BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 11-1215

GULF POWER CO.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties, intervenors, and amici appearing before the Federal Communications Commission in the proceedings leading to the order on review are the Florida Cable Telecommunications Association, Inc., Bright House Networks, LLC, Comcast Cablevision of Panama City, Inc., Cox Communications Gulf Coast, LLC, Mediacom Southeast, LLC, and the Gulf Power Company.

All parties, intervenors, and amici appearing before this Court are listed in the Petitioner's Brief.

B. Ruling Under Review

Fla. Cable Telecomms. Ass'n, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Commc'ns Gulf, L.L.C., Cable Operators v. Gulf Power Co., Decision, 26 FCC Rcd 6452 (2011) ("*Order*") (J.A.).

C. Related Cases

The *Order* has not previously been before this Court. Counsel are not aware of any other related cases pending before this Court or any other court.

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** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Act	Pole Attachments Act of 1978, *codified at*, 47 U.S.C. § 224
ALJ	Administrative Law Judge
Cable Operators	Florida Cable Telecommunications Association, Inc.; Bright House Networks, LLC; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf Coast, L.L.C.
Cable Rate	The maximum pole attachment fee permitted under section 224(d)(1) and the FCC's regulations.
Commission (or FCC)	Federal Communications Commission
Gulf Power	Gulf Power Company

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

In the *Order* on review,[1] the Federal Communications Commission ("FCC" or "Commission") held that Gulf Power Company violated the Pole Attachments Act, 47 U.S.C. § 224, and the Commission's rules, by demanding price increases of more than 500 percent for allowing cable television providers to exercise their statutory right to access the power

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[1] *Fla. Cable Telecomms. Ass'n, Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Commc'ns Gulf, L.L.C., Cable Operators v. Gulf Power Co.*, Decision, 26 FCC Rcd 6452 (2011) ("*Order*"), *aff'g* Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 22 FCC Rcd 1997 (ALJ 2007) ("*Initial Decision*").

company's utility poles for the purpose of attaching cable transmission wires. Gulf Power contended that the United States Constitution entitled it to impose rates substantially higher than those permitted under the Pole Attachments Act. The Commission, applying *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003), a decision that upheld against a constitutional challenge the FCC's application of the statutory maximum pole attachment rate, rejected Gulf Power's argument. The Commission concluded that, consistent with *Alabama Power*, payment of the maximum rate under the Pole Attachments Act and the FCC's regulations does not entail an unconstitutional taking in violation of the Fifth Amendment.

The questions are as follows:

1. Are Gulf Power's arguments challenging the FCC's application of the test for just compensation set forth in *Alabama Power* procedurally barred by the doctrines of judicial estoppel and/or collateral estoppel?

2. If Gulf Power's arguments are not procedurally barred, does the *Alabama Power* standard correctly determine the just compensation for the taking of utility pole space, and did the FCC reasonably apply that standard to the facts of this case?

3. Are the Commission's findings supported by substantial evidence?

STATUTES AND REGULATIONS

Relevant statutes and regulations are set out in the appendix attached to this brief.

COUNTERSTATEMENT OF THE CASE

This case represents the fourth attempt by Gulf Power or its corporate affiliate (Alabama Power Co.) to challenge the constitutionality of the Pole Attachments Act.[2] Having failed three times in the Eleventh Circuit,[3] Gulf Power now invites this Court to reach a different result.

For many years before this litigation, Gulf Power charged cable television providers rates at or near the regulated Pole Attachment rate, approximately $6.00 per utility pole, per year. In 2000, however, Gulf Power deviated sharply from its longstanding pricing. It notified cable television systems that it was unilaterally raising its pole attachment rates by over 500

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[2] Gulf Power and Alabama Power are wholly owned subsidiaries of Southern Co. *See* Gulf Power Br. at iii (Southern Co. owns 100 percent of the common stock of Gulf Power).

[3] *See Gulf Power Co. v. U.S.*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*") (rejecting facial constitutional attack on the Pole Attachments Act); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"), *rev'd*, *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co*., 534 U.S. 327 (2002) (dismissing as unripe a facial attack on the FCC's implementing rules); *Alabama Power*, 311 F.3d 1357 (rejecting an as-applied Fifth Amendment challenge). Gulf Power's affiliate, Georgia Power Company, also unsuccessfully raised a Fifth Amendment challenge to a Commission-imposed pole attachment rate. *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc*., 346 F.3d 1033, 1036 (11th Cir. 2003).

percent, to $38.06 per pole, per year. This new rate was substantially higher than the maximum regulated rate permitted under the statute.

This precipitous rate increase led various cable television operators to file a complaint with the FCC. The Commission ruled that Gulf Power's increased rates violated the Pole Attachments Act and the FCC's rules. Applying the constitutional standard set forth in *Alabama Power*, the Commission held that the regulated pole attachment rate under the Pole Attachments Act and the Commission's implementing rules provides Gulf Power just compensation for the use of space on its utility poles by cable television providers, and therefore comports with the Takings Clause of the Fifth Amendment.

Gulf Power now petitions this Court for review of the FCC's *Order*.

COUNTERSTATEMENT OF THE FACTS

I. BACKGROUND

A. The Pole Attachments Act of 1978

Since the inception of cable television, cable television companies have leased space on existing telephone or electric utility poles 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 for an annual or other periodic fee, and pay an additional one-time "make-ready" fee to reimburse the utility for the initial expenses it would not

have incurred but for the cable attachment (such as the cost of preparing the poles and attaching the wires). This arrangement benefitted cable television providers and produced a new stream of revenue for utility pole owners, which otherwise received no income from the unused space on their poles.

Responding to concerns that utility pole owners were "charg[ing] monopoly rents"[4] when leasing space on their poles, Congress enacted the Pole Attachments Act of 1978, which is codified (as part of the Communications Act) at 47 U.S.C. § 224. Congress recognized that "[o]wing to a variety of factors, including environmental or zoning restrictions," and the substantial costs of erecting a separate pole network or entrenching cable underground, the cable company usually has no alternative but to use available space on existing utility poles.[5] Congress further recognized that the "local monopoly in ownership or control of poles" gives utility companies the ability to charge unreasonably high pole attachment rates.[6]

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[4] *Nat'l Cable*, 534 U.S. at 330.

[5] S. Rep. No. 95-580, 95th Cong. 1st Sess. at 12-13 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 120-121 (1977 Senate Report). *See FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("[u]tility company poles provide . . . virtually the only practical physical medium for the installation of television cables.").

[6] 1977 Senate Report at 12. *See Nat'l Cable*, 534 U.S. at 330; *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 577 (D.C. Cir. 2002) ("[U]tilities often exploited their market position to charge excessively high attachment rates.").

Section 224(b) of the Act directs the FCC to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions." 47 U.S.C. § 224(b)(1). *See generally Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 929 (D.C. Cir. 1993). By giving the Commission this authority, Congress sought "to curb the extraction of monopoly profits by utilities from cable operators in need of pole space." *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1267 (5th Cir. 1986). *See Nat'l Cable*, 534 U.S. at 341 ("The very reason for the [Pole Attachment] Act is that − as to wires − utility poles constitute a bottleneck facility, for which utilities could otherwise charge monopoly rents.").

Section 224(d)(1) of the Act specifies that a cable attachment 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 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 statutory minimum rate the Commission can allow 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 statutory maximum allowable rate is the "fully allocated" cost of the attachment – that is, a rate that includes a proportionate share of the capital and operating costs of the utility pole, conduit, or right-of-way. *See Florida Power*, 480 U.S. at 253. The upper bound (a share of the fully allocated or fully distributed costs) and the lower bound (incremental or marginal cost) define a zone of reasonable pole attachment rates.

The Commission codified in its rules a cost methodology that produces rates in the upper end of the range of reasonableness prescribed in section 224(d)(1), *i.e.,* the fully allocated cost of a pole attachment.[7] These fully allocated costs include components for the utility company's administrative, maintenance and depreciation expenses, income taxes, and a return on investment (or profit). *Amendment of Comm'ns Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12121 (¶ 28) (2001). This cost methodology, known as

[7] *See*, *e.g.*, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, Report and Order, 2 FCC Rcd 4387, 4388 (¶ 6) (1987), *recon. denied*, 4 FCC Rcd 468 (1989).

the Cable Formula or Cable Rate, yields the maximum pole attachment fee permitted under section 224(d)(1).[8]

B. *FCC v. Florida Power*

In 1987, the Supreme Court in *Florida Power* rejected a claim that the Pole Attachments Act, as originally enacted, effected a taking of property without just compensation in violation of the Fifth Amendment. 480 U.S. 245. The Court held that there was no *per se* taking because the Act at that time did not require utilities to give cable operators access to space on utility poles. The Court also determined that the rates computed under the Cable Formula, which provided for the recovery of fully allocated costs, are not confiscatory and therefore satisfy the constitutional standards for rate regulation. *Id.* at 254.

