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

In the Matter of	)	
	)	
Alabama Cable Telecommunications Assoc.,	)	File No. PA 00-003
Comcast Cablevision of Dothan, Inc., et al.	)	
Complainant,	)	
	)	
v.	)	
	)	
Alabama Power Company,	)	
Respondent/Applicant	)	
	)	
Application for Review	)	

ORDER

Adopted: May 23, 2001 **Released: May 25, 2001**

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. Before the Commission is an application for review ("Application"), filed by Respondent on September 11, 2000, of an Order released by the Cable Services Bureau ("Bureau") under delegated authority.[1] The Order, DA 00-2078 ("Bureau Order"),[2] granted in part Complainant's pole attachment complaint ("Complaint") filed pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")[3] and Subpart J of the Commission's Rules.[4] The Bureau Order found Respondent's proposed annual pole attachment rate of $38.81 to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. The Bureau Order required Respondent to allow the Complainant to continue to remain attached to Respondent's poles at the current annual negotiated rate of $7.47 per pole, pending the satisfactory negotiation of a new agreement. The parties were ordered to negotiate a new agreement in good faith using the Commission's cable pole attachment rate formula as a guide to establishing a reasonable rate. Respondent was also ordered to refund amounts charged over the $7.47 rate. Along with its Application, Respondent filed an emergency petition for stay of the Bureau Order pending judicial review ("Petition"). In this order we deny Respondent's Application and Petition.

[1] A listing of the documents filed in this matter and reviewed by the Commission is attached as an exhibit to this order.

[2] *In the Matter of Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company*, PA 00-003, DA 00-2078, 15 FCC Rcd 17346 (released September 8, 2000).

[3] 47 U.S.C. §224.

[4] 47 C.F.R. §§1.1401–1.1418.

II. BACKGROUND

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments 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. The Commission shall provide that such rates, terms and conditions are just and reasonable.[5] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[6] The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[7] The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate.[8] The Telecommunications Act of 1996 ("1996 Act"),[9] expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers[10] in addition to cable systems,[11] until a separate methodology[12] became effective for telecommunications carriers after February 8, 2001.[13] Because the instant complaint concerns pole attachment rates in effect prior to February 8, 2001, we apply the cable attachment formula ("Cable Formula").[14] A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the Cable Formula. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[15]

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[5] 47 U.S.C. §224 (b) (1).

[6] 47 U.S.C. § 224(b)(1) and (2). Alabama has not certified that it regulates rates, terms and conditions of pole attachments. *See Public Notice, "States That Have Certified That They Regulate Pole Attachments,"* DA 92-201, 7 FCC Rcd 1498 (1992).

[7] 47 U.S.C. § 224(b)(1).

[8] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order,* 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979); *Memorandum and Order*, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987*). See also, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 (2000).

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 153(44).

[11] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[12] *See Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[13] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[14] *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

[15] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,*

3. The Pole Attachment Act, as amended by the 1996 Act, imposes upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[16] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[17] The mandatory access provision added by the 1996 Act was addressed by the Eleventh Circuit Court of Appeals in *Gulf Power I*,[18] which held that the 1996 Act's mandatory access amendment to the Pole Attachment Act effected a taking of property, but that there is an adequate process for obtaining just compensation. In *Gulf Power II*,[19] the Court addressed the constitutionality of the Commission's regulations implementing the 1996 Act amendments and found that the regulations also authorize a taking of property. The Court reserved on the issue of whether the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[20]

4. Subpart J of the Commission's rules[21] sets out a scheme for an aggrieved party to seek recourse to the Commission after negotiations with a utility have failed. In addition to other requirements, a pole attachment complaint must state with specificity the pole attachment rate that is claimed to be unjust or unreasonable.[22] A complaint must include specific information supporting the complainant's allegation that the pole attachment rate is unreasonable but will not be dismissed if the utility has failed to provide the information.[23] If it has not already done so, a utility shall provide the required information in response to the complaint.[24] This information includes all of the supporting information necessary to a calculation of the maximum pole attachment rate allowed under the Pole Attachment Act, using the Cable Formula, and the supporting pages from the utility's Federal Energy Regulatory Commission ("FERC") Form 1.[25]

Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[16] 47 U.S.C. § 224 (f) (1).

[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶ 1123 (1996). *See also Local Competition Reconsideration Order, In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, FCC 99-266 (released October 26, 1999).

[18] *Gulf Power v. United States*, 187 F.3d 1324 (1999).

[19] *Gulf Power v. FCC*, 208 F.3d 1263 (2000), *stayed pending Supreme Court review; petition for cert. granted* January 22, 2001.

[20] *Id.* at 1272-73.

[21] 47 C.F.R. §§1.1401–1.1418.

[22] 47 C.F.R. § 1.1404 (e).

[23] 47 C.F.R. § 1.1404 (k).

[24] Id.

[25] *Id. See also* 18 C.F.R. Part 101 for a list and description of the FERC accounts.

III. BUREAU ACTION

5. The Bureau Order concluded that the parties to the Complaint were engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee to Respondent. For a number of years prior to the Complaint, the parties' used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole. Complainant did not challenge that rate. In June of 2000, Respondent announced that it was rescinding all existing agreements and requested Complainant to enter into new agreements with an annual rate of $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, the Commission applies the Cable Formula using public data when available. In this case, both parties submitted pole attachment rate calculations that drew similar conclusions, but neither calculation resulted in an increase above the last rate agreed to by the parties, $7.47.

6. The Bureau Order also concluded that Respondent did not attempt to justify its proposed $38.81 rate using the Cable Formula. Instead, the Respondent argued that the Complaint should be dismissed for lack of jurisdiction and second, that the Cable Formula does not provide just compensation and the Bureau should substitute a different methodology for determining the maximum permitted rate. The Bureau denied Respondent's motion to dismiss and Respondent's arguments in favor of a different methodology. The Bureau Order concluded that the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[26] Indeed, the Bureau Order noted that Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission.[27] The Bureau Order further noted that the United States Supreme Court has upheld the Cable Formula for calculating pole attachment rates.[28]

7. The Bureau Order concluded that the Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act and that a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[29] The Bureau Order further concluded that the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs

[26] *See S. Rep. No.* 95-580, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

[27] *Id.*

[28] *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

[29] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

associated with the space used for the attachment as well as a return on investment and provides just compensation to the utility for the space occupied on the pole.

IV. APPLICATION FOR REVIEW

A. Jurisdiction over attachments that provide high-speed access to the Internet

1. Respondent's position

8. Respondent argues first that the entire proceeding should be dismissed because the Complainant provides Internet services and therefore the Commission does not have jurisdiction over the charges for their pole attachments pursuant to *Gulf Power II*. Respondent alleges that the Bureau ignored the *Gulf Power II* decision because no mandate was issued in that proceeding. Respondent argues that this action is inexplicable and unlawful because the Eleventh Circuit rules state that the "issuance or non-issuance of the mandate" has no impact on the binding nature of a published decision, citing the Eleventh Circuit Internal Operating Procedures associated with Federal Rule of Appellate Procedure 36 and the cases cited therein. Respondent argues that a stay of the mandate is irrelevant. Respondent claims that the Bureau's decision is made more egregious due to the fact that the Commission and Respondent were both parties to the *Gulf Power II* decision.

2. Complainant's position

9. Complainant responds that the Bureau was correct in finding that the decision in *Gulf Power II*, regarding the Pole Attachment Act's application to cable attachments that are commingled with Internet services, was not final and did not require dismissal of the Complaint. Complainant argues that, as the Bureau pointed out, further litigation is in progress over that question. Complainant further points out that the Courts in both *Gulf Power I* and *Gulf Power II*, found the Commission's jurisdiction to preserve physical access to poles to be constitutional, both before the 1996 Act, for voluntarily negotiated attachments and after the 1996 Act, for attachments made pursuant to the mandatory access requirements of the Pole Attachment Act.[30] Complainant also argues that its current pole attachment arrangements are the product of negotiated access conducted prior to 1996 and the Commission has continuing jurisdiction to require Respondent to maintain reasonable rates, terms and conditions with respect to pole attachments entered into before the 1996 Act. Complainant asserts that Respondent's argument to the contrary is inconsistent with both the Supreme Court's decision in *FCC v. Florida Power Corp.*[31]("*Florida Power*") and with *Gulf Power I* and *II*.

10. Complainant continues that Respondent's attempts to jettison the Commission's jurisdiction over cable pole attachments and exact monopoly rents is premature because the *Gulf Power II* decision, even assuming it were correct, is not yet final. Complainant argues that the decision has been stayed since its inception, first due to the pending petitions for rehearing and/or rehearing *en banc* and subsequently through a stay pending the filing of a petition for certiorari with the United States Supreme Court.[32] Complainant also argues that Respondent's case appears premised on its claim that the potential

[30] Citing *Gulf Power I* at 1333-1336.

[31] 480 U.S. 245 (1987).

[32] Because that petition was granted on January 22, 2001, the stay is effective until the case is decided by the

to provide Internet divests the FCC from any authority over all of these attachments. Complainant responds that a well-built cable system has the potential for carrying communications services yet unborn but that potential does not remove it from the scope of the Pole Attachment Act. Finally, Complainant argues that, even if *Gulf Power II* were final and correct, Respondent has made no showing that "Internet" will be provided over every Alabama attachment to every customer.

3. Discussion

11. We find that the Bureau did not ignore the *Gulf Power II* decision but instead made a reasoned decision not to dismiss the Complaint because the *Gulf Power II* mandate was stayed by the Court. The cases cited in the Eleventh Circuit Internal Operating Procedures and by Respondent are not applicable to the instant case. *Martin v. Singletary*,[33] involved a convicted murderer's third petition for federal habeas relief. In rejecting the petition for relief, the court found that petitioner failed to meet a test of "actual innocence" established by a previous court decision. Although that previous decision was stayed, the court applied the same test of "actual innocence." The Court elucidated however, that "[a] mandate is the official means of communicating our judgment to the district court and of returning jurisdiction in a case to the district court. The stay of the mandate in [the previous court decision] merely delays the return of jurisdiction to the district court to carry out our judgment in that case."[34] Similarly, in *Vo Van Chau v. Department of State*,[35] cited by Respondents, the question arose in the context of a motion for preliminary injunction. In evaluating whether a party was likely to succeed on the merits of its case, the court looked to a previous decision for guidance. Even though the mandate for that previous decision had not issued, the court was guided by that decision in its determination of the likelihood of success of the case before it.

12. The instant case is quite distinguishable from those two examples. As Respondent points out, the Commission is a party to the *Gulf Power II* decision. The Commission requested and was granted a stay pending review by the Supreme Court. In requesting a stay, the Commission pointed out that an immediate issuance of the mandate would cause premature and perhaps unnecessary disruption in major segments of the cable industry, and it could threaten the deployment of affordable high-speed Internet access for many American consumers. In contrast, the Commission explained, maintaining the longstanding status quo for several additional months would not cause substantial harm to the parties. The request for a stay was granted and the result is to preserve the regulatory status quo. In fact, that is the very purpose of the stay, to preserve the status quo pending final action by the Supreme Court.[36] The Respondent is the party seeking to upset the status quo by raising its pole attachment rates and ignoring the

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Supreme Court.

[33] 965 F.2d 944 (11th Cir. 1992).

[34] *Id.* at 945, n. 1.

[35] 891 F. Supp. 650 (D.C. Dist. Ct. 1995).

[36] *Commodity Futures Trading Commission, et al. v. British American Commodity Options Corp., et al.*, 434 U.S. 1316, 1319, 98 S.Ct. 10, 12 (1977). *See also, Algonquin Gas Transmission Co. v. Township of Bernards in Somerset County*, 112 F.Supp. 86, 91 (1953) ("The effect of stay of mandate by the United States Court of Appeals is to continue the status quo for period specified in stay.")

Commission's regulations for calculating reasonable rates. The Bureau merely applied the Commission's rules which, in conformance with the Eleventh Circuit's grant of a stay of the mandate in *Gulf Power II*, remain in effect pending Supreme Court review, and which preserve the same standard that has been applied for over twenty years and was approved by the Supreme Court in *Florida Power*. We will affirm the Bureau's decision not to dismiss the Complaint for lack of jurisdiction based on *Gulf Power II*.[37]

B. Jurisdiction over the rates, terms and conditions of mandatory nondiscriminatory access

1. Respondent's position

13. Respondent argues that the proceedings should be dismissed because the circumstances surrounding Respondent's termination of the pole attachment agreements with Complainant and the rate increase involve only a breach of contract claim and the Commission does not have jurisdiction over such claims. Respondent argues that the Bureau Order nullifies Respondent's contractual right to terminate its existing agreements. Respondent believes that the Bureau accepted an argument made by the Complainant that a "course of dealing" had superseded the parties' mutual right to terminate the contracts. Respondent cites Commission decisions that delineate the Commission's jurisdiction. For example, Respondent quotes *Marcus Cable Associates v. Texas Utilities*[38] ("*Marcus Cable*"), where the Commission held that its authority over pole attachments does not "supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual rates, terms, or conditions. Consequently, the threshold question before us is whether the issues raised in the Complaint concern a breach of contract not involving unjust and unreasonable contractual rates, terms and conditions."[39] Respondent concludes that this precedent establishes that the instant proceeding should be dismissed.

2. Complainant's position

14. Complainant answers that Respondent's sudden termination of Complainant's pole attachment contracts and its attempt to unilaterally impose a new contract with an annual attachment rate of $38.81 per pole, more than 500 percent higher than existing pole attachment rates, violated the Commission's rules requiring negotiation in good faith, and prevention of unjust and unreasonable pole attachment rates, terms and conditions. Complainant argues that, despite Respondent's attempts to depict this dispute as one involving only the enforcement of legitimate contract rights, Respondent departed from a long established course of dealing over pole attachment amendments in order to apply a termination clause as a coercive mechanism for demanding that Complainant sign a new, one-sided pole agreement with a more than 500 percent rate increase. Complainant claims that Respondent's implied threat to interrupt Complainant's business should Complainant fail to acquiesce to Respondent's unilateral demands, and Respondent's unwillingness to negotiate at all were violations of the Commission's established requirement that utilities must negotiate all pole attachment agreements in good faith. Complainant states that in the past two decades, when one party, usually the utility, has given notice of an intent to terminate, despite

[37] We note that the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry, *Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, FCC 00-355 (released September 28, 2000).

[38] *In the Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Co.*, 12 FCC Rcd 10362 (1997).

[39] *Id.* at ¶ 10 (footnote omitted).

contractual language purporting to require the removal of Complainant's cables and wires from the utility's poles, the parties have agreed that Complainant's facilities may remain on the poles during the conduct of good faith negotiations towards a new pole agreement.

15. Complainant also argues that Respondent's termination of Complainant's pole attachment contracts would cause irreparable harm. Complainant asserts that if unilaterally imposed contracts are not accepted, the termination of existing contracts would remove the provisions which currently govern all of the day-to-day matters involving pole attachments, including matters relating to construction, modification, rights-of-way, transfers, inspections, damage and indemnification, safety, and other technical and engineering issues, imposing enormous uncertainty and substantial technical and financial risks upon Complainant during their conduct of daily operations, including installations, repairs, upgrades, and rebuilds. Complainant states that it cannot reasonably reproduce a substitute facility for Respondent's poles or move facilities underground.

16. Complainant continues that payment of the $38.81 rate pending final resolution would substantially limit its ability to offer new services such as digital cable service, expanded video service, and advanced telecommunications service. Complainant asserts that most smaller operators do not have the capital resources to cover such a large increase in operating expenses, and it is uncertain whether the necessary funds could be obtained from lenders. Complainant also argues that cable operators would not be likely to recover the increase in pole rents through subscriber charges because of competitive market conditions, including competition from DBS dishes that Respondent sells. Complainant also asserts that the magnitude of Respondent's pole rate increase is likely to lead some small cable operators to go out of business and prevent, delay or make economically infeasible Complainant's rebuilds and other services to the public and public entities, including schools, libraries, and government facilities.

17. Complainant concludes that the Commission has jurisdiction over these matters and the authority to remedy abuses. Complainant also cites *Marcus Cable* for the proposition that "the Commission's jurisdiction encompasses certain practices growing out of a contractual relationship between a utility and a cable operator . . .".[40] Complainant cites additional cases supporting the Commission's jurisdiction over all complaints involving the rates, terms and conditions of pole attachments.[41] Finally, Complainant asserts that the law is clear that Respondent may not create new rents or contract terms by unilateral amendment to existing contractual arrangements and then immunize its actions from Commission scrutiny.[42] Complainant also compares Respondent's duty to negotiate in good faith under the Pole

[40] *Id.* at 10366.

[41] Complainant cites the following cases: *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 14 FCC Rcd 3244 (1999); *Public Service Co. of Colorado v. Mile Hi Cable Partners L.P.*, No. 98CA1666, 1999 Colo. App. LEXIS 334 (Ct. App. Dec. 23, 1999); and *Texas Utilities Electric Co. v. Heritage Communications, Inc*., CA 3-89-3080-R (N.D. Tex. June 22, 1990).

[42] In support if its assertion, Complainant cites *Second Report & Order* in Docket 78-144, 72 F.C.C.2d 59, 67 (1979), *aff'd, Monongahela Power Company v. FCC,* 655 F.2d 1254 (1981); *Capital Cities Cable, Inc. v. Southwestern Public Service Co.* PA-85-0005, Mimeo No. 5431 (June 28, 1985), *recon. denied*, PA-85-0005, Mimeo No. 6957 (September 13, 1985); *TCA Management Co. v. Southwestern Public Service Company*, 10 FCC Rcd. 11832 (1995) at ¶¶ 14-15 (citing *Monongahela Power Co. v,. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) (*per curiam*); *Capital Cities v. SPS, supra, slip. op.* at 2, ¶ 4; *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, PA 84-0016, Mimeo 35810, *slip. op.* at 2, ¶ 4 (released May 17, 1985*); TeleCable Development Corp. v. Appalachian Power Co.*, PA 79-0007, Mimeo 889, *slip. op.* at 3 (Com. Car. Bur. released Oct. 31, 1980).

Attachment Act and the Commission's rules,[43] with broadcast stations' obligation to negotiate retransmission consent agreements in good faith under the Satellite Home Viewer Improvement Act of 1999,[44] concluding that the Bureau Order properly imposed a bargaining order on Respondent pursuant to its statutory authority to ensure that the rates, terms and conditions of attachments remain just and reasonable.

3. Discussion

18. As noted above, pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments 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 to insure that such rates, terms and conditions are just and reasonable.[45] Where onerous terms or conditions are found to exist, we may adjust rates or invalidate the term or condition.[46] Frequently, respondents to complaints will argue that the complaint is not really about the rates, terms and conditions of access but instead is merely a matter of breach of contract more suitable for another forum. Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments.[47]

19. We would be hard pressed to find a set of circumstances that falls more within the Commission's jurisdiction than the circumstances of this case. In this matter, the issue is not whether the Complainant failed to pay its invoice, or rearranged attachments in violation of an agreement negotiated in conformance with the Commission's rules and the Pole Attachment Act, but whether Respondent's unilateral rate increases, with the concomitant threat to dislodge Complainant's attachments with the express purpose to make Complainant assert its mandatory right to access,[48] constitute unjust and unreasonable rates, terms or conditions. Every allegation contained in the complaint involves the rates, terms and conditions of access to Respondent's poles. The Bureau's decision, to order Respondent to allow the Complainant to continue to remain attached to the poles pending the negotiation of a rate in accordance with the Commission's formula, is well within the Commission's jurisdiction to enforce the access

[43] Citing *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Opinion and Order on Reconsideration,* 4 FCC Rcd. 468 (1989) at ¶ 39; *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order,* 2 FCC Rcd. 4387 at n.51 (1987).

[44] Citing *Implementation of the Satellite Home Viewer Improvement Act of 1999,* 15 FCC Rcd 5445 at ¶¶ 40 – 43 (released March 16, 2000).

[45] 47 U.S.C. §224 (b) (1).

[46] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration,* 4 FCC Rcd 468 at ¶ 25 (1989).

[47] *See, for example, In the Matter of Mile Hi Cable Partners, et al. v. Public Service Company of Colorado,* 14 FCC Rcd 3244 (1999) at ¶ 12.

[48] Respondent's June 8, 2000 letters to Complainant state that "If Attachee should desire to keep its facilities on APCO's poles, then Attachee must exercise its right of mandatory access."

provisions of the Pole Attachment Act as well as the Commission's jurisdiction to ensure that conditions of pole attachment agreements are just and reasonable.

20. The Bureau also concluded that, under these circumstances, an attacher that is already attached to a utility's poles is not required to file a complaint for access under the Commission's rules in order to remain on the pole pursuant to the mandatory access provisions of the Pole Attachment Act.[49] This is because there are no preliminary access issues, such as insufficient capacity or safety considerations,[50] to be determined if an attacher is already on the pole. Requiring an attacher to utilize the complaint process to gain mandatory access when it is already attached to the pole would be an inefficient waste of the parties' and the Commission's resources. However, the larger issue is whether all voluntary relationships become mandatory pursuant to the 1996 Act's mandatory access amendments to the Pole Attachment Act. While the mandatory access provisions of the Pole Attachment Act could arguably be construed as directed to new entrants attempting to gain access to crowded poles, the language of the Pole Attachment Act does not draw a distinction between old and new attachers. This issue is only relevant if the *Gulf Power I* and *Gulf Power II* decisions, which held that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations implementing the Pole Attachment Act authorize a taking, are found to impose a different standard of compensation for mandatory as opposed to voluntary relationships.

21. Because a pole owner generally may, at some point, pursuant to a negotiated agreement, terminate its voluntary relationship with an attacher under reasonable terms and conditions, we cannot support a finding that voluntary relationships are "grandfathered" under the Pole Attachment Act as perpetual voluntary relationships. We believe that any constitutional challenge to the Commission's rate formula will be analyzed by a court pursuant to *Gulf Power I* and *Gulf Power II* as if the attachment at issue was mandatory under the Pole Attachment Act, whether or not the attacher enjoyed an existing voluntary relationship at the time of the 1996 Act amendments to the Pole Attachment Act. However, as more fully explained below, the Pole Attachment Act and the Commission's rules implementing the Pole Attachment Act, including the Commission's formula for calculating just and reasonable pole attachment rates, satisfy the constitutional requirement of just compensation for the taking of property under the Fifth Amendment to the U.S. Constitution, whether or not the relationship between attacher and utility is voluntary or mandatory.

C. The requirement of due process and request for stay

1. Respondent's position

22. Respondent argues that the Bureau Order effects an unconstitutional taking because the Commission does not provide a reasonable, certain, and adequate process for obtaining just compensation. Respondent claims that in *Gulf Power I*, the Commission committed to the Eleventh Circuit that it would stay any of its orders that would lower a pole attachment charge below that which the pole owner deems to be just compensation until that order is reviewed by a court. Respondent asserts that this policy would allow a utility to have judicial review of the Commission's determination of just compensation prior to

[49] The pertinent provision of the Pole Attachment Act states that "[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." 224 U.S.C. § 224 (f) (1).

[50] *See* 224 U.S.C. § 224 (f) (2).

being forced to provide access to its property. Respondent argues that such a commitment is necessary to ensure that a reasonable, certain, and adequate provision for obtaining just compensation exists at the time of the taking. Respondent claims that the Commission is now acting in contravention of this express policy.

23. Respondent argues that the holding in *Gulf Power I*, that judicial review of any Commission rate determination would "ensure that the utility is not required to provide access to its property at a rate that does not provide just compensation,"[51] is premised on the understanding that Respondent would not be required to provide access to its facilities for a fee less than what Respondent deemed to be just compensation until a judicial determination of just compensation was made. Respondent supports its argument with the claim that in answer to a question posed by the Court in *Gulf Power I*, "[d]oes 47 U.S.C. section 224, or any regulation issued pursuant to that provision, require a utility to provide access to its poles, ducts, conduits, or rights-of-way at a rate below which the utility considers to be just compensation at any time prior to a court determining the just compensation for that access?",[52] the Commission (through the Department of Justice) replied that a pole owner would not be required to provide access at a rate below what the owner considers to be just compensation until judicial review is made because the Commission would stay the operation of any of its orders that might attempt to reduce that charge. Respondent claims that the *Gulf Power I* decision was predicated upon these representations made by the Commission. Respondent relies on this same argument in support of its petition for emergency stay.

24. Respondent claims that it is time for the respective parties to pole attachment agreements to end the complaint process before the Commission and have the courts review the just compensation requirements arising from the taking effectuated by the mandatory access provision. In order to accomplish this and allow the judicial process to work, Respondent argues that the Commission should stay the effects of the Bureau Order pending judicial review. Respondent also claims that fundamental principles of fairness and equity require the Commission to stay the Bureau Order to avoid making inconsistent and prejudicial representations to the courts.[53]

[51] Citing *Gulf Power Co. et al. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999).

[52] *See* letter dated March 29, 1999 to Clerk, United States Court of Appeals for the Eleventh Circuit from the U.S. Department of Justice.

[53] Citing *Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999); *Morrow v. City of Birmingham*, 926 F. Supp. 1033, 1040-42 (S.D. Ala. 1996), *aff'd*, 117 F.3d 508 (11th Cir. 1997) and *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

2. Complainant's position

25. Complainant responds that both of Respondent's contentions, first, that under *Gulf Power I* no party may have access to its utility poles prior to judicial review of its claim for compensation and second, that the Commission is obligated to stay the Bureau Order pending judicial review, are incorrect. Complainant argues that *Gulf Power I* specifically rejected the notion that Respondent may charge whatever fee it wishes prior to a judicial determination of just compensation,[54] holding instead that "[t]he Fifth Amendment does *not* require a judicial determination of just compensation *in the first instance* on each occasion of a taking of private property."[55] Complainant quotes the *Gulf Power I* decision as follows:

> [W]e see no constitutional problem with a process that employs an administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of 'provid[ing] an adequate process for obtaining compensation.'[56]

26. Complainant continues that if a court reviewing a rate decision by the Commission concludes that the rate does not provide just compensation, it may issue a new rate order which ensures that just compensation is provided from the commencement of any attachment. Complainant also asserts that Respondent's claim concerning the Commission's alleged representation to the *Gulf Power I* court is erroneous. Complainant states that no such promise was made, rather the response to the Court's question merely stated that the Commission has the power to stay its rate order pending review by a court of appeals. Complainant points out that neither the Department of Justice nor the Commission ever promised to always grant such a stay and the Commission did not bind itself to a blanket policy requiring a stay of any rate order simply because the utility disagreed with the result.

[54] Citing G*ulf Power Co. v. FCC*, 187 F.3d 1324, 1334 (11th cir. 1999).

[55] Citing *Id.* at 1334.

[56] Citing *Id*. at 1333.

27. Complainant also points out that in this case, a stay of the Bureau Order requiring the parties to negotiate an agreement in good faith would effect a drastic change in the status quo and irreparable harm. Complainant argues that committing itself to such an inflexible policy of staying every decision would rob the Commission of any effective legal authority to fulfill its statutory duties under the Pole Attachment Act. Complainant concludes that because the Commission never made the unlikely promise that Respondent claims, to stay its own rate orders pending judicial appeal, the refusal to grant the stay requested by Respondent is neither contrary to express Commission policy nor void due to estoppel.[57]

3. Discussion

28. The Fifth Amendment to the United States Constitution states in pertinent part that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[58] The 1996 Act amendments to the Pole Attachment Act gave cable operators and telecommunications carriers a mandatory right of nondiscriminatory access to utility poles, ducts, conduit and rights-of-way.[59] In *Gulf Power I*, the Court analyzed the constitutionality of this right of access in light of the Fifth Amendment's prohibition against the taking of property for public use without due process and just compensation. After disposing of the issue of whether the mandatory access provision effects a taking of property and finding that it did, the *Gulf Power I* Court reviewed whether an adequate process is available to a utility to secure just compensation for that taking. The Court concluded that there is an adequate process. First, the Court stated that a reasonable, certain and adequate provision for obtaining compensation must exist at the time of the taking.[60] Then the Court determined that, although it is ultimately the responsibility of the judicial branch to ensure that the constitutional standard of just compensation is satisfied,[61] there is no constitutional problem with a process that employs an administrative body, such as the Commission, to determine just compensation in the first instance.[62]

29. The *Gulf Power I* Court next reviewed the existing process for judicial review of Commission orders to determine if that judicial review process ensures that the final and conclusive determination of the just compensation owed to a utility is made by the judicial branch.[63] *Gulf Power I* concluded that because the judicial review process could ensure that a utility would receive a just

[57] Complainant also notes that the Respondent's argument that the cable industry also "committed" to the Eleventh Circuit to pay whatever a utility asked pending judicial review is inaccurate, citing an April 5, 1999 letter by counsel for the National Cable Television Association to Thomas Kahn, Clerk of the Eleventh Circuit ("If the FCC orders a reduction in rates, utilities *may* likewise seek a stay of the rate order from either the FCC or the Court of Appeals")(emphasis added by Complainant).

[58] U.S. Const. Amend. V.

[59] 47 U.S.C. § 224(a),(f).

[60] *Gulf Power I* at 1331.

[61] *Id.* at 1333

[62] *Id.* at 1333.

[63] *Id.* at 1334.

compensation rate both prospectively and in the period prior to the court's determination of the issue, the process is constitutionally adequate.[64] Although no party to the *Gulf Power I* decision appealed the Court's determination on this issue, various parties, including Respondent, continue to argue that the process is inadequate. Our review of the letters provided in response to the Court's question, stated above in paragraph 23, reveal that neither the Commission, nor the Department of Justice representing the Commission, indicated that the Commission would stay all pole attachment compensation orders pending judicial review. The letters merely provide a summary of the existing process, which allows either the Commission or a court to stay a compensation order pending further review. Indeed, had the *Gulf Power I* Court relied on any such representations in reaching its conclusions, it would have included those representations in its reasoning supporting its decision. Instead, the *Gulf Power I* decision reiterates the process as it exists and as it was referred to in the referenced letters.[65] As the *Gulf Power I* court concluded, the Commission's rules provide an adequate process for a pole owner to secure just compensation under the constitutional standard as elucidated in *Gulf Power I*. We find that denial of Respondent's request for a stay is not inconsistent with the representations made by the Commission and the Department of Justice to the Eleventh Circuit Court of Appeals in *Gulf Power I*. We therefore reject Respondent's argument that the Commission is estopped from reviewing any requests for stay on the merits of the request.

30. Furthermore, Respondent's argument that every compensation order should be automatically stayed without regard to the merits of such action is unpersuasive. Respondent's proposal would allow Respondent to charge any rate with impunity, completely nullifying the Pole Attachment Act, whose purpose is to prevent the charging of monopoly rents by utilities for pole attachments. Respondent could charge monopoly rents, eliminate competition to Respondent's own services, and create not only a monopoly over poles but over services as well.

31. We are also not persuaded by Respondent's arguments for a stay of this Bureau Order. To be successful on a request for stay of the effectiveness of a bureau or Commission order pending judicial review, Respondent must demonstrate that (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent relief; (3) a grant would not substantially harm others; (4) the relief requested would be in the public interest.[66] Other than arguing, as noted above, that the Commission made representations to the *Gulf Power I* court, Respondent did not attempt to support its emergency petition for stay. By not staying the Bureau Order, we are preserving the status quo and avoiding the disruption to the Complainant's cable operations pending this further review by the Commission and the appeals court. As the *Gulf Power I* Court concluded, "it is just as likely that the earlier rate formula gave

[64] *Id.* at 1335 ("Directing the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision will ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate.")

[65] *Id.* at 1334-1336.

[66] *See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (DC Cir. 1977); *In the Matter of Applications of Cumulus Licensing Corp., Order*, FCC 00-391 (released Jan. 17, 2001), *In the Matter of Applications of Shareholders of CBS Corp. and Viacom, Inc. for Transfer of Control of CBS Corp. and Certain Subsidiaries, Order*, FCC 01-94 (released March 16, 2001).

the utilities industry more than the constitutional minimum."[67] We conclude that Respondent has not presented evidence that would support a stay of the Bureau Order pending Commission or judicial review.[68]

D. The requirement of just compensation

1. Respondent's position

32. In addition to its process arguments, Respondent argues that the Order fails to provide just compensation because, according to Respondent, the Commission's formula does not provide the "full and perfect equivalent in money of the property taken."[69] Respondent lists three reasons why the formula is constitutionally deficient in Respondent's view. First, Respondent claims that the formula does not require cable companies to pay their fair share of the costs of unusable space; second, Respondent claims that the formula does not allow for a recovery from all of the FERC accounts containing pole-related costs; and third, the formula uses embedded costs in its calculations. Respondent disputes that the formula provides compensation for the fully allocated costs of a pole and argues that the $38.81 fee is a conservative measure of just compensation. Respondent argues that judicial precedent indicates that in instances where market value is not readily apparent, there are various other measure of value that are employed to ensure that compensation meets the constitutional standard.[70] Respondent argues that it submitted voluminous materials establishing that the $38.81 charge is consistent with principles of just compensation and that the Commission's formula fails to provide just compensation.

33. In support of its argument that the formula does not require cable companies to pay their fair share of the costs of unusable space, Respondent cites to the legislative history of the 1996 Act amendments to the Pole Attachment Act. Respondent argues that, in establishing a rate for telecommunications attachers as opposed to cable attachers, Congress expressed a view that the unusable space on a pole "is of equal benefit to all entities attaching to the pole."[71] Respondent continues that the formula's use of embedded costs does not provide just compensation. Respondent asserts that using embedded or historical costs is disfavored as a measure of current market value.[72] Respondent continues that the cost of materials, labor, easements, and placement is greater today than it was at the time the system was constructed and the market value of the pole system is far greater than the historical cost of the system. Respondent argues that demand for the utility corridors has increased and the value of the linear corridors in the modern technological era is not related to the original cost of a single pole. Respondent

[67] *Gulf Power I* at 1338.

[68] We note that Respondent presented a more thorough argument in its petition for stay filed with the 11th Circuit Court of Appeals in Case No. 00-147631. However, Respondent's petition for stay was denied by the 11th circuit Court of Appeals on Jan. 3, 2001.

[69] Citing *United States v. Miller*, 317 U.S. 369, 373 (1942).

[70] Citing *United States v. Toronto, Hamiliton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949).

[71] Citing *House Report No*. 104-204, at 92; *House Conf. Rep. No*. 104-458, at 206.

[72] Citing *Id.* and 8A *Nichols* § 20.01.

also argues that forward-looking, or replacement, cost is the measure used to determine the prices new entrants into the telecommunications market must pay to incumbents to purchase unbundled elements of the incumbent's network and consistency demands that the same pricing methodology be applied throughout the 1996 Act.[73] Respondent admits however, that prospective attaching entities, unlike the entrants seeking access to an incumbent's telecommunications network, are not the pole owners' competitors in providing electric services.

34. Specifically, Respondent submitted an affidavit in which the affiant[74] ("Affiant I") claims to apply standard appraisal techniques and valuations for property similar to pole attachments. Respondent asserts that Affiant I concluded that there is an active and competitive market for communications corridors, clusters, and systems. Affiant I used three approaches to determine market value: a depreciated replacement cost plus enhancement approach, a sales comparison approach, and an income capitalization approach. In addition, Affiant I included a factor for entrepreneurial profit; used an economic-based depreciation rate calculated for Respondent (as opposed to a tax-based depreciation rate); and used a separate depreciation rate for purposes of determining the carrying charge to reflect that portions of capital could be re-invested over time. Affiant I concluded that Complainant should be paying an annual rate of $47 under the first approach; $25-$40 or $628 under the second approach; and $38.69-$64.48 under the third approach, leading to a reasonable range of $40-$55.

35. Respondent also provided another affidavit with its Response to the Complaint which purports to explain why the Commission's formula does not provide just compensation. In that affidavit, the affiant[75] ("Affiant II") incorporates a previous affidavit, filed in response to the Commission's pole attachment rulemaking proceedings.[76] Affiant II's affidavit may be summarized as follows: Affiant II asserts that Respondent's $38.81 rate does not include any enhancement value; the rate uses gross investment in calculating carrying charges; the rate reflects a conservative approach to the number of attaching entities; the rate for a telecommunications attacher is more than three times higher than the cable attacher rate; increasing costs in building and maintaining networks are not reflected in embedded costs; joint use agreements with telephone companies reveal rates between $26.29-$30.30; the formula should include more FERC accounts; the cable rate does not allow recovery for unusable space; the presumptions in the formula don't apply to Respondent; gross investment figures should be used without excluding costs for grounds and arrestors; gross investment figures should be used in the denominator of the carrying charges even though this will lower the rate; forward-looking cost of capital should be used but the calculation is internal and not publicly available; and finally, an enhancement value should be included. Affiant II concludes that the use of replacement costs plus every other factor Respondent requests yields a rate of $43.03.

[73] Citing *Iowa Utilities Board v. FCC*, Case No. 96-3321, at 10 (8th Cir. 2000).

[74] Mr. Henry J. Wise, MAI.

[75] R.E. Prater, Manger, Power Dleivery Support for Alabama Power Company.

[76] CS Docket No. 97-98.

2. Complainant's position

36. Complainant responds that the Bureau Order correctly determined that the combination of full recovery for make-ready or change-out costs, along with the full recovery of costs associated with the space used for the attachment, as well as a return on capital allowed under the Commission's formula provides just compensation to Respondent. Complainant asserts that the Constitution does not support Respondent's argument that it is entitled to a higher pole attachment rate than that calculated in accordance with the Pole Attachment Act and the Commission's regulations. Complainant argues that just compensation is determined by the loss to the person whose property is taken,[77] generally measured by one of three approaches: market value, the income approach, or the cost approach.[78] Complainant explains that in the case of pole attachments, none of the three approaches, market value, the income approach, or the cost approach applies. Complainant concludes that the Commission's formula, which is based upon payment of the operating expenses and actual capital costs of the utility, is consistent with the constitutional requirement of reimbursing loss to the owner of property. Complainant argues that Respondent failed to demonstrate a factual or legal basis for higher compensation than that provided by the Commission's regulations and the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking.[79]

37. Regarding the market value approach, in the case of pole attachments, Complainant asserts that there is no market for attachments to utility poles. Complainant argues that the Supreme Court stated that "market value" is not an appropriate method for calculating just compensation "'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'"[80] Complainant states that attempting to calculate a "market value" for pole attachment space would result in manifest injustice to the public because poles themselves are monopoly resources, for which no feasible substitutes exist and to monetize that monopoly value and attempt to embrace it as "market value" would preclude any remedy for monopoly abuses. Complainant points out that it has long been recognized by the courts,[81] Congress,[82] and the Commission,[83] that utility poles and like structures are essential facilities,

[77] Citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987), quoting *United States v. Causby*, 328 U.S. 256, 261 (1946).

[78] Citing *United States v. Miller*, 317 U.S. 369, 374 (1942); *Nichols on Eminent Domain*, § 14A.06[2] and [3].

[79] Citing *United States v. John J. Felin & Co*., 334 U.S. 624, 641 (1948).

[80] Citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), (*citing United States v. Commodities Trading Corp*., 339 U.S. 121, 123 (1950)); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984).

[81] Citing *F.C.C. v. Florida Power Corp*., 480 U.S. 245, 247 (1987*); MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132, 1146-47 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983*); TV Signal Co. of Aberdeen v. American Tel. & Tel.*, 1981 U.S. Dist LEXIS 11080, *14-15 (D.S.D. 1981); *and General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971).

[82] Citing 123 Cong. Rec. 35,006 (1977).

[83] Citing *Twixtel Technologies*, Letter from FCC Common Carrier Bureau, July 6, 1990 at 4; *Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970).

mandatory corridors that communications services must share. Complainant asserts that Affiant I's attempt to calculate a "market value" for Complainant's pole attachments by comparing them to joint use agreements between Respondent and telephone companies and by analogizing to railroads and wireless communications towers is misguided. Complainant argues that joint use agreements are not relevant because telephone companies occupy more space than cable operators and because utilities specifically establish high fixed asset values in order to obtain compensation from state public service commissions. Complainant also questions Affiant I's lack of evidence of actual transactions.

38. Next, Complainant rejects the income approach because a pole attachment does not itself generate income and does not involve a taking of an entire business. Complainant asserts that the income approach is premised upon the idea "that a potential buyer will be willing to pay a price for an asset that reflects a present value of the future benefits (i.e., income) that the buyer can realize from the asset."[84] In the case of pole attachments, Complainant argues, Complainant does not obtain ownership of even a section of a pole, let alone an entire business. Per Complainant, Respondent's contract limits an attacher's rights to a mere license and attachments do not deprive Respondent of its business or displace its operations. In addition, Complainant argues, it is impossible to forecast a future income stream that would be tied to an attacher's use of a percentage of otherwise unused, excess pole capacity. Furthermore, Complainant argues that Respondent's claim that the income approach to valuation supports a five-fold increase in pole rents is baseless because Affiant I does not even attempt to follow a real income approach to valuation, which requires consideration of the anticipated future income generated by an asset and translation of that income stream into present value using an appropriate discount rate. Instead, according to Complainant, the appraiser simply postulates a pole replacement cost, an unrealistic three to five year payback period for utility poles, an inflated cable pole occupancy percentage of 27 percent, and then uses simple division to determine a figure for annual pole rental.

39. Finally, regarding the cost approach, Complainant argues that Respondent's use of reproduction costs does not make sense because it is not reasonable to reproduce existing utility poles. Complainant argues that the "cost approach" may be used to determine just compensation for pole attachments only if it is based upon actual costs because replacement cost valuation for pole attachments is inconsistent with the law on just compensation. Complainant asserts that a replacement cost approach requires that the property interest being condemned be complete ownership.[85] Complainant's pole attachments, Complainant argues, occupy only a fraction of Respondent's poles. In addition, Complainant asserts, courts do not apply a replacement cost approach to valuation if reproducing the property would not be a reasonable business venture.[86] Complainant continues that utility poles cannot be reasonably reproduced because they are an essential facility.[87] Complainant states that Affiant I's "share the savings" approach, in which the rental is compared to what cable operators would have to spend to reproduce something that zoning, environmental, and other restrictions prevent them from reproducing - a duplicate network of utility poles, does not have any basis in appraisal methodology. Complainant points out that Respondent never incurs any replacement costs when cable operators attach to Respondent's poles because,

[84] Citing *Nichols*, § 14A.06[3].

[85] Citing *Nichols*, § 14A.06[2][e].

[86] Citing *United States v. Toronto, Hamilton & Buffalo Navigation*, 338 U.S. 396, 403 (1949).

[87] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

when additional space is needed, Respondent recovers its costs, dollar for dollar, in the form of make-ready charges.

40. Complainant argues that, in the context of negotiated contracts, the Supreme Court upheld the constitutional sufficiency of the compensation provided by the formula,[88] and that Respondent has not met its burden to show that the reasoning in Florida Power does not apply to mandatory access. Complainant disputes that Consolidated Gas,[89] cited by Respondent, has any precedential weight, because it was a dissent, not a holding of the court, and the entire case was vacated by the Supreme Court and dismissed with prejudice. Even so, Complainant argues that even under the reasoning of Consolidated Gas, which required a reasonable rate of return on investment, the Commission's provision in the cable rate formula for fully allocated costs (including a return on capital) would provide Respondent with compensation that is constitutionally sufficient.

41. Finally, Complainant responds to Respondent's various specific issues regarding the pole rate formula's elements pertaining to usable space and pole height presumptions; the use ratio; particular utility cost accounts; and the use of historical costs. First, Complainant points out that Respondent has not met its burden of presenting the Commission with new evidence on any of these issues that would justify a rate greater than the current rate. With respect to usable space and pole height presumptions, Complainant argues that Respondent presents the same arguments and evidence that the Commission rejected in rulemaking proceedings.[90] Although the usable space figures used by the Commission are rebuttable presumptions, Complainant argues that Respondent does not introduce sufficient evidence of differing pole height or minimum attachment heights for the specific plant at issue. Complainant also points out that Respondent's claim that its average existing pole height should be considered to be forty feet is based on average replacement pole height for the most recent year. Complainant also points out that, even if the Commission accepted Respondent's claim that its average pole height is forty feet, the resulting pole rate with all adjustments would be less than the current rate.

42. Complainant continues that Respondent's contention, that the Commission must apply the full cost allocator specified for telecommunications services, that is scheduled to be phased in over five years, to cable systems would have the undesirable consequence of greatly impeding the development of the facilities-based competition intended by the 1996 Telecommunication Act. Complainant states that the cable rate space allocator of 7.4% requires cable attachers to pay the utilities' operating costs in the same proportion that the cable attachment bears to the total usable space on a utility pole. Complainant continues that the difference between rates calculated under the cable formula and the fully-phased in telecommunications formula may be insignificant, depending upon the number of competitive local exchange carriers ("CLECs") that attach to poles in the coming years.[91] Complainant argues that the gradualness of the increase in rates attracts and retains facilities-based competitors until a later stage in the

[88] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

[89] Citing *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262, 1314-1316 (11th Cir. 1990), *vacated, City Gas Co. of Florida v. Consolidated Gas Co. of Florida*, 111 S.Ct. 1300 (1991).

[90] Citing *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 (2000) ("*Fee Order*").

[91] Citing *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777 (1998).

development of a competitive market when there are a sufficient number of parties on the pole that a "per capita" allocation of pole costs does not create an undue burden on any of the attaching parties. By contrast, Complainant argues, if that full rate is implemented today, then the pole rate will artificially increase, creating a potentially insurmountable barrier to the deployment of new facilities and an incentive for a cable operator not to diversify into telecommunications.

43. Complainant disagrees with Respondent's contention that certain additional expense accounts should be included in the derivation of the pole rent. Complainant asserts that much of the argument and advocacy presented by the Respondent are lifted in their entirety from presentations made in a previous Commission pole attachment rulemaking proceeding,[92] the rulemaking, where it was considered and rejected. Complainant argues that Respondent fails to advance sufficient evidence to prove that any residual expenses related to poles that may be included in these accounts is significant or that they would not would create a double charge against make-ready expenses.[93] Specifically, Complainant argues that clearing costs are already capitalized into FERC Account 364, which is included in the formula, and cable operators pay right-of-way and other related fees directly to the appropriate local government authority. Complainant argues that any allocation of land and land rights to poles (as opposed to aerial space) based on the data Respondent provided would only add four cents to the pole rate, which would still be less than the current rate. In addition, Complainant points out that grounding involves installing a conductor and ground rod to discharge power surges or to discharge induced current. Complainant states that cable operators are required to attach their facilities to the electric company ground, but existing power company grounding systems are not sufficient to ground these system components and each attaching party is responsible for grounding its own system of conductors.[94] Excluding grounding systems, Complainant argues, is also consistent with FERC accounting and recent public service commission authority.[95]

44. Complainant argues that the practice of having cable operators pay make-ready and change-out costs assures that any actual replacement costs associated with pole attachments are borne by the attaching party, and in accordance with this practice, Respondent receives over one million dollars per year from cable operators through make-ready reimbursements. In addition, Complainant argues, Respondent's proposed calculation of carrying charges times replacement cost results in a recovery of nearly three times the administrative overhead and taxes that Respondent actually incurs, and fails to account for accumulated deferred taxes. Complainant argues that Respondent's inclusion of an unsupported "entrepreneurial incentive" is inconsistent with its existing regulatory obligation to erect and maintain poles. Complainant points out that the Commission's approach has been corroborated by state public service commissions in California,[96] Michigan,[97] New York,[98] and elsewhere,[99] that have

[92] CS Docket 97-98.

[93] Citing *Fee Order* at ¶ 61 and Declaration of Patricia D. Kravtin, CS Docket No. 97-98, ¶¶ 45-48.

[94] Citing Complainant's Reply at 46-50 and Declaration of John Pietri, at ¶¶ 8-10, CS Docket No. 97-98.

[95] Citing 18 C.F.R. Part 101 (Account 365) and *Consumers Power Co., et al.*, Case No. U-10831 at 23.

[96] Citing Cal. Pub. Util. Code § 767.5 (Deering 1996).

[97] Citing *See Consumers Power Co. et al*., Mich. Pub. Serv. Comm'n., Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *aff'd, Detroit Edison Co. v. Michigan Public Service Commission*, Slip. Op., No. 203421 (Mich. App. Nov. 24, 1998), *appeal denied, Detroit Edison Co. v. Michigan Public Service Commission*, 602

affirmatively rejected using reproduction costing for pole attachments, and by the utilities' own use of embedded costs to establish the financial arrangements with telephone utilities under joint use agreements. Complainant concludes that the use of historic costs in determining pole attachment rates also meets appraisal standards for currency and reliability.

3. Discussion

45. We begin our review of the issue raised by Respondent, whether the Commission's pole attachment rate formula provides just compensation under the Fifth Amendment to the United States constitution, by picking up the analysis at the point where the Supreme Court last addressed it some years ago. In *Florida Power*, the Supreme Court was faced with this very issue, the constitutional sufficiency of the pole attachment rate formula. The *Florida Power* court first addressed whether the Pole Attachment Act in effect at that time, which did not include a mandatory access provision, authorized a *per se* taking of property as that term was defined in *Loretto v. Teleprompter* ("*Loretto*").[100] In *Loretto*, the court determined that a New York statute that required a rental property owner to permit cable attachments to its rental property effected a taking for which just compensation is due. The *Loretto* Court concluded that in cases where a regulation restricting the use of property amounts to a physical occupation, there is a taking to the extent of the occupation, without regard to other factors that a court might ordinarily examine such as "the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action."[101] The *Loretto* Court did not express an opinion on the amount of compensation due.[102] In *Florida Power*, the court concluded that the Pole Attachment Act did not authorize a taking under the *Loretto* physical invasion test. The Court stated, in reference to the application of a *per se* taking rule, that it did not decide what the application of *Loretto* would be "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements."[103]

46. The *Florida Power* court dealt with the *Loretto* issue because it was reviewing the lower court's conclusion that the Pole Attachment Act effected a *per se* taking of property, and the lower court's conclusion that, because the Pole Attachment Act authorized the Commission to make the initial determination of compensation, a judicial function, it was unconstitutional. The Supreme Court reversed the lower court on both issues. The most important aspect of *Florida Power*, for purposes of our review of the issue now before us, is the court's treatment of the remaining question, whether, under traditional Fifth

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N.W.2d 386 (Mich. 1999).

[98] Citing *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95C-0341 at 11 (June 17, 1997).

[99] Citing *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n, Docket 7061-U (October 21, 1997).

[100] 458 U.S. 419 (1982).

[101] *Loretto* at 432.

[102] *Id.* at 441.

[103] *Florida Power* at 252, n. 6.

Amendment analysis, the Commission's pole attachment rate formula effected a taking of property without just compensation. The Court concluded that it did not. The Court stated that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory."[104] *The Florida Power* court squarely determined that the compensation provided by applying the Commission's pole attachment formula is constitutionally sufficient.

47. In reaching this conclusion, the Court stated that "[I]t is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible"[105] . . . "so long as the rates set are not confiscatory."[106] In *FPC v. Hope Natural Gas Co.* ("*Hope Natural Gas*"),[107] in the context of rate regulation, the Supreme Court concluded that "[u]nder that statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."[108] The *Hope Natural Gas* Court continued that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid . . ."[109] In *Duquesne Light Company v. Barasch*, ("*Duquesne Light*")[110] the Supreme Court summarized the history of the development of the standard for reviewing rate regulation, beginning with Justice Brandeis' dissent in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*,[111] and noting that "[p]erhaps the most serious problem associated with the fair value rule was the 'laborious and baffling task of finding the present value of the utility'",[112] and that the "test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex and inexact process."[113] The *Duquesne Light* court stated that "[f]orty-five years ago in the landmark case of [*Hope Natural Gas*], this Court . . . held that the 'fair value rule' is not the only constitutionally acceptable method of fixing utility rates. In [*Hope Natural Gas*] we ruled that historical cost was a valid basis on which to calculate utility compensation."[114]

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[104] *Id.* at 254.

[105] *Id.* at 253.

[106] *Id.*

[107] 320 U.S. 591 (1944).

[108] *Id.* at 602.

[109] *Id.* at 605.

[110] 488 U.S. 299 (1989).

[111] *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276(1923).

[112] *Duquesne Light* at 309, n. 5 (citation omitted).

[113] *Id.* (citation omitted).

[114] *Id.* at 310.

48. In *Florida Power*, the Supreme Court appropriately applied this standard of review to the Commission's pole attachment rate formula and found that the formula did not effect a taking of property without just compensation. The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator. In addition to these charges, the attacher pays a proportionate share of pole capital costs and operating expenses based on the amount of space occupied by the attachments. The Commission's pole attachment rate formula for cable attachers allocates the cost of the entire pole by the percentage of total usable space used. The formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The Supreme Court determined that this formula results in a rate that is not confiscatory.[115] Under the *Florida Power* standard of review for regulated rates, the current pole attachment formula for cable attachments, which is substantially unchanged from that reviewed by the *Florida Power* court, provides just compensation.

49. On February 8, 2001, pursuant to the Pole Attachment Act, a second rate became effective for telecommunications attachers. The telecommunications pole attachment rate is similar to the cable attachment rate with the sole exception being a different methodology for determining the proportion of pole space that is attributable to the attachment. Pursuant to statutory mandate, the telecommunications pole attachment rate allocates the cost of the unusable portion of the pole to an attacher based on the total number of attaching entities rather than on the portion of usable space occupied by the attachment. Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula. The existence of a difference between the formulas does not arise to a constitutional issue, because both formulas provide just compensation under the Fifth Amendment. In *Duquesne Light*, the Court reiterated that "'rate-making power is a legislative power and necessarily implies a range of legislative discretion.'"[116] Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates. The end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocated costs of the pole-related expenses and is therefore, not confiscatory under the *Florida Power* test. Because the end result is not confiscatory, it satisfies the Fifth Amendment requirement that property not be taken without just compensation. As the *Duquesne Light* court stated, "the commission[117] 'must be free, within the limitations imposed by pertinent constitutional and *statutory commands*, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.'"[118] Under the *Florida Power* test, both the cable and telecommunications pole attachment rate formulas provide the utilities with rates that are constitutionally sufficient.

50. Although *Florida Power* is settled law, the question of the constitutional sufficiency of the

[115] *Florida Power* at 254.

[116] *Duquesne Light* at 313 (quoting *Minnesota Rate Cases*, 230 U.S. 352, 433).

[117] State of Pennsylvania Public Utilities Commission (footnote not in original).

[118] Id. at 313-314 (emphasis in original) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767).

Commission's pole attachment rates has been raised by Respondent. Confusion about the issue has arisen following the Eleventh Circuit Court of Appeals' decision in *Gulf Power I*, which held that, under the reasoning of *Loretto*, the 1996 Act's mandatory access amendments to the Pole Attachment Act effect a taking of property. Based on its finding in *Gulf Power I*, in *Gulf Power II*, the Eleventh Circuit found that the Commission's regulations implementing the 1996 Act amendments to the Pole Attachment Act also authorize a taking of property. Both opinions reserved on the issue of whether the statute or the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[119] In *Gulf Power I*, utilities made essentially the same argument that Respondent makes, that "because a utility's property is now being taken, the rate it was able to collect when it was voluntarily providing access is no longer appropriate. This is so, they argue, because the standard for determining just compensation for a taking should be more rigorous than that for determining a rate for providing voluntary access."[120]

51. Respondent's argument misinterprets the extent of the holding in *Gulf Power I* and *II*. The courts' finding, that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations authorize a taking, merely changes the initial focus of the review of pole attachment rates set using the Commission's formula. Instead of first examining the "character of the governmental action"[121] the review proceeds directly to the measure of compensation. However, that measure of compensation is not changed simply because the regulation restricting the use of property amounts to a physical occupation under *Loretto*. Changing the nature of access from voluntary to mandatory did not change the extent of the property occupied. The essential nature of the regulation, a restriction on the price that a utility may charge for attachments to its monopoly-owned poles, remains unchanged. The constitutional measure of value of that property is the same as the measure that has been used since *Hope Natural Gas*, if the end results of the regulations are "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed. . .",[122] then the regulations are constitutionally valid. The Commission's formula uses the same public information that is gathered in other federal and state rate-making processes, processes that are constitutionally sufficient under the *Hope Natural Gas*, *Duquesne Light* and *Florida Power* standard of review, to calculate the pole attachment rate.

52. The Commission's formula enables a utility to recover all of the costs that are attributable to the pole attachment. The property at issue, excess, unused pole attachment space, is the same whether the attachment is obtained through voluntarily signed contracts or through mandatory access. The Respondent has voluntarily entered into a regulated industry and voluntarily used its poles for wire communications. Respondent's belief that it is entitled to obtain a higher return on pole attachments that are not voluntarily negotiated has no constitutional basis; the utility pole space is the same property used by Respondent in its regulated core business and is only a small portion of otherwise unused property. The Commission's formula, by providing Respondent with reimbursement of its operating expenses and its cost of capital proportionate to the space used by an attachment, enables Respondent to continue to operate

[119] *Gulf Power I* at 1338; *Gulf Power II* at 1272-73.

[120] *Gulf Power I* at 1337.

[121] *Loretto* at 432.

[122] *Hope Natural Gas* at 605.

successfully, maintain its financial integrity, attract capital, and compensate its investors at a rate approved for property devoted to the operation of a regulated industry. The Commission's formula relies on the latest year-end actual publicly reported costs of utilities and assures just and reasonable rates to both the utility and the attaching parties, establishes accountability for prior cost recoveries, and accords with generally accepted accounting principles. We affirm the Bureau's determination that the Commission's formula provides just compensation to a utility for the use of its poles for attachments by cable system operators.

53. In essence, Respondent argues that we should apply a different analysis to determine just compensation. Even if we were to assume, for the sake of argument, that Respondent's argument has merit, we would still end up with the same measure of compensation. The objections to other measures of just compensation for rate regulations, objections which lead to the development of the standard applied in *Florida Power*, and which are summarized in *Duquesne Light*, are just as valid in this case as in any preceding rate case. In *United States v. Commodities Trading Corp.*,[123] the Supreme Court stated that it "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases."[124] Just compensation is generally determined by the loss to the person whose property is taken,[125] keeping in mind that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'"[126] The determination of just compensation centers on putting the property owner in as "good position pecuniarily as he would have occupied if his property had not been taken."[127] One common measure of loss is the fair market value of the property taken. Fair market value represents a price that reflects what a purchaser in fair market conditions would pay for the property.[128] However, the Supreme Court has concluded that where a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied.[129] Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.

54. We find Complainant's argument and supporting evidence on this issue to be persuasive. We agree with Complainant that the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by Respondent and other utilities, affect the measure of compensation. Cable attachers generally have no practical or cost-effective alternative to attachments to existing poles. In any specific area, there is only one provider of pole space and there is usually surplus space on those poles. In this case, and in many other cases, the cable attacher is already on the pole and

[123] 339 U.S. 121 (1950).

[124] *Id.* at 123.

[125] *United States v. Causby*, 328 U.S. 256, 261 (1946).

[126] *United States v. Commodities Trading Corp.*, 339 U.S. at 124.

[127] *United States v. Miller*, 317 U.S. at 373.

[128] *United States v. Miller*, 317 U.S. 369, 374 (1942).

[129] *Id.* at 374; *United States v. Commodities Trading Corp.*, 339 U.S. at 123.

conducting business and there is no viable alternative. The rates, terms and conditions of pole attachments are regulated because of the bottleneck monopoly status of the utilities' poles. Although utilities continue to argue that poles are no longer bottleneck facilities, no credible evidence of this has ever been presented to the Commission and it certainly cannot be argued that cable operators who already have attachments to utility poles have any other reasonable options to pursue.

55. Despite Respondent's and other utilities' arguments to the contrary, there is no non-monopoly market in pole attachments. There are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments. Respondent has a monopoly on pole attachments in its service area and any rents it negotiates with other service providers not covered by the Commission's pole attachment rate formula reflect a monopoly value. Respondent's comparisons to other industries, technologies and property rights are inapposite because the property interests involved are too different to draw any meaningful conclusions. Respondent was unable to show that there is any reasonable way to evaluate a pole attachment value using a comparable sales approach.

56. Under the income capitalization method, the value of a particular piece of property is shown by calculating the present value of the income the property could be expected to generate over its useful economic life.[130] "[F]or a court to allow value to be proved in such a suspect manner, impeccably objective and convincing evidence is required."[131] This approach is impossible or inappropriate in cases in which the property involved either produced no income, or the income was far too speculative to rely on.[132] Complainant reasonably argues that the income approach to valuation is inappropriate because the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment. Respondent listed several different types of valuations under the heading of the income capitalization approach, but none of these valuations even approximate an income capitalization methodology. Respondent failed to meet its burden to show that this methodology is required or even appropriate for pole attachments.

57. Respondent's final attempt at appraisal, using replacement costs less depreciation with or without the addition of an enhanced value, also fails. As Complainant points out, the ownership interest in the space occupied by a pole attachment is a limited property interest, restricted in duration, primacy, exclusivity, and physical manner of use, all of which affect the determination of value of the interest conveyed. A pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole. Because the utility's interest in the property is not completely destroyed, requiring the use of replacement costs as a measure of just compensation is inappropriate. Also, it is not feasible to reproduce existing utility poles. Zoning, environmental, local government, and financial constraints make it impractical and often impossible to construct new pole systems. Respondent was unable to offer a reasonable proposal for implementing this methodology, opting instead for a permutation of the Commission's formula, manipulating the various elements to result in a higher rate. Although Respondent argues that the replacement cost appraisal methodology will result in higher pole attachment rates, this theory is not supported by Respondent's calculations. Many of the changes in methodology that Respondent incorporates in its calculations, such as the amount of space occupied, the average number of

[130] *Snowbank Enterprises, Inc. V. United States*, 6 Cl.Ct. 476, 486 (1984).

[131] *United States v. 69.1 Acres of Land*, 942 F.2d 290, 294 (4th Cir. 1991).

[132] *Seravalli, et al. v. United States*, 845 F.2d 1571, 1574-1575 (Fed. Cir. 1988).

attaching entities, pole height presumptions, inclusion of lightning arresters and grounding equipment, entrepreneurial incentives, and other increased expenses are not related to a replacement cost methodology. We also find that Respondent, and pole owners in general, are not entitled to an enhanced value or network value for pole attachments. Complainant reasonably argues that the utility is not conveying to the attacher the right to be in the public right-of-way, which is granted by the local franchising authority for a fee, nor does the utility provide the attacher with a complete corridor of access to a network of customers. We find Complainant's arguments persuasive on this issue.

58. The Commission's formula has been used successfully over the years by the Commission and various states[133] to promote reasonable, affordable, predictable, and nondiscriminatory access to poles for cable television systems. Preventing utilities from setting rates for pole attachments at levels that are well in excess of their actual costs and well above the costs that they attribute to themselves in pricing services that compete directly with those offered by attachers, precludes utilities from establishing an unfair and unjustified competitive advantage and improperly discriminating against their competitive rivals. Respondent has not supported its assumption that the constitutional requirement of just compensation entitles Respondent to a higher pole attachment rate than that calculated in accordance with the Pole Attachment Act and the Commission's rules. Respondent has not provided any credible evidence that shows that the Respondent is not compensated fully under the formula and placed in the same position monetarily as it would be but for the attachments. The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation. In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service. Respondent carries the burden to show that the Commission's formula does not provide just compensation.[134] We find that Respondent has not met its burden to show that one of its three appraisal methodologies must be used to measure the value of just compensation. We also find that Respondent did not provide sufficient and credible evidence to support its claim to the $38.81 rate. We therefore affirm the Bureau Order's rejection of Respondent's proposed justification of its $38.81 rate.

59. Respondent also challenged specific aspects of the formula, including the formula presumptions for pole height and usable and unusable space. We agree with Complainant that Respondent has not met its burden of presenting the Commission with new evidence that would justify the adoption of different presumptions by the Commission. We have already rejected utility arguments supporting a change in the pole height presumption because the evidence presented was not sufficient to change the

[133] As Complainant points out, the majority of states that have certified to regulate pole attachment rates rely on an historic cost methodology. Complainant cites Cal. Pub. Util. Code § 767.5 (1999); *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, Decision No. 98-10-058 (Cal. PUC Oct. 22, 1998); *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364 (Issued and effective June 17, 1997), recon. denied, 1997 N.Y. PUC LEXIS 639 (October 7, 1997); *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U, October 21, 1997.

[134] *See Hope Natural Gas* at 602 ("It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (citations omitted)); *see also Permian Basin Area Rate Cases* at 767.

presumption of an industry wide average pole height of 37.5 feet.[135] However, in any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height. In this case, Respondent could have offered evidence of the specific height data for its cable-attached poles, but instead, Respondent claimed that its average existing pole height should be considered to be forty feet based upon its claim that its average replaced pole in 1999 is approximately forty feet. There is no evidence to support a conclusion that average height of the poles replaced in 1999 reflect the system-wide pole height average. Respondent's proffer is not sufficient or even appropriate data to overcome the presumption of 37.5 feet.

60. Regarding usable space presumptions, Respondent has not provided data that would overcome the formula presumption of 13.5 feet of usable space on a 37.5 foot pole or the presumption that an attacher uses one foot for its attachment. Respondent also claims that the cable rate formula does not require cable attachers to pay their fair share of unusable space and that cable operators must pay the telecommunications rate in order to provide just compensation to the utility. Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.

61. Respondent also argues that the absence of particular FERC utility cost accounts in the Commission's formula renders it constitutionally deficient. Respondent admits that it has raised these arguments before, and advances no new evidence to indicate that the expense accounts it identifies must be appropriately included in the formula. We have thoroughly reviewed all of the information provided on this topic by Respondent and Complainant as well as the description of the FERC accounts contained in 18 C.F.R. Part 101 and find no evidence that these accounts contain any significant costs that should be allocated to a pole attachment. Each account contains costs that relate to the utility's core business function of energy distribution and it would not be reasonable or just to include these accounts in a calculation of a pole attachment rate. Respondent argues that administrative efficiency is not a good enough reason for excluding certain accounts. However, administrative efficiency alone is not the basis for the decision to exclude certain accounts. It was based first on the description of the accounts. The insignificance of the relationship of these accounts to pole attachment costs are what dictate that a full scale ratemaking proceeding to identify every item in the regulatory accounts would be inequitable. As the Supreme Court stated in *Duquesne Light*, "[i]nconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect."[136] In addition, adding accounts containing engineering expenses that are paid for through make-ready expenses would result in a double charge to attachers.

[135] *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 (2000).

[136] *Duquesne Light* at 314.

E. Arbitrary and capricious agency action

62. Finally, Respondent argues that the Order constitutes arbitrary and capricious agency action because the Bureau failed to analyze the issue of just compensation and did not address Respondent's evidence concerning rebuttable presumptions in the pole attachment regulations. Complainant disputes Respondent's allegations. Respondent mischaracterizes the Bureau Order. We disagree with Respondent that the Bureau Order was based on arbitrary or capricious decisionmaking. The Complaint was filed in response to the unilaterally imposed $38.81 pole attachment rate, not the negotiated rate of $7.47. The Bureau's first task was to determine if the $38.81 rate was just and reasonable in accordance with the Commission's rules. Because Respondent made no attempt to justify the $38.81 rate using the Commission's rules, and based on the record before us, the rate in fact violated our rules, the Bureau did not err when it found the rate to be unreasonable. Second, the rebuttable presumptions are only pertinent to a rate calculated using the Commission's formula. As discussed above in paragraphs 59-61, Respondent did not offer evidence that would overcome the presumptions used in the formula in this particular application of the formula. The Bureau Order merely noted that the various rates calculated by Complainant using Respondent's financial information did not result in a rate higher than $7.47, even assuming that Respondent was successful on certain issues. The Bureau was not under an obligation to specifically address those issues which could not affect the final outcome by increasing the $7.47 rate agreed to by the parties. The Bureau is also not required to resolve hypothetical questions. In resolving a pole attachment complaint, the Bureau is not required to revisit the same issues that have already been raised and rejected by the Commission in a rulemaking proceeding. We find that the Bureau properly considered all pertinent evidence. Thus the Bureau Order was not the result of arbitrary and capricious action.

63. Respondent also claims that the Bureau Order is arbitrary and capricious because the Bureau Order improperly relied on administrative convenience as the basis for its decision. We find Respondent's allegations to be completely without merit. Although the Bureau Order considered the congressional and Commission policy to avoid a prolonged and complex rate setting methodology for pole attachments in its deliberations, as indicated above, the Bureau's decision was based on a number of substantive factors. Respondent further argues that the Bureau Order is internally inconsistent because it first acknowledges, in accordance with Commission regulations, that further negotiations between the two parties are likely to be fruitless, in the absence of Commission resolution of the issues raised in the Complaint, and then later orders the parties to negotiate in good faith in accordance with the guidance provided in the Order. Respondent believes this cannot be classified as reasoned decision making. We find Respondent's charges to be without reason or foundation. Every complaint proceeds on the finding that the parties' negotiations have failed over unresolved issues. Resolving the issues for the parties and ordering further negotiations is a just and reasonable decision. We conclude that the Bureau Order is neither arbitrary nor capricious.

64. Respondent also argues that the Commission's continued use of historical costs in the pole attachment rate formulas constitutes arbitrary and capricious action in violation of 5 U.S.C. § 706(2)(A). Respondent observes that the Commission applies a different methodology in the context of universal service requirements and interconnection agreements as opposed to pole attachments. Respondent argues that consistency demands that the same pricing methodology be applied throughout the 1996 Act. We disagree with Respondent's argument that the Commission's continued use of a historical cost methodology in the pole attachment context is arbitrary and capricious. As explained in detail below, the Commission had a rational basis, amply supported by record evidence, for choosing different pricing methodologies in

these different contexts.[137]

65. In the Universal Service Order[138] and Local Competition Order,[139] the Commission reasonably and in detail explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the new competitive objectives of the 1996 Act. These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a local telecommunications market.[140] The Commission found the use of a forward-looking cost methodology particularly important in this context because we determined that a firm compares forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.[141]

66. By contrast, the predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[142] Due to the local monopoly in ownership or control of poles, the legislative record indicated that some utilities had abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for access by cable companies to their pole space.[143] This actual and potential anti-competitive behavior prompted Congress to pass the Pole Attachment Act. It was in this context that the Commission, guided by Congressional direction to use existing accounting measures to determine costs, decided to employ a historical cost based pole attachment formula in implementing the Pole Attachment Act.[144] There is nothing novel about the Commission's use of a historical cost methodology in the context of regulating monopoly rates. For example, to carry out the statutory goal of section 623(b) of the Communications Act – i.e., to ensure that individual retail subscribers of monopoly cable providers were not exploited -- the Commission, in addition to using a benchmark approach, also adopted a historical, cost-of-service alternative methodology for the cable

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[137] *See Federal Communications Commission, et al. v. National Citizens Committee for Broadcasting, et al.*, 436 U.S. 775, 803 (1978). *See also, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-843 (1984) (the standard of review of an agency action for arbitrariness or capriciousness is a deferential standard by which a reviewing court will uphold an agency action if its has a rational basis).

[138] *Federal-State Joint Board on Universal Service*, FCC 96J-3, 12 FCC Rcd 87 (1997).

[139] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, 11 FCC Rcd 15499 (1996).

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

[141] *Local Competition Order*, 11 FCC Rcd at 15813, 15846 (¶¶ 620, 679).

[142] S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109.

[143] *Id.*

[144] *See In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979).

television industry.[145]

67. The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.[146] By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate-of-return regulation.[147] Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."[148]

68. In addition, the benefits of using a forward-looking cost methodology are less pronounced in the pole attachment context than in the universal service/interconnection context. The Pole Attachment Act protects cable and telecommunications attachers from monopoly prices set by utilities that are not necessarily in direct competition with the attachers, although there may be potential for direct competition.[149] The Pole Attachment Act does not set out a scheme for attachers to access the network elements of a utility's core business. The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.[150] Thus, while in some cases pole owner and attacher may both provide telecommunications services, most typically a cable attacher, as is true in this case, or telecommunications attacher is seeking relief under the Pole Attachment Act from the rates, terms and conditions imposed by an electric utility pole owner. In the telecommunications interconnection context, on the other hand, the statute sets out a scheme for determining rates solely between competing telecommunications carriers. Thus, rate regulation in the context of pole attachments is not focused primarily on the same concerns that predominate with interconnection.

69. In addition, the assets being regulated in the two contexts are very different. The Pole Attachment Act addresses access to poles, ducts, conduits and rights-of-way, in contrast to the unbundled elements of an incumbent's telecommunications network that are addressed in the interconnection context. These telecommunications network elements, in contrast to poles, ducts and conduits, are subject to a

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[145] 47 U.S.C. § 543(b); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations*, 9 FCC Rcd 4527 (1994). *See also Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 178-87 (D.C.Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

[146] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. (1996).

[147] *See Local Competition Order*, 11 FCC Rcd at 15857 (¶ 704).

[148] 47 U.S.C. § 252(d)(1)(A)(i).

[149] We recognize that increasing convergence of services and electric utilities' entry into telecommunications may change this situation in the future.

[150] *See 1977 Senate Report*. In the *1977 Senate Report*, Congress also noted that poles owned by cable companies were less than 0.1 percent of the total number of poles nationwide. There is nothing in the record to suggest that this percentage has markedly changed.

rapidly changing technology. A forward looking cost pricing methodology reflects the cost of replacing the functions of an asset using the most efficient technology available so as to appropriately capture the technological changes that are occurring.[151] As a result, new entrants are given the proper cost signals to decide whether to construct their own networks or to use the incumbent's. In the context of pole attachments, there has been significantly less change in the nature of the asset since their deployment decades ago, so it is not as critical to employ a formula that accounts for such factors. Indeed, given the nature of the pole attachment asset, the two methodologies – