inferred that Congress expected the number of attachers to increase over the years, which would reduce the rates paid by each user. Indeed, with several attachers, the telecommunications rate for each individual attacher can actually be less than the cable rate (although the total payments from all telecommunications attachers will always exceed the payment from a cable company).

In any event, the utilities are correct that a telecommunications attacher may pay more than a single cable television attacher. APCo brief at 23. But they are wrong in claiming that the cable attachers are not paying a share of the

cost of the entire pole, as the 224(d) formula clearly shows. Their complaint that the disparity in the two rates is "unfair" and "indefensible" (APCo brief at 23, 24) is merely their quarrel with Congress's legislative judgment. Given, as explained above, that the Section 224(d) cable television rate provides constitutional just compensation, the FCC's decision to enforce that rate, which implements the statutory directive, was not arbitrary or capricious.

3. Miscellaneous Accounts. The FCC publishes a schedule of FERC accounts that are related to the cost of owning and maintaining the utility poles and are therefore incorporated in the rate base of the Cable Formula.[35] The utilities point to nine FERC cost accounts associated with their operating expenses and capital costs that they say should be included in the rate base. These accounts include the cost of grounds and arrestors, the cost of clearing rights of way, and the cost of certain transportation and storage equipment. APCo brief at 34-35

The utilities have been making this argument for years in various contexts, and the Commission has consistently held that the proffered accounts do not contain any significant costs that should be allocated to the ownership or maintenance of the poles. Under the Pole Attachments Act, only the costs or expenses that have a sufficient nexus to the operating expenses and capital costs

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[35] *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, supra,* 2 FCC Rcd at 4404.

of the utility attributable to the pole must be included in the formula. 47 U.S.C. § 224(d)(1). Here, each account proffered by the utilities contains costs that are more directly related to the utility's core business function of energy distribution, and so the Commission has declared that it would not be reasonable or just to include these accounts in the calculation of the pole attachment rate.[36]

The Commission just recently reevaluated its formula methodology and reaffirmed this conclusion. The Commission acknowledged that some of the costs within the proffered accounts may have some relationship to pole attachments, but the agency determined that "any increased accuracy that would be derived from including some minute percentage of pole-related expenses that may be recorded in miscellaneous accounts is outweighed by the complexity of arriving at an appropriate and equitable percentage of the expenses."[37] The Commission noted that the inclusion of the proffered accounts "would have the significant disadvantage of requiring the allocation of portions of FERC accounts

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[36] *See id.*, 2 FCC Rcd at 4389-93; *TCA Management Co. v. Southwestern Public Service Co.*, 10 FCC Rcd 11832 (1995); *Panhandle TV & Cable Co. v. Potomac Edison Co.*, 1984 FCC LEXIS 2131 (1984); *Multi-Channel TV Cable Co. of Mansfield, Inc. v. Virginia Electric & Power Co.*, 52 Rad. Rep.2d (P&F) 1502 (1983).

[37] *Amendment of Rules and Policies Governing Pole Attachments, supra,* 15 FCC Rcd at 6475.

into rate-based calculations turning virtually every rate dispute into a full-blown, discovery-laden case."[38]

Contrary to the utilities' assertions, the Cable Formula does incorporate all capital and operating expenses reasonably and readily attributable to pole plant. However, the Cable Formula does not purport to be a precise ratemaking tool, in keeping with the Congressional directive that the Commission should not become mired in special accounting studies and other ratemaking minutia. Rather, the Commission was told to use public information readily available and to "make its best estimate" of some of the less readily identifiable costs.[39] As a result, the formula quite possibly does omit some costs that might be included in a formal ratemaking proceeding. But the formula also allows certain accounts that overstate the expenses attributable to poles. As the Commission recently explained: "The potential for inclusion of unrelated expenses in certain accounts must be balanced with the inability to recover other minor expenses that may have a legitimate nexus to pole attachments that are included in unrelated accounts. Our policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from

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[38] *Id.* at 6476 (footnote omitted)

[39] Sen. Rep. No. 95-580, *supra,* at 19-21.

every account used."[40] For example, administrative accounts include expenses such as research and development for highly complex technological and business planning projects which would far exceed the administrative oversight for poles. The Commission includes those accounts, however, because the bulk of the expenses in the accounts are relevant to plant investment.

It is not necessary to categorize precisely all miscellaneous expenses in the accounts used in the formula because it all balances out, and neither the Constitution nor the public interest nor elemental fairness requires anything more than that. As the Supreme Court said in *Duquesne Light Co. v. Barasch*, 488, U.S. 299, 314 (1989), "Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other respect."

III. THE RATE COMPLAINT PROCEEDING WAS JURISDICTIONALLY SOUND AND PROCEDURALLY FAIR.

*A. **Separation of Powers.*** The utility intervenors, but not APCo, ask the Court to "reconsider and reverse" the holding in *Gulf Power I,* 187 F.3d at 1333-34, that the Constitution allows an administrative agency to make the initial determination of just compensation, so long as that determination is subject to judicial review. AEP brief at 23. The utilities should have sought rehearing *en banc* or certiorari in *Gulf Power I,* because under this Court's prior precedent

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[40] *Amendment of Rules and Policies Governing Pole Attachments, supra,* 15 FCC Rcd at 6463-64.

rule, a panel cannot overrule a prior panel's holding even if convinced it is wrong. *See, e.g., United States v. Steele,* 147 F.3d 1316, 1317-18 (11th Cir. 1998)(*en banc); Cargill v. Turpin,* 120 F.3d 1366, 1386 (11th Cir.1997) ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision."), *cert. denied,* 530 U.S. 1080 (1998); *accord United States v. Hogan,* 986 F.2d 1364, 1369 (11th Cir. 1993).

At any rate, *Gulf Power I* was correct in holding that the 1996 Pole Attachments Act provides a constitutionally sound process for obtaining compensation that includes adequate judicial participation, and the utilities identify no new developments that justify revisiting this holding. The issue resolved in *Gulf Power I* is not whether the courts are the ultimate arbiters of constitutional requirements, for clearly they are. *See Commodities Trading Corp.*, 339 U.S. 121, 124 n.3 (1950). Rather, the question is whether it is unconstitutional for Congress or an agency to play any role at all in the process. With respect to compensation for pole attachments, Congress has provided an ample role for the courts. If pole owners believe that the FCC has established an inadequate rate because it either interpreted or applied the formula incorrectly, they may seek judicial review of the FCC's decision. 47 U.S.C. § 402(a). In fact, the utilities here argue that the statutory formula is unconstitutional and that the Court can provide complete relief – notwithstanding the FCC's role in the process. *See* APCo brief at 46 (summarizing relief requested).

The case on which the utilities primarily rely in making this argument is consistent with *Gulf Power I* and other recent cases. *See* AEP brief at 23-24, discussing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). This Court in *Gulf Power I* addressed *Monongahela* and held that "the fact that our constitutional scheme dictates that the judicial branch is entrusted with the ultimate responsibility for ensuring that just compensation is awarded does not mean the other branches of government must be excluded from the process of determining the proper level of just compensation." 187 F.3d at 1333; *see Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974), where the Court said that *Monongahela* "did no more than restate the general principle that the courts, not the legislature, are *ultimately* entrusted with assuring compliance with constitutional commands" concerning just compensation for physical takings" (emphasis added).[41]

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[41] The Seventh and Second Circuits also have held correctly that *Monongahela* does not bar an administrative agency from setting the amount of compensation in the first instance because the requirement of a judicial determination "is satisfied by the availability of judicial review." *See Wisconsin Central Limited v. Public Service Commission of Wisconsin*, 95 F.3d 1359, 1369 (7th Cir. 1996); *Metropolitan Transportation Authority v. ICC*, 792 F.2d 287, 296 (2d Cir. 1986), rejecting the claim that a statute was unconstitutional "because an administrative agency rather than a court determines the compensation and because the statute ties the agency's hands in determination of that amount."

B. Jurisdiction Over The Complaint. In *Gulf Power II* this Court held that the FCC has no statutory authority to regulate the rates for cable television pole attachments that are used to provide Internet service. 208 F.3d at 1276-1278. On motion by the FCC and its supporting intervenors, the Court's mandate was stayed pending writ of certiorari. *See* Order, dated October 12, 2000. The petitions for writs of certiorari were subsequently granted *sub nom. National Cable Television Ass'n v. Gulf Power Co.*, Case No. 00-832.

Notwithstanding the stay of mandate, APCo contends, as it did in its unsuccessful motion for stay in this Court, that the FCC was required to dismiss the complaint in this case because the issue presented was the rate to be charged for attachments by cable companies that were allegedly providing commingled cable and Internet service. APCo brief at 40-41.

APCo misapprehends the significance of the mandate. The stay of mandate "in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by [the case] as binding authority," *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992), but the value of the case is for "the courts in this circuit." *Ibid.* Such precedential value is irrelevant to whether the FCC was obliged to follow the decision in *Gulf Power II* notwithstanding the stay of mandate.

The advisory committee on the Federal Rules of Appellate Procedure has explained that a judgment or order of a court of appeals "is not final until issuance of the mandate; at that time the parties' obligations become fixed." Advisory Committee Notes, 1998 Amendments, Rule 41, Subdivision (c).

Similarly, this Court has observed the importance of the mandate when it said: "Until the mandate issues, an appellate judgment is not final; the decision reached in the opinion may be revised by the panel, or reconsidered by the en banc court, or certiorari may be granted by the Supreme Court." *Flagship Marine Services, Inc. v. Belcher Towing Co.,* 23 F.3d 341, 342 (11th Cir. 1994).

In other words, the *holding* in *Gulf Power II,* and the precedential value within the Eleventh Circuit, is extant. The *mandate,* and the parties' obligation to comply with the holding, are not. The jurisdiction of the FCC is not affected by the *Gulf Power II* decision so long as the mandate is stayed. Any other interpretation would render the stay of mandate meaningless.

C. Other Objections. The utilities assert that the Commission's pole attachment complaint proceeding is defective because "if and when" they are ultimately successful in their claim that they are entitled to more than the statutory rate, "there *may not* be any process that will compensate APCo retroactively" because the FCC "*apparently* lacks the statutory authority to order a cable company to retroactively pay a charge higher than the statutory maximum." APCo brief at 38 (emphasis added). This same argument was part of the utilities' facial attack on the statute in *Gulf Power I.* The argument was rejected there because it was entirely hypothetical. *Gulf Power I,* 187 F.3d at 1136 & n.9.

The utilities have done nothing to transform their hypothetical argument. They make no attempt to show why, or under what circumstances specific to this case, the Commission's administrative procedures cannot provide the

compensation to which they are entitled.[42] They still rely on conclusory assertions that make impossible any meaningful reply. We do note, however, that the utilities ask the Court in the Conclusion to their brief to order the cable companies to pay just compensation retroactively to the date of the alleged taking, APCo brief at 46, which would seem to belie their fear that the system will leave them without adequate redress.

In that regard, we note also that pole attachment ratemaking is not a tariffed activity, so an order of retroactive compensation would not seem to run afoul of the general proscription against retroactive ratemaking.[43] Rather, the attachment rates are set by private contract based on the federal model. If the rates were found to be constitutionally inadequate, it would appear that the general remedial power of the courts could ensure that just compensation is awarded from the date of the taking.

In lieu of meaningful analysis on this issue, the utilities resurrect the canard they uttered in their unsuccessful motion for stay that the question of retroactive compensation would be moot if the FCC had not played "fast and loose" with its commitments to this Court. APCo brief at 38-39 & n.24. APCo

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[42] The FCC has broad authority to take such actions "as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). One such function is to carry out any mandate (absent a stay of mandate) issued by a court reviewing the agency's decisions.

[43] *See, e.g., Public Utilities Comm'n of Calif. v. FERC,* 988 F.2d 154, 160 (D.C. Cir. 1993).

continues to claim that the FCC assured the Court in the *Gulf Power I* proceeding that it would stay any order pending judicial review which had the effect of lowering the compensation demanded by a utility for providing mandatory access, and that the FCC has dishonored that promise in this case. As we assured the Court in our opposition to motion for stay,[44] the FCC *never* made any such promise. On the contrary, the FCC, through the Department of Justice, stated that "the FCC *has the power* to stay its rate order pending review by the court of appeal." Letter from Alisa Klein to Thomas K. Kahn, Clerk of the Court, dated Feb. 26, 1999, at page 2 (Attachment C to APCo Motion for Stay). The Government did not state or imply that a stay would be granted as a matter of course. Indeed, the FCC, like this Court, has explicit standards for the exercise of its stay power. *See, e.g., Application of SCANA Comm., Inc.,* 15 FCC Rcd 9203, 9204 ¶ 4 (Wireless Bureau 2000). An order granting a stay would never be automatic, either by the FCC or by this Court, as APCo should know.[45]

Next, the utilities claim that the complaint process violates their due process rights under the Fifth Amendment because "pole complaints normally are

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[44] *See* "Opposition to Motion for Stay Pending Review," filed by the FCC on November 3, 2000, at pages 8-9.

[45] By Order dated January 3, 2000, this Court denied APCo's motion for stay pending review. The FCC cannot be faulted for declining to issue a stay where this Court itself found no basis for doing so.

to be adjudicated on the basis of the pleadings, without the opportunity for a hearing." AEP brief at 27. The argument is puzzling inasmuch as the utilities cite in support of the argument Section 1.1411 of the Commission's rules, 47 C.F.R. § 1.1411, which states quite clearly: "The Commission may decide each complaint upon the filings and information before it ... or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings." If the utilities are claiming that they were denied a right to a hearing *in this case*, they must identify some substantial and material question of fact that warrants a hearing, but they have not done so. Indeed, no one disputed the material facts in this case; rather, the dispute centered on the methodology that should be employed for calculating just compensation – a legal issue that does not warrant an evidentiary hearing.[46]

Finally, the utilities allege "that the FCC did not even consider the evidence submitted by the parties," nor did it "provide a reasoned explanation for its decision." APCo brief at 43, 44. The utilities' real complaint is that the

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[46] The Commission's discretion and expertise in deciding whether to hold an evidentiary hearing are "paramount," and the court's role in reviewing that decision is a limited one. *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980)(*en banc*); *see, e.g., Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). To the extent the utilities claim that a hearing before the FCC would be constitutionally inadequate because they are entitled "to a full trial on the merits in an independent forum," AEP brief at 28 n.11, this Court in *Gulf Power I* has already rejected that claim. 187 F.3d at 1333-34. *See also* page 41 above.

Cable Services Bureau did not use this complaint proceeding as a vehicle for reexamining the Cable Formula and overturning the FCC's recently released pole attachments rulemaking.[47]

The Bureau acknowledged that it was declining to address the specific issues relating to the application of the formula because "[a]ll of these arguments have been addressed and rejected in prior Commission Orders," and because "under any scenario proposed by [APCo], [the cable companies'] agreed rate of $7.47 exceeds the fully allocated costs." *Bureau Order* at ¶ 5 & n.17. Indeed, the utilities concede that APCo is entitled to only $6.30 under the Cable Formula. APCo brief at 9 n.7.

The utilities' "evidence" constituted an attack on the Cable Formula itself, which was not within the purview of the Cable Services Bureau to entertain. The limited scope of the Bureau's review of the evidence and the focused explanation for its decision were entirely commensurate with its delegated responsibility to administer the Cable Formula as adopted by Congress and administered by the Commission. A more elaborate review of the case should and must await a Commission decision on APCo's pending application for review.[48]

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47 *See Amendment of Rules and Policies Governing Pole Attachments, supra,* 15 FCC Rcd 6453 (2000).

48 In any event, the Bureau did not prescribe a new rate, but merely directed the parties to negotiate further. *Bureau Order* at ¶ 17. Any more detailed review of the evidence can await an actual prescription.

CONCLUSION

The captioned petitions for review should be dismissed. If the Court chooses to reach the merits of this case, the decision of the FCC's Cable Services Bureau should be affirmed.

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Certificate of Compliance

Pursuant to Rule 37(a) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief contains 11,895 words.

Gregory M. Christopher

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Alabama Power Company, et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

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