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[8] 47 C.F.R. § 1.1409(e)(3). That subsection prescribes the following formula to determine the maximum rate: Maximum Rate = (Space Occupied by Attachment/Total Usable Space) x Net Cost of Bare Pole x Carrying Charge Rate. *See Order* at n.7 (J.A.).

C. The 1996 Amendments Providing for Nondiscriminatory Access

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq*. ("1996 Act"), Congress made fundamental changes to telecommunications regulation designed to eliminate legal and economic barriers to entry in local telephone and other telecommunications markets. *See generally AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Among these changes were amendments to the Public Utility Holding Company Act, 15 U.S.C. § 79, *et seq.* (repealed 2005), allowing utility companies to enter communications businesses from which they previously had been barred. *See* 15 U.S.C. § 79z-5c (as amended by section 103 of the Telecommunications Act of 1996).

Congress recognized that the entry of utilities companies into telecommunications markets would give those companies an incentive to refuse to enter into pole attachment agreements with cable or telecommunications competitors on a nondiscriminatory basis. To address this anticompetitive concern, Congress added a mandatory access provision to the Pole Attachments Act. That provision requires any utility that chooses to use its poles, ducts, conduits, or rights-of-way, at least in part, for wire communications 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." 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).

The 1996 Act made no modification to the range of reasonable rates prescribed by section 224(d). Thus, after the adoption of the 1996 Act, "as before, the FCC determines the compensation a utility may receive for providing access by setting a 'just and reasonable' rate within the range of minimum to maximum rates Congress set forth in the Act." *Gulf Power I*, 187 F.3d at 1327.

D. Challenges to the Amended Pole Attachments Statute and Rules

Following the enactment of the mandatory nondiscriminatory access provisions of the 1996 Act, Gulf Power took the position that it had a constitutional right to charge pole attachment rates in excess of the maximum prescribed by the Cable Formula and section 224(d). In a series of cases filed in the Eleventh Circuit, Gulf Power, its affiliated company Alabama Power, and other utilities argued that limiting pole attachment rates to the maximum rate permitted by section 224 and the FCC's implementing rules constitutes a taking of their property without just compensation in violation of the Fifth Amendment.

1. *Gulf Power I*

In *Gulf Power I*, 187 F.3d 1324, Gulf Power and other utilities filed a civil action seeking a declaration that the Act's mandatory access provision violates the Fifth Amendment because it effects a *per se* taking of utility property without an adequate process for securing just compensation. The utilities specifically argued that they might not receive just compensation because the FCC cannot lawfully prescribe a rate above the maximum rate prescribed in section 224(d) and a reviewing court cannot order the Commission to set a rate above the maximum statutory rate. *Id.* at 1336.

The Eleventh Circuit agreed that the mandatory access provision effects a physical taking of a utility's property, *id.* at 1328-31, but rejected the utilities' claim that the statute is facially unconstitutional, *id.* at 1331-38. The court explained that the FCC's initial rate determination, coupled with the availability of judicial review of that administrative decision, provides a constitutionally adequate process for ensuring that a utility receives just compensation. In response to the utilities' argument that the process would be inadequate if the just compensation rate exceeded the statutory rate, the court pointed out that Gulf Power and the other utilities had "not shown the just compensation rate will *ever* fall outside the statutory range, let alone that it will do so in most cases." *Id.* at 1336 n.9. The court held that the

hypothetical "possibility that the just compensation rate might exceed the statutory maximum rate" was not ripe for decision. *Id*. at 1338.

2. *Gulf Power II*

The same day the utility companies sought declaratory relief in *Gulf Power I*, a group of utilities companies including Gulf Power sought judicial review of a Commission rulemaking order that, among other things, adopted a formula to govern pole attachment rates used in the provision of telecommunications services. *See Gulf Power II*, 208 F.3d at 1269. The utilities argued that the rules facially violate the Fifth Amendment because they effectuate a taking of utility property without just compensation. The Court dismissed that constitutional argument as unripe for judicial review, explaining that it "is essentially the same argument the utilities made to the *Gulf Power I* panel." *Id*. at 1272, 1273.

3. *Alabama Power v. FCC*

Gulf Power renewed its constitutional challenge in *Alabama Power*, 311 F.3d 1357. That case involved the lawfulness of Alabama Power Company's increase of its pole attachment rates to levels greatly exceeding the maximum rate permitted under section 224 and the Cable Formula. Gulf Power and its affiliate, Alabama Power, each filed petitions for review of a decision of the Commission's Cable Services Bureau finding that the

proposed increases were unreasonable, and therefore invalid, under section 224 and the Commission's rules. Those petitions were consolidated with Alabama Power's subsequent petition for review of the Commission order affirming the staff decision. *See id.* at 1366-67.

Both utilities, which jointly litigated the case before the Eleventh Circuit,[9] argued that the Fifth Amendment standard for determining just compensation to a utility company for the use of pole space should be based upon replacement cost or fair market value, which often yields a rate substantially in excess of the regulated rate.

The Eleventh Circuit issued its decision in November 2002. The court first dismissed on jurisdictional grounds the petitions for review of the Cable Services Bureau decision that had been filed by Gulf Power and Alabama Power. 311 F.3d at 1366-67. Because Alabama Power had properly invoked the court's jurisdiction by filing a petition for review of the Commission-level order, however, the court decided the merits of the Fifth Amendment challenge. *See id.* at 1367-71.

[9] These two wholly owned subsidiaries of the Southern Company retained the same attorneys, who filed joint briefs on behalf of both companies. An attorney representing both Alabama Power and Gulf Power likewise presented oral argument before the Eleventh Circuit.

Although the Eleventh Circuit viewed the mandatory access requirement of section 224(f)(1) as creating a *per se* physical taking, it held that the FCC's cable attachment rate provides just compensation to Alabama Power for the use of its space on the utility pole and therefore does not violate the Takings Clause of the Fifth Amendment. The court pointed out that "just compensation is determined by the loss to the person whose property is taken." *Id.* at 1369. Unlike most property, the court explained that space on utility poles is not necessarily "rivalrous," *i.e.*, the loss to the owner may not equal the gain to the taker. Thus, when there is sufficient space on the pole to accommodate all attachments, the court reasoned that the cable company's attachments "do[] not foreclose any other use" of the pole and the power company incurs "no lost opportunity . . . or other burden" by the attachment. *Id.* at 1369. In such cases, the court explained that the "marginal cost" – that is, "the increment to total cost that results from producing an additional increment of output" (*SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981)) (quotations omitted) – "will be sufficient to compensate the pole owner." 311 F.3d at 1370.

The Eleventh Circuit pointed out that Alabama Power had made no allegation, let alone a showing, that its poles were at full capacity. *Id.* at 1370. Because a rate based upon the Cable Formula enables a utility to

recover far more than the marginal costs of accommodating a new attachment, the court held that the regulated rate "necessarily provides just compensation." *Id.* at 1370-71.

The court, however, held open the possibility that if a utility company were to show that space on its poles were rivalrous, a cable attachment rate based upon the Cable Formula might not provide just compensation. *Id.* at 1370. The Court determined that a utility company could advance a claim that a rate based upon the Cable Formula does not provide just compensation by satisfying a two-part test. Under that test, the utility company must establish "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." *Id.*

Alabama Power filed a petition for rehearing *en banc*, which was denied by the Eleventh Circuit. *Alabama Power Co. v. FCC*, 57 Fed. Appx. 416 (Table) (11th Cir. 2003). The Supreme Court subsequently denied certiorari. *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003).

II. THIS PROCEEDING

A. Background

Comcast Cablevision of Panama City, Inc., Media Southeast L.L.C., Cox Communications Gulf Coast, and Time Warner Cable (collectively the "Cable Operators") provide cable service in communities throughout Florida. For many years, these companies (or their predecessors-in-interest) voluntarily had entered into contracts with Gulf Power to lease space on Gulf Power's poles. Compl. (July 10, 2000) at 4 (¶ 11) (J.A.). During the July 1999-June 2000 time period, these contracts required the Cable Operators to pay Gulf Power approximately $6.00 per pole, per year. *Order* at ¶ 9 (J.A.). The contracts also required the Cable Operators to pay the cost of all make-ready work[10] needed to accommodate their attachments, plus a 15 percent markup if Gulf Power performed the make-ready work. *Order* at ¶ 9 (J.A.); *Initial Decision* at ¶ 11 (J.A.).

In 2000, Gulf Power notified the Cable Operators that, at the expiration of the contract term, the annual pole attachment rates would increase to $38.06 per pole, per year, an increase that exceeded by more than 500 percent both the existing pole attachment rates and the maximum permissible rate

[10] "'Make-ready' generally refers to the modification of poles or lines or the installation of equipment to accommodate new attachments." *Order* at n.26 (J.A.).

under the Cable Formula. *See Order* at ¶ 19 (J.A.). Gulf Power maintained that it would no longer provide voluntary access to its poles and that henceforth any attachments would be governed by the Act's mandatory access provision for which it was entitled to just compensation under the Takings Clause of the Fifth Amendment. Gulf Power Co.'s Resp. to Compl. (Aug. 9, 2000) (J.A.).

B. Initial Complaint Pleadings

On July 10, 2000, the Cable Operators filed with the FCC's Enforcement Bureau a complaint against Gulf Power alleging violations of section 224. Compl. (J.A.). The Cable Operators alleged that Gulf Power's "exorbitant" rate of $38.06 per pole did not "comply with the Commission's methodology for calculating pole attachment rates." *Id.* at 8 (J.A.).[11] The Cable Operators also claimed that Gulf Power violated section 224 and the Commission's rules by unilaterally terminating the existing pole attachment agreements and forcing the Cable Operators to accept massive rate increases. The Cable Operators asked the Commission to, *inter alia*, declare the $38.06 pole attachment rate unlawful, prohibit any rate increase that exceeds the

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[11] The Cable Operators alleged that the rates in their current contracts with Gulf Power slightly exceeded the maximum rate under the Cable Formula but they had "no dispute" with paying the moderately higher rates to which they had agreed. Compl. at 7 n.4 (J.A.).

maximum authorized by the Commission's rules, and order Gulf Power to pay refunds. *Id.* at 8-9 (J.A.).

In response, Gulf Power conceded that its proposed price "does not comply with the Commission's methodology for calculating pole attachment rates." Resp. to Compl. at 34 (¶ 28) (J.A.). It also "[a]dmit[ted] that the Commission's cable rate calculation formula yields an annual attachment rate under [s]ection 224 of approximately $4.61." *Id.* at 22 (¶ 19) (J.A.). Claiming that the pole attachments are a taking under the Act's mandatory access provisions, however, Gulf Power asserted that it was entitled to just compensation under the Fifth Amendment and that the Cable Formula failed to provide just compensation. Gulf Power Resp. to Compl. at 34-48 (¶ 28) (J.A.).

C. Enforcement Bureau Decision and Reconsideration

In May 2003, the FCC's Enforcement Bureau, acting under authority delegated to it by the Commission, issued an order granting the complaint. Memorandum Opinion and Order, 18 FCC Rcd 9599 (2003) ("*Bureau Decision*") (J.A.). The Bureau found that Gulf Power had failed to justify the $38.06 rate using the Cable Formula and thus concluded that the rate increase is unreasonable under section 224 and the Commission's rules. *Id.* at ¶ 17 (J.A.). The Bureau ordered that the rates contained in the parties'

prior pole attachment agreements remain in effect, pending further negotiations between the parties. *Id.* at ¶ 3.

The Bureau also rejected Gulf Power's assertion that the Cable Formula fails to provide just compensation under the Takings Clause of the Fifth Amendment. The Bureau explained that the Commission, in the agency order affirmed by *Alabama Power*, had determined that the Cable Formula, plus the payment of make-ready expenses, provides more than "just compensation." *Id.* at ¶ 15 (citing *Alabama Cable Telecomms. Ass'n, Comcast Cablevision of Dothan, Inc. et al. v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12223-36 (¶¶ 32-61) (2001), *aff'd, Alabama Power v. FCC*, 311 F.3d 1357(11th Cir. 2002). The Bureau also explained that Gulf Power had submitted no evidence in this proceeding that would satisfy the two-part test articulated by the Eleventh Circuit's *Alabama Power* decision. *Id.* at ¶ 15 (J.A.).

On June 23, 2003, Gulf Power asked the Enforcement Bureau to reconsider its decision and set the proceeding for a full evidentiary hearing. Gulf Power Co.'s Pet. for Recons. and Req. for Evidentiary Hr'g (June 23, 2003) ("Gulf Power Pet.") (J.A.). Gulf Power pointed out that the Eleventh Circuit's decision in *Alabama Power* was issued after the record in this case had closed. As a result, Gulf Power claimed that it had no opportunity to

present evidence specifically targeted to the two-part *Alabama Power* test relied upon by the Bureau in rejecting its constitutional claim.

Although Gulf Power argued that *Alabama Power* was incorrectly decided, it told the Bureau that once that case becomes "final, either through denial of certiorari review or an ultimate ruling on the merits by the Supreme Court, it will be binding upon the FCC — it will set the standard." Gulf Power Co.'s Reply to Complainants' Opp'n to Pet. for Recons. (Aug. 13, 2003) at 5-6 ("Gulf Power Reply") (J.A.). Gulf Power argued that a hearing would give it "the opportunity to meet the Eleventh Circuit standard should it [*i.e.*, *Alabama Power*] ultimately stand as *binding precedent*." *Id.* at 4 (J.A.) (emphasis altered). *Alabama Power* became final on October 6, 2003, when the Supreme Court denied certiorari. 540 U.S. 937.

In September 2004, the Enforcement Bureau granted Gulf Power's petition and instituted a formal evidentiary hearing before an Administrative Law Judge ("ALJ") to permit Gulf Power to try to show that it satisfied the two-part *Alabama Power* standard. Hearing Designation Order, 19 FCC Rcd 18718 (2004) (J.A.). Because Gulf Power was the moving party with respect to the Petition, the Bureau ruled that Gulf Power would bear the burden of proof. *Id.* at ¶ 8 (J.A.).

D. Evidentiary Hearing Before an ALJ

In April 2006, an ALJ conducted a five-day evidentiary hearing in which the parties presented documentary evidence and cross-examined witnesses. In his opening presentation, Gulf Power's attorney characterized *Alabama Power* as "a very important case that applies to this proceeding. Gulf Power may not like what it says, but . . . for the purposes of this proceeding, we have to live with what it says." Tr. at 638 (J.A.).

Gulf Power sought to show that its poles were at full capacity on the basis of three types of evidence: (1) an analysis of the space specifications of typical poles and space requirements showing that Gulf Power could not accommodate more than three attachments without performing make-ready work (*Order* at n.104 (J.A.); *Initial Decision* at ¶¶ 12-13 (J.A.)); (2) a survey of a portion of its poles, known as the Osmose Study, that showed that 74 percent of those poles could not accept additional attachments without make-ready adjustments or reconfigurations (*Order* at ¶ 15 (J.A.); *Initial Decision* at ¶¶ 15-17 (J.A.)); and (3) characteristics of 100 exemplar poles, many of which would require make-ready before they could accommodate an additional attachment (*Order* at ¶ 15) (J.A.)). Gulf Power classified poles that could accommodate additional attachments through make-ready work to be at full capacity. *See* Tr. at 654.

The Cable Operators' economic expert, Patricia Kravtin, testified that a pole that can accommodate an attachment without displacing or excluding an existing attachment is not at full capacity. Compls. Exh. A, at 31-32 (J.A.). Ms. Kravtin explained that "if the addition of another attachment on the pole does not preclude the pole owner's ability to accommodate another attachment or another use, then by definition there is available or effective capacity on the pole." *Id.* at 26 (J.A.). Ms. Kravtin stated further that "the ability to perform make-ready work on a pole provides direct evidence of the nonrivalrous condition of the pole." *Id.* at 32 (emphasis omitted) (J.A.). Michael Dunn, one of Gulf Power's witnesses, acknowledged on cross-examination that "a rearrangeable pole," *i.e.*, a pole that could accommodate another attachment with make-ready work, "would not be at full capacity." Tr. at 726-27 (J.A.).

Ms. Kravtin testified that Gulf Power "routinely performs make-ready [and] rearrangements . . . for itself, its joint pole owners, and other third-party attachers" to accommodate new attachments. Compls. Exh. A, at 33 (J.A.). Gulf Power did not dispute that testimony.[12]

[12] *See Order*, FCC 05M-50 (ALJ, released Oct. 12, 2005) (J.A.) (Gulf Power admits its "historical willingness to accommodate attachers by performing make ready."); *Initial Decision* at ¶ 23 (J.A.).

Gulf Power presented no evidence showing that it was unable to accommodate any attachment due to insufficient space on its poles. *Id.* at ¶ 23 (J.A.). Mr. Dunn conceded that he was unaware of any instances in which Gulf Power denied any party access to a utility pole "because another cable operator was there." Compls. Exh. 86 (Dunn Deposition) at 129 (J.A.). *See Initial Decision* at ¶ 15 (J.A.).

E. The ALJ's Initial Decision

In an order released in January 2007, the ALJ, applying the *Alabama Power* test, held that "Gulf Power ha[d] failed to show that any pole is at full capacity and that (1) the Cable Formula has cost it an opportunity to rent space to someone else at a higher rate or that (2) it is prevented from putting the space to a higher valued use within its own operations." *Initial Decision* at ¶ 26 (J.A.).

The ALJ rejected Gulf Power's argument that a pole is at full capacity if any make-ready work is needed to accommodate an attachment. *Id.* at ¶ 22 (J.A.). The ALJ pointed out that make-ready modifications and rearrangements on poles "are normal to accommodate new attachments" and that "Gulf Power is never out of pocket" because the cable operator pays make-ready expenses. *Id.* at ¶ 19 (J.A.). The ALJ further observed that Gulf Power had "[failed to identify] any instance when it was prevented from

accommodating an attachment because of cable attachments." *Id.* at ¶ 23 (J.A.).

Based on the record evidence, the ALJ found that Gulf Power had "failed to prove . . . any pole's utilized capacity makes impossible the attachment of any potential user waiting in the wings, or that [the Cable Operators'] cable attachments deny Gulf Power an alternative opportunity of higher value." *Id.* at ¶ 28 (J.A.). The ALJ therefore concluded that "Gulf Power has not lost any opportunity and . . . [its] utility poles are 'for practical purposes nonrivalrous.'" *Id.* at ¶ 20 (quoting *Alabama Power*, 311 F.3d at 1369) (J.A.). It followed that the regulated rate, "which provides for recapturing allocated costs," is "entirely just and equitable." *Id.* at ¶ 27 (J.A.).

F. Gulf Power's Exceptions to the ALJ's *Initial Decision*

On March 2, 2007, Gulf Power filed exceptions to the *Initial Decision*. In its Exceptions, Gulf Power asserted that *Alabama Power*, while wrongly decided, "remains the law" and must be "harmonize[d] . . . with other binding precedent." Gulf Power Exceptions (Mar. 24, 2007) at 4 (J.A.).

Gulf Power argued that the "most critical error" in the *Initial Decision* is the ALJ's determination that a utility pole is not at full capacity "so long as

capacity can be expanded to accommodate a new attacher." *Id.* at 1 (J.A.). Gulf Power claimed that the ALJ's consideration of make-ready work in ascertaining whether a pole is at full capacity is inconsistent with *Alabama Power*, other precedent from the Eleventh Circuit and section 224(f).[13] *Id.* at 4-10 (J.A.). Gulf Power did not contest the *Initial Decision*'s finding that it had failed to prove that it could put the pole space occupied by the Cable Operators to a higher-valued use in its own operations.

G. The *Order* on Review

On April 12, 2011, the Commission, in the *Order* on review, denied Gulf Power's exceptions and affirmed the ALJ's determination that Gulf Power failed to make "the evidentiary showing required by . . . *Alabama Power* to seek compensation in excess of the Cable Rate for the Cable Operators' attachments." *Order* at ¶ 23 (J.A.). The Commission thus concluded that Gulf Power failed "to show that it is entitled to compensation above the Cable Rate." *Id.* at ¶ 37 (J.A.).

The Commission held that Gulf Power failed to satisfy its burden of showing its poles are at full capacity under the *Alabama Power* standard. *Id.*

[13] Section 224(f) states that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, 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).

at ¶¶ 24-31 (J.A.). The Commission explained that a utility pole is not at full capacity "when an electric utility can accommodate a new attachment, in compliance with applicable safety codes, by using conventional techniques that the utility uses in its own operations." *Id.* at ¶ 24 (J.A.). The Commission concluded that Gulf Power had failed to show specific poles that could not accommodate a new attachment without use of an unconventional attachment technique or a pole replacement. *Id.* at ¶¶ 24-25 (J.A.).

The Commission rejected Gulf Power's assumption, in determining whether a pole is at full capacity, that the existing attachments on that pole are static. The Commission explained that Gulf Power's view, if accepted, "would give utilities the ability to avoid their statutory obligation to provide access to usable pole space based solely on the placement of their own attachments." *Id.* at ¶ 28 (J.A.).

The Commission also rejected as fundamentally flawed the Osmose study and the exemplar poles evidence on which Gulf Power relied to show full capacity. Those studies, the Commission explained, incorrectly classified a pole at full capacity whenever any make-ready work — "no matter how insignificant" — was required to accommodate a new attachment. *Id.* at ¶ 25 (J.A.). The Commission likewise found unpersuasive Gulf Power's claim that it had showed "structural" rivalry on its poles based upon the amount of

usable space for attachments on a typical joint-use pole and "systematic" rivalry based on spacing requirements when a pole has multiple attachers. *Id.* at n.104. (J.A.). The Commission pointed out that "Gulf Power can and does accommodate multiple attachers on its poles, and it failed to identify a single instance when it was unable to accommodate a new attacher because of existing cable attachments." *Id.* The Commission further explained that the notion of "'systematic' rivalry" was inconsistent with the requirement in *Alabama Power* that the utility company prove "full capacity 'with regard to each pole.'" *Id.* at ¶ 25 (J.A.) (quoting *Alabama Power*, 311 F.3d at 1370).

The Commission rejected Gulf Power's claim that the agency's approach to full capacity is inconsistent with *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), and section 224(f). *Order* at ¶ 26 (J.A.). The Commission acknowledged that the Eleventh Circuit in *Southern Company* had invalidated an FCC rule requiring utilities companies to expand capacity to accommodate a proposed attachment when the parties had agreed that capacity on a given pole was insufficient, but pointed out that the court, in affirming other pole attachment rules, upheld as reasonable the agency's construction of the phrase "insufficient capacity" in section 224(f) to signify "the actual absence of usable physical space on a pole." *Id.* (quoting *Southern Co.*, 293 F.3d at 1349) (J.A.). The Commission explained that its

analysis of full capacity in this case is consistent with the construction of "insufficient capacity" upheld in *Southern Company*. *Id.* at ¶ 26 (J.A.).[14]

The Commission held that Gulf Power had failed to show under the second part of the *Alabama Power* test that other buyers were "waiting in the wings" or that it had a higher valued use for the pole space sought by the Cable Operators. *Order* at ¶¶ 32-35 (J.A.). The "linchpin" of this part of the test, the Commission explained, "is proof of rivalry for pole space." *Id.* at ¶ 33 (J.A.). And to demonstrate such rivalry, Gulf Power must show that "someone was competing with the Cable Operators for space on poles that were at full capacity" so that "'forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself)'" would result in a lost opportunity. *Id.* (quoting *Alabama Power*, 311 F.3d at 1370).

The Commission found that "Gulf Power failed to adduce evidence that anyone (including Gulf Power) is competing for the use of space

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[14] The Commission also pointed out that its analysis is consistent with the agency's interpretation of the phrase "insufficient capacity" in its recent broadband rulemaking order. *Order* at n.84 & ¶ 22 (J.A.) (citing *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5341-42 (¶¶ 231-34) (2011) ("*Broadband Rulemaking Order*"), *appeal docketed sub nom. Am. Elec. Power Serv. Corp. v. FCC*, No. 11-1146 (D.C. Cir. filed May 18, 2011)).

occupied by the Cable Operators on poles that are at full capacity." *Id.* at ¶ 34 (J.A.). The Commission found that Gulf Power's evidence regarding the higher pole attachment rents that the Cable Operators pay to another utility company and the higher pole attachment rents other attachers pay to Gulf Power "shed[] no light on whether there is rivalry for space on Gulf Power poles occupied by the Cable Operators." *Id.* The Commission also found unpersuasive Gulf Power's evidence of high pole attachment prices in unregulated markets because "the relevant market in this case is regulated, as directed by Congress." *Id.*

Finally, the Commission rejected Gulf Power's claim that, under *Alabama Power*, a buyer "waiting in the wings" (311 F.3d at 1390) can be a hypothetical buyer rather than an actual buyer. *Id.* at ¶ 35 (J.A.). The Commission explained that "[r]ivalry for space on poles at full capacity must be real, not hypothetical. Otherwise, Gulf Power has not suffered any lost opportunity." *Id.* at n.122 (J.A.).

SUMMARY OF ARGUMENT

1. The bulk of Gulf Power's arguments before this Court challenge the FCC's application in the *Order* of the constitutional standard for just compensation applied by the Eleventh Circuit in the *Alabama Power* case. These arguments are procedurally barred. First, the doctrine of judicial

estoppel bars Gulf Power from arguing that the Commission erred in applying the *Alabama Power* standard without conducting its own independent analysis of the correctness of that decision in adjudicating the Cable Operators' complaint. Gulf Power repeatedly told the Commission in the proceedings below that the agency was bound by *Alabama Power.* The utility company should not now be heard to argue that the Commission erred in applying that case.

The doctrine of issue preclusion also bars Gulf Power's substantive constitutional challenge to the takings standard adopted in *Alabama Power*. Gulf Power (joined by its corporate affiliate) fully litigated before the Eleventh Circuit the appropriate Fifth Amendment standard for determining just compensation to a utility for the use of its pole space. Having lost before the Eleventh Circuit, it is collaterally estopped from relitigating the same issue in this Court.

2. Even if Gulf Power's substantive constitutional argument were not procedurally barred, it lacks merit. The *Alabama Power* standard correctly measures just compensation for the taking of utility pole space in terms of the utility company's loss. The standard appropriately recognizes that where a cable attachment does not foreclose any other use of the pole space, the utility company's cost is very small — no more than the marginal costs of the cable

attachment — and thus the Cable Rate, which exceeds marginal costs, necessarily provides just compensation. On the other hand, where the utility company can show its pole space is rivalrous because its pole is at full capacity and the cable attachment therefore presents an opportunity cost, the *Alabama Power* standard appropriately recognizes that the utility might be entitled to greater compensation. Because *Alabama Power* and the FCC's *Order* held that just compensation was the higher Cable Rate (not marginal costs), Gulf Power's contention that marginal costs are inadequate compensation is beside the point. Moreover, *Alabama Power* correctly used an alternative to fair market value (which measures the amount a willing buyer would pay to a willing seller) because as to nonrivalrous pole space, the loss to the property holder is not equal to the gain of the property taker. In addition, utility poles are a bottleneck facility and fair market value measures just compensation only where fair market conditions exist.

3. The Commission in its *Order* correctly applied the *Alabama Power* standard. The Commission properly construed the Eleventh Circuit's opinion to require a utility to demonstrate full capacity with regard to each pole; it reasonably determined a pole was not at "full capacity" when a new attachment could be accommodated through rearrangements or with

conventional attachment techniques; and it properly determined that a buyer "waiting in the wings" means an actual buyer, not a hypothetical buyer.

4. Substantial evidence supports the Commission's determinations that Gulf Power had not satisfied its burden of identifying poles that were at full capacity and that the utility company had shown neither the existence of a buyer waiting in the wings nor that a cable attachment had deprived it of a higher-valued use in its own operations. It is undisputed that Gulf Power failed to identify any instance in which it was unable to accommodate a new cable attachment because its utility poles were at full capacity.

THE APPLICABLE STANDARDS OF REVIEW

Gulf Power bears a high burden to establish that the *Order* on review is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. *E.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

To the extent that constitutional claims are not procedurally barred, they are reviewed de novo. *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

ARGUMENT

I. GULF POWER'S ARGUMENTS CHALLENGING THE FCC'S APPLICATION OF *ALABAMA POWER* ARE PROCEDURALLY BARRED.

A. Gulf Power Is Judicially Estopped From Arguing That The FCC Violated the APA By Applying *Alabama Power.*

Ordinarily, parties seeking judicial review of an administrative decision argue that the agency erred by failing to adhere to judicial precedent. In this case, Gulf Power argues that the Commission erred because it *followed* a federal court of appeals' precedent on a matter of constitutional law. *See* Gulf Power Brief at 25 (contending that the Commission unlawfully applied *Alabama Power* without undertaking a "reasoned analysis concerning its validity."); *see also id.* at 24 (application of *Alabama Power* violated the Administrative Procedure Act). Gulf Power does not argue that *Alabama Power* presented distinguishable facts or different legal issues. To the contrary, Gulf Power correctly characterizes *Alabama Power* as "nearly identical" to this case. Gulf Power Petition at 3 (J.A.). Gulf Power's argument reduces to the contention that the Commission was obligated independently to assess the merits of *Alabama Power* in its adjudication (akin

to review by the United States Supreme Court). Gulf Power is estopped from presenting that argument, which is incorrect in any event.

The doctrine of judicial estoppel provides that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). *See Zedner v. United States*, 547 U.S. 489, 504 (2006).

Although critical of *Alabama Power*, Gulf Power repeatedly asserted in the proceedings below that the Commission was bound by that decision. Gulf Power told the Enforcement Bureau in its reconsideration petition that *Alabama Power* is "binding upon the FCC — it will set the standard." Gulf Power Reply at 5-6 (J.A.). Gulf Power likewise told the ALJ in the evidentiary hearing that *Alabama Power* "applies to this proceeding." Tr. at 638 (J.A.). And Gulf Power told the Commission in its exceptions to the *Initial Decision* that *Alabama Power* "remains the law," characterizing that case as "binding precedent." Gulf Power Exceptions at 4 (J.A.). After repeatedly arguing before the Commission that *Alabama Power* is binding law, Gulf Power should not be permitted inconsistently to argue before this

Court that the Commission erred in applying that precedent in the *Order* on review.

In any event, the Commission did not err by following *Alabama Power*. *Alabama Power* is the leading case on the just compensation owed to a utility company for the use of its pole space under the Fifth Amendment. The constitutional analysis in *Alabama Power* has been followed by other panels of the Eleventh Circuit, *see, e.g.*, *Klay v. All Defendants*, 425 F.3d 977, 985 (11th Cir. 2005); *Georgia Power Co*., 346 F.3d at 1036, (rejecting a Fifth Amendment challenge to a Commission-imposed pole attachment rate by another wholly-owned subsidiary of Southern Company). In the nine years since its issuance, *Alabama Power* has never been reversed, overruled, or even criticized by any court. On the precise constitutional issue decided in *Alabama Power*, there is no contrary judicial precedent.

The Commission correctly followed that precedent in this case. Had the FCC deviated from *Alabama Power* in the adjudication and ruled in favor of Gulf Power, the Cable Operators likely would have sought judicial review of that decision in the Eleventh Circuit. And any Eleventh Circuit panel hearing such a challenge, bound by the *Alabama Power* circuit precedent, would have had no choice but to reverse the FCC. Accordingly, Gulf

Power's argument that the FCC abused its discretion in following a dispositive appellate precedent is meritless.

Contrary to Gulf Power's position, adherence to precedent is "a cardinal and guiding principle of adjudication." *California v. FERC*, 495 U.S. 490, 499 (1990). Federal courts of appeals, not administrative agencies, have "special competence" in interpreting the Constitution. *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 200 (5th Cir. 1989). Gulf Power's contention that the Commission had to justify its adherence to *Alabama Power* flies in the face of a fundamental principle of jurisprudence.[15]

B. Issue Preclusion Bars Gulf Power from Challenging the *Alabama Power* Standard.

Gulf Power's substantive challenge to the just compensation standard set forth in *Alabama Power* is barred by the doctrine of issue preclusion (also known as collateral estoppel). That doctrine precludes "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court

[15] *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808 (D.C. Cir. 2002), *see* Gulf Power Br. at 24-25, is inapposite. That case involved whether *Chevron* deference was due to an agency's interpretation of its statute, where it was unclear whether the agency had adhered to a prior judicial construction of the statute because it felt compelled to do so or because it independently believed the interpretation to be reasonable. This Court "remand[ed] the case to the agency for clarification of [its] position." 309 F.3d at 810. *Holland* therefore does not support Gulf Power's claim that the FCC was obligated to justify its application of a dispositive *constitutional* holding by a court of appeals.

determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). By precluding persons from raising issues "that they have had a full and fair opportunity to litigate," *id.* at 892 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)), the doctrine protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153–154.

Under the law of this circuit, issue preclusion bars a party from relitigating an issue decided adversely to that litigant in a prior case where three conditions are met. First, the issue must have been contested and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction. Third, preclusion must not work a basic unfairness to the litigant bound by the earlier determination. *E.g.*, *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (citing *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)).

Each of those elements is present in this case. Thus, Gulf Power is barred from relitigating the constitutional issue that the Eleventh Circuit

resolved against it in *Alabama Power*. First, the appropriate Fifth Amendment standard for determining just compensation to a utility company for the use of its pole space was "'contested by the parties and submitted for judicial determination in the prior case.'" *Martin*, 488 F.3d at 454 (quoting *Yamaha*, 961 F.2d at 254). Gulf Power argued in *Alabama Power* that the standard should be based upon replacement cost or fair market value, which often yields a just compensation rate substantially in excess of the regulated rate. Brief of Alabama Co. and Gulf Power Co., *Alabama Power Co*., 311 F.3d 1357 (Nos. 00-14763-I & 00-15068-D), 2001 WL 34355823. *See* Reply Brief of Alabama Co. and Gulf Power Co., *Alabama Power Co*., 311 F.3d 1357 (Nos. 00-14763-I & 00-15068-D), 2001 WL 34355827.[16] The Commission vigorously opposed that argument.[17]

[16] Preclusion "results from the resolution of a question *in issue*, not from the litigation of specific *arguments* directed to the issue." *Sec. Indus. Ass'n v. Bd. of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990). "[I]t is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha,* 961 F.2d at 254. Thus, where, as here, "the previously litigated 'issue was one of law, new arguments may not be presented to obtain a different determination of that issue.'" *Id.* at 254 (quoting Restatement (Second) of Judgments § 27, cmts at 253 (1982)).

[17] Brief of Federal Communications Commission and the United States of America, *Alabama Power Co.,* 311 F.3d 1357 (Nos. 00-14763-I & 00-15068-D), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310689A1.pdf..

Second, the Eleventh Circuit in reaching its decision squarely rejected Gulf Power's proposed just compensation standard. The court held that the Cable Rate provides a utility company with just compensation under the Fifth Amendment for the use of its space on utility poles unless the utility establishes "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." *Alabama Power*, 311 F.3d at 1370.

Finally, no unfairness will result by precluding Gulf Power from relitigating in this case the just compensation standard that applies to utility pole space. Gulf Power already has presented its views fully on that issue to the Eleventh Circuit, and there is no equitable reason to permit Gulf Power to relitigate its position in this Court.

The Eleventh Circuit ultimately dismissed Gulf Power's petition for review, thereby relegating Gulf Power to the status of a non-party *amicus curiae*, *see Alabama Power*, 311 F.3d at 1357 n.17. But that does not defeat the application of issue preclusion under the specific circumstances in this case. Although issue preclusion generally applies only to parties to the earlier litigation, "the rule against non-party preclusion is subject to exceptions." *Taylor*, 553 U.S. at 893. If a person has "'control' over the litigation in

which th[e] judgment was rendered," *id.* at 895 (quoting *Montana*, 440 U.S. at 154) or openly "'assists in the prosecution or defense of an action in aid of some interest of his own . . . [that person] is as much bound . . . as he would be if he had been a party.'" *Montana*, 440 U.S at 154 (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910)) (ellipses in original).

These principles apply with full force here. Until the day that the *Alabama Power* decision was issued, Gulf Power controlled the prosecution of the case jointly with its corporate affiliate, Alabama Power. Gulf Power was a signatory to the joint petitioners' opening brief; it was a signatory to the joint petitioners' reply brief; and it is our understanding that its counsel presented oral argument on behalf of both utility companies. Notwithstanding the Eleventh Circuit's subsequent dismissal of its petition for review, Gulf Power had a full and fair opportunity to present to the Eleventh Circuit its position on the just compensation standard that applies to the taking of utility pole space.[18]

Issue preclusion is particularly appropriate here, because Southern Company is using its wholly-owned subsidiaries to afford it repeated

[18] The fact that Gulf Power purported to "reserve[] the right to argue that *Alabama Power* was wrongly decided" does not trump application of the doctrine of issue preclusion. *See* Gulf Power Exceptions at 4 n.2 (J.A.). That reservation wrongly presupposes that Gulf Power had a right to relitigate issues it unsuccessfully had raised in the *Alabama Power* case.

opportunities to litigate issues that clearly would be precluded if litigated in its own name. Southern Company has another wholly-owned subsidiary, Mississippi Power Co., which is located in the Fifth Circuit. *See* Southern Co. 2010 SEC 10-K at page 1-1 (Feb. 25, 2011). If this Court considers and rejects on the merits Gulf Power's constitutional claim, under Gulf Power's theory, Mississippi Power could again raise the issue before the Commission, and ultimately seek judicial review in the Fifth Circuit – giving Southern Company subsidiaries *four* opportunities to present the same issue in three courts of appeals. Issue preclusion is designed to prevent such duplicative and wasteful litigation.

II. THE *ALABAMA POWER* STANDARD CORRECTLY DETERMINES JUST COMPENSATION FOR THE TAKING OF UTILITY POLE SPACE.

Consistent with the Eleventh Circuit's decisions in *Alabama Power*, *Gulf Power I*, and *Gulf Power II*, the FCC's *Order* assumes that the nondiscriminatory access provision of the amended Pole Attachments Act

effects a taking of the utility's property.[19] It then applies the just compensation standard set forth in *Alabama Power* to determine whether the regulated Pole Attachments Act rate comports with the Takings Clause of the Fifth Amendment.

Contrary to Gulf Power's argument, the *Alabama Power* standard properly applies established takings jurisprudence to determine the just compensation due to a utility company for the use of its pole space by a cable attachment. Consistent with Supreme Court precedent, the *Alabama Power* standard measures just compensation in terms of "the loss to the person whose property is taken," 311 F.3d at 1369 (citing *United States v. Causby*, 328 U.S. 256 (1946)). *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235-36 (2003). In calculating that loss, *Alabama Power* properly took into account the fact that utility pole space may not be rivalrous, *i.e.*, the cable

[19] The government had taken the position in those prior cases that pole attachments do not effect a per se physical taking. *See*, *e.g.*, *Alabama Power Co. v. United States*, No. 02-1474 (S.Ct.), Government's Brief in Opposition to Petition for Certiorari at 11 n.3 (July 2003), www.justice.gov/osg/briefs/2003/0responses/toc3index.html. While the government continues to believe that its argument is correct, this Court need not reach (and could not properly reach) the question whether a taking occurred in this case. As shown below, even assuming that pole attachments effect a taking of Gulf Power's property, the regulated rate provides just compensation under the Fifth Amendment.

attachment does not necessarily preclude other uses of the pole space. 311 F.3d at 1369.

As the court in *Alabama Power* recognized, where pole space is nonrivalrous, the cable company's attachment does not "foreclose any other use" – *i.e.*, the attachment does not cost the utility anything in terms of "lost opportunity or any other burden." *Id.*[20] Thus, the utility's loss is very slight – no more than the marginal costs of the cable attachment. Because the Cable Rate established by the Commission under the Pole Attachments Act substantially exceeds marginal costs, *Alabama Power* correctly concluded that the Cable Rate "necessarily provides just compensation" for the use of nonrivalrous pole space. *Id.* at 1370-71. On the other hand, where the utility company can show that pole space is rivalrous – by demonstrating that the pole is at full capacity and the cable company's attachment deprives the utility company of a lost opportunity – *Alabama Power* recognizes that the utility company may be entitled to compensation above the Cable Rate. *Id.*

[20] Gulf Power argues that the *Alabama Power* "decision was based upon a fictional presumption (a one-million foot utility pole with only one potential attacher)" and "unsupported hypothetical imagery" unrepresentative of actual utility poles. *See* Gulf Power Brief at 17, 29. Gulf Power's reading is too literal. The court's hypothetical merely illustrated its basic point that utility pole space can be nonrivalrous. *See Alabama Power*, 311 F.3d at 1369.

In an attempt to manufacture a circuit split,[21] *see* Gulf Power Brief at 25, Gulf Power mounts a lengthy attack on the *Alabama Power* decision. This criticism, which pervades the company's brief – while scarcely mentioning the *Order* on review in this case – is beside the point and, in any event, unfounded.

Gulf Power faults *Alabama Power* for allegedly holding that marginal costs are just compensation for the taking of pole space except in certain circumstances. *See id.* at 18, 23, 27-28, 31-34, 56-57. In fact, both *Alabama Power* and the *Order* on review held that the compensation due to the utility company was the Cable Rate, "which provides for much more than marginal cost," *Alabama Power*, 311 F.3d at 1370. *See Order* at ¶ 23 (J.A.) (holding that "the Cable Rate provides just compensation to Gulf Power for the use of pole space by the Cable Operators."). Furthermore, because the Commission's rules entitle Gulf Power to set the annual pole attachment fee pursuant to the Cable Formula, 47 C.F.R. § 1.1409(e)(3), Gulf Power's compensation for the use of its pole space is *never* limited to its marginal costs. In arguing that marginal costs fail to provide just compensation for the

[21] Gulf Power is based in Florida and the poles at issue are located in that State. *See generally Bureau Order* at ¶ 2 (J.A.). The company could have filed its petition for review in the Eleventh Circuit, *see* 47 U.S.C. § 402(a), but instead chose to file its petition for review in this Court.

use of its utility pole space, Gulf Power challenges a holding that the Commission (and the *Alabama Power* court) never made.[22]

Nor is there any merit to Gulf Power's assertion that this case involves "the government commanding Gulf Power to give up property for essentially no compensation." Gulf Power Brief at 27. Because Gulf Power's contracts with the Cable Operators require the cable companies to pay for any applicable make-ready costs, the compensation that the utility company actually receives for the use of its pole space is make-ready expenses (Gulf Power's non-recurring costs) *plus* at least the Cable Rate (which reflects a portion of Gulf Power's fully distributed costs, including a return on

[22] Gulf Power states that it "could locate no . . . reported decision [other than *Alabama Power*] in which marginal costs were considered just compensation for a physical taking." *See* Gulf Power Brief at 32. However, *Metro. Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986), a case cited in Gulf Power's brief, *see* Gulf Power Brief at 32, considered marginal costs to be just compensation in a situation where, as here, the property was non-rivalrous. In that case, the agency ordered a commuter railroad to permit Amtrak use of its track for Amtrak's intercity trains. Amtrak's use of the trackage did not interfere with the commuter railroad's use of the same trackage for its own trains. The court of appeals, assuming that that there was a taking, stated that the "compensation is adequate since the commuter railroad, in obtaining avoidable costs [*i.e.,* marginal costs], will receive what it would have had but for the taking." *Id*. at 297. The court further explained that "the owner . . . will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation." *Id*. The court thus rejected the commuter railroad's "claim that [the] adoption of the avoidable cost methodology is constitutionally infirm." *Id*. at 298.

investment).[23] Indeed, because the attachers separately pay up-front make-ready costs, the annual pole rate is additional revenue that Gulf Power can use to defray expenses that otherwise would be borne by the utility and its ratepayers.

Moreover, although Gulf Power now complains about the inadequacy of its compensation, for decades before enactment of the Act's mandatory access provisions, Gulf Power voluntarily entered into contracts with the Cable Operators that set pole attachment rates at or near the Cable Rate, plus reimbursement for make-ready expenses. *See* Complaint at 2 (J.A.). During that period, Gulf Power was under no obligation to sell under the pre-1996 regime if it thought it was not receiving an adequate return under the regulated rates. Yet it still elected to lease space to cable operators at those rates.

Equally unavailing is Gulf Power's contention that *Alabama Power* erroneously employed the concept of nonrivalrous property in its takings analysis. As noted above, settled law requires just compensation to be measured by "the owner's pecuniary loss," *Brown*, 538 U.S. at 240, not by the gain to the taker. It was entirely appropriate for the *Alabama Power*

[23] Some of Gulf Power's contracts with the Cable Operators entitle it to a pole attachment rate slightly higher than the Cable Rate. See n.11**,** *supra.*

court, in calculating loss to the utility company associated with the cable attachment, to consider that pole space is nonrivalrous, *i.e.*, that the loss to the owner may not equal the gain to the taker. *Alabama Power*, 311 F.3d at 1369. *See Metro. Transp. Auth. v. ICC*, 792 F.2d at 297. This analysis properly took account of the undisputed fact that a cable attachment does not necessarily preclude other uses of the pole space.

Gulf Power argues that utility pole space is rivalrous because "the loss to the owner (use of pole space) is exactly the same as the gain to the taker (use of the pole space)." Gulf Power Brief at 29. That argument misses the mark. The physical property in takings cases is always the same; the question is its value to the parties involved. Where pole space is nonrivalrous, the cable attachment by definition does *not* result in a loss of value to the utility. In that situation, the cable attachment does not prevent the utility from placing its own attachments on the pole, accommodating other attachers, or using that space in any other manner. The slight loss to the utility of nonrivalrous pole space is not congruent with the high value of the pole space to the cable operator, which uses the pole space to provide service to its customers.

Finally, there is no merit to Gulf Power's claim that the *Alabama Power* court erred in not basing compensation upon a market value analysis.

Gulf Power Brief at 32-36. Although market value is ordinarily used as a measure for just compensation, the Supreme Court has long held that there is no "rigid rule for determining what is 'just compensation' under all circumstances." *United States v. Commodities Trading Corp*., 339 U.S. 121, 123 (1950). In some cases, "market value . . . may not be the best measure of value." *United States v. Cors*, 337 U.S. 325, 332 (1949).

As Gulf Power acknowledges, the Supreme Court in *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 — a case that Gulf Power characterizes as "strikingly similar" to this one — "departed" from a fair market valuation. Gulf Power Brief at 25, 56. In *Brown*, the Supreme Court considered the just compensation for a governmental taking of interest earned on certain pooled escrow accounts. The Court found the governmental confiscation of the interest to be a "per se" physical taking and held that just compensation "is measured by the property owner's loss rather than the government's gain." 538 U.S. at 235-36. Because the property holders' net losses were zero (*i.e.,* the transaction costs associated with the property-holder obtaining the interest exceeded the amount of interest earned), the Court held that the just compensation due to the property holders under the Fifth Amendment also was zero. *Id.* at 240.

The interest in *Brown*, like the nonrivalrous utility pole space at issue here, represents the unusual situation where the loss to the property owner (zero) is not equivalent to the property taker's gain (the monetary value of the interest taken). In that atypical circumstance, *Brown* (like *Alabama Power*) recognizes that it is appropriate to use an alternative to fair market value (*i.e.*, what a willing buyer would pay in cash to a willing seller) in measuring the property owner's loss.

Moreover, courts look to fair market value as a measure of just compensation only where fair market conditions exist. *See United States Co. v. Miller,* 317 U.S. 369, 374 (1943) (fair market value "denotes what it fairly may be believed that a purchaser *in fair market conditions* would have given" for the property) (emphasis added) (internal quotations omitted). "Utility poles constitute a bottleneck facility, for which utilities could otherwise charge monopoly rents." *Nat'l Cable*, 534 U.S. at 341. The Supreme Court has long recognized that just compensation does not include compensation for the monopoly power that a particular owner may exert. *Cors*, 337 U.S. at 334 (government cannot be compelled to pay "hold up value" for property taken); *Miller*, 317 U.S. at 375 ("special value to the condemnor . . . must be excluded"); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 79, 81 (1913). The *Alabama Power* court correctly declined to

use a fair market valuation for attachment space on a nonrivalrous utility pole for which there is no free market, particularly when monopoly power is present. For these reasons, Gulf Power's claim that the Cable Operators pay above the regulated rate for pole attachments in unregulated markets is unavailing.

III. THE COMMISSION PROPERLY CONSTRUED THE *ALABAMA POWER* STANDARD.

Gulf Power contends that the Commission erroneously interpreted the *Alabama Power* test in three ways: (1) by requiring Gulf Power to prove full capacity with regard to each pole; (2) by interpreting full capacity as a pole that could not accommodate a new attachment unless Gulf Power employed a unique attachment technique or replaced the pole; and (3) by construing the court's reference to another buyer "waiting in the wings" to refer to an actual buyer, not a hypothetical buyer. Gulf Power Brief at 36-44. None of these contentions has merit.

Per Pole Standard. The *Alabama Power* standard plainly states that "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." 311 F.3d at 1370 (emphasis added). Gulf Power argues that the

Commission misinterpreted this standard because it imposed a requirement that Gulf Power "prov[e] full capacity with regard to each pole." Gulf Power Brief at 37 (quoting *Order* at ¶ 25 (J.A.) (quoting *Alabama Power*, 311 F.3d at 1370). Gulf Power acknowledges that the Commission "accurately quotes" the *Alabama Power* decision, but — stringing together a few isolated references the Eleventh Circuit made to pole networks — contends that the court really intended to permit a utility to make the requisite showing "on either a pole-by-pole basis or along a network of poles." *Id.* at 37 (emphasis omitted).

Gulf Power has not always construed *Alabama Power* in this fashion. In its petition for reconsideration to the Bureau, Gulf Power recognized that "the Eleventh Circuit's standard . . . imposes a *per pole* evidentiary burden upon Gulf Power." Gulf Power Petition at i (J.A.) (emphasis added). That interpretation honors the text of the Eleventh Circuit's decision. Had the court intended to permit a utility company to make the requisite showing on a per network basis, it would not have stated that the utility must make that showing "with regard to each pole." 311 F.3d at 1370. In any event, as Gulf Power has failed to make the requisite showing either on a per pole or a per network basis, its argument, even if it were accepted, would not alter the result in this case.

Full Capacity. The Commission properly determined that a pole is not at "full capacity" "[w]hen a new attacher could be accommodated by rearranging existing attachments or with conventional attachment techniques to the same extent that the utility uses them." *Order* at ¶ 24 (J.A.). As the Commission reasonably explained, taking into account such routine rearrangements and make-ready techniques is necessary to prevent utility companies from avoiding their statutory obligation to provide cable companies access to their poles by the inefficient placement of the attachments. *Order* at ¶ 28 (J.A.).

There is no merit to Gulf Power's claim that the Commission's construction of "full capacity" is inconsistent with the *Alabama Power* and the *Southern Company* decisions. Gulf Power Brief at 8-41. The Court in *Alabama Power* was well aware that utilities routinely use make-ready techniques to accommodate additional attachments, *see* 311 F.3d at 1368, and its definition of full capacity reasonably reflects that understanding. Moreover, as the Commission explained in its *Order*, the Commission's determination is consistent with *Southern Company. See Order at* ¶¶ 26-27 (J.A.). The rule invalidated by the Eleventh Circuit in that case required utilities to expand capacity when the parties had agreed that capacity on a given pole was insufficient. In affirming a different Commission rule,

however, the court explicitly upheld the agency's interpretation of "insufficient capacity" to denote "the actual absence of usable physical space on a pole," *id.* at ¶ 26 (J.A.) (quoting *Southern Co.*, 293 F.3d at 1349)), and the Commission's analysis of full capacity in its *Order* is consistent with that judicially approved construction.

Gulf Power claims that the Commission in construing "full capacity" engaged in the unlawful retroactive application of a rule because it relied upon the statutory definition of "insufficient capacity" set forth in the *Broadband Rulemaking Order*. *See* Gulf Power Brief at 40-41. That argument is unavailing. First, section 405 of the Communications Act bars Gulf Power from presenting issues of law or fact on which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405. *See, e.g.*, *Globalstar, Inc. v. FCC*, 564 F.3d 476, 483-84 (D.C. Cir. 2009). Because Gulf Power did not present its argument to the Commission in a reconsideration petition or otherwise, section 405 bars the company from raising it for the first time on judicial review.

In any event, the argument is without merit. The Commission in this case applied the *Alabama Power* standard in resolving Gulf Power's constitutional claim. In doing so, the Commission reasonably determined that lack of "full capacity" under *Alabama Power* has the same meaning as

"insufficient capacity" under section 224(f), as that statutory phrase is defined in the *Broadband Rulemaking Order*. That application does not constitute retroactive rulemaking.

Buyer Waiting in the Wings. The Commission properly construed *Alabama Power*'s reference to "another buyer of the space . . . waiting in the wings" to connote "an actual buyer, not a hypothetical buyer." *Order* at ¶ 35 & n.122 (J.A.). The *Alabama Power* court reasoned that "[w]hen a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm — a missed opportunity that does not exist in the nonrivalrous scenario." 311 F.3d at 1370. Unless the utility shows an actual attacher that the utility company cannot accommodate (or the deprivation of a higher valued use in its own operations), the court explained that there is no missed opportunity that would justify a pole attachment rate greater than the Cable Rate. *Id.* at 1370. The existence of a hypothetical buyer simply does not show a "'lost opportunity' foreclosed by the government." *Alabama Power*, 311 F.3d at 1371. *See Order* at n.122 (J.A.).

Gulf Power argues that the court in *Alabama Power* "contemplated that a hypothetical buyer would suffice" because it described fair market value as what a willing buyer would pay in cash to a willing seller. Gulf

Power Brief at 43. The court made clear, however, that it was using "an alternative to fair market value," and the requirement that the utility company show the existence of a buyer "waiting in the wings" or a higher-valued use was to prove a "lost opportunity," not to measure fair market value. *Alabama Power*, 311 F.3d at 1368, 1370, 1371. There is a difference between using hypothetical buyers in computing fair market value once a loss is established, and using hypothetical buyers to show the fact of a loss. Where, as here, there is no evidence of an actual buyer waiting in the wings who cannot be accommodated, the utility has not substantiated a loss, and thus there is no need to determine how to measure it. In short, Gulf Power misunderstands — and incorrectly applies — the *Alabama Power* standard.

IV. THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Gulf Power argues that the *Order* should be reversed because it allegedly had submitted substantial evidence in the administrative proceeding that its poles were at full capacity and that it could put the pole space to a higher valued use in its own operations. Gulf Power Brief at 44-53. As shown in this section, the Commission reasonably concluded that Gulf Power's evidence was insufficient to satisfy its burden of proof as to those issues. In any event, Gulf Power is wrong in claiming that its alleged submission of "substantial evidence" to support its position shows that the

Commission erred. Where, as here, there is conflicting record evidence, "a conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *E.g.*, *Dickson v. Nat'l Trans. Safety Bd.,* 639 F.3d 539, 542 (D.C. Cir. 2011) (quoting *Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989)). The Court thus "'will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (quotation omitted).

In any event**,** substantial evidence supports the Commission's conclusion that Gulf Power failed to meet its burden of proof under the *Alabama Power* test. The Commission reasonably found that Gulf Power had not shown that its poles were rivalrous simply by presenting evidence of standard pole heights and space allocations. Notwithstanding those height and space limitations, the record showed that Gulf Power, through rearrangements and standard make-ready techniques, can and routinely does accommodate multiple attachments on its utility poles. *Order* at n.104 & ¶ 29 (J.A.). Indeed, the Commission found that Gulf Power "failed to identify a single instance when it was unable to accommodate a new attacher because of

existing cable attachments." *Id.* at n.104 (J.A.). Gulf Power does not dispute that finding.

The Commission also reasonably rejected Gulf Power's attempt to satisfy its burden of proof by relying on the Osmose pole study and the exemplar poles evidence. Gulf Power's claim that this evidence showed its poles were full was based upon the incorrect assumption that poles are at full capacity if any make-ready work is needed to accommodate a new attachment, no matter how routine or insignificant. As the Commission pointed out, Gulf Power failed to satisfy its burden "to identify poles that could not accommodate a new attachment unless Gulf Power employed a unique attachment technique or the pole was changed out." *Id.* at ¶ 25 (J.A.). But even if Gulf Power had shown that its poles were at full capacity, it "would not be entitled to compensation above the regulated rate for the independent reason that it also failed to show that other attachers were 'waiting in the wings' or that it could have put attachment space to a higher-valued use within its own operations." *Id.* at n.102 (J.A.).

Gulf Power argues the Commission erred in finding that the utility company had failed to show specific utility poles were at full capacity because Gulf Power's hearing Exhibit 86 allegedly shows that a Cable

Operator representative "admitted" that three utility poles were "full."[24] That argument is unavailing for several reasons. First, neither Gulf Power nor the Cable Operators argued below that the three poles were at full capacity, and thus section 405 bars Gulf Power from raising this argument on review. 47 U.S.C. § 405.[25]

Second, Exhibit 86 itself is internally inconsistent and contradictory on the subject of whether the three poles were at full capacity. Although a list in the exhibit classifies the three poles as "full," the email attached to that list questions "whether it's truly accurate to call 3 of the poles 'full.'" GP-Exh. 86 (J.A.). Moreover, the *only* witness addressing Exhibit 86 in the hearing testified that he did not agree that the three poles were at full capacity. Tr. at 1714 (Testimony of Michael Harrelson) (J.A.).

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[24] Exhibit 86 consists of (1) a list and brief description of specific poles classified by category, *e.g.*, "poles that are full", and (2) an email attaching that list.

[25] Gulf Power's submission of Exhibit 86 at the hearing did not give the Commission a fair opportunity to consider the claim that the three poles were at full capacity. Exhibit 86 was submitted to the ALJ, not to the Commission, and "[i]t is 'the Commission' itself that must be afforded the opportunity to pass on the issue." *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997). In any event, "the Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner," *id.* — or indeed arguments that are not advanced at all. Gulf Power was "responsib[le] for flagging the relevant issues which its documentary submissions presented" to the Commission, *id.* at 280, and it did not do so with respect to Exhibit 86.

Third, even if the three poles were at full capacity, Gulf Power would not be entitled to compensation above the regulated rate because it had not shown either that another attacher was "waiting in the wings" or that it was deprived of the opportunity to put the space to a higher-valued use in its own operations. *See Order* at n.102 (J.A.).

Gulf Power's claim that it presented substantial evidence that it would be able to put the pole space to a higher-valued use in its own operations is equally unavailing. *See* Gulf Power Brief at 51-53. The company did not raise this argument before the Commission, and thus it is barred by section 405 from raising it before this Court. 47 U.S.C. § 405. The fact that Gulf Power presented testimony on this subject in the hearing before the ALJ is insufficient to preserve the issue for judicial review. *Bartholdi Cable*, 114 F.3d 274, 279.

In any event, there is no record evidence that Gulf Power was deprived of a lost opportunity because it was unable to use its pole space for a higher-valued use in its own operations. Although Gulf Power argues that transformers and street lights are higher-valued uses, it does not claim that any cable attachment precludes those uses. To the contrary, citing its own witness's testimony, Gulf Power acknowledges that it could accommodate

such uses with "some type of make-ready." *See* Gulf Power Brief at 52 (quoting GP-B at 38-39).

Finally, Gulf Power claims that the right to exclude the Cable Operators is a higher-valued use that warrants compensation above the regulated rate. Gulf Power Brief at 51-52. That argument is without merit as it challenges the alleged taking itself, not the just compensation for that alleged taking. "'The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.'" *Brown*, 538 U.S. at 235 (quoting *Williamson Cnty Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)).

CONCLUSION

The Court should deny the petition for review and affirm the Commission's *Order*.

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UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

October 27, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GULF POWER CO.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

NO. 11-1215

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13,435 words.

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October 27, 2011

STATUTORY APPENDIX

U.S. Constitution: 5th Amendment
47 U.S.C. § 224
47 U.S.C. § 405

U.S. Const., amend. V

RIGHTS OF PERSONS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

47 U.S.C. § 224

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.
(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions

are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.
(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered

via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.
(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, 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 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.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole

attachment agreement) to provide any telecommunications service.
(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way 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.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.
(f) Nondiscriminatory access

(1) A utility shall 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.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.
(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.
(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.
(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for

reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Gulf Power Company, Petitioners

v.

Federal Communications Commission and The United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on October 27, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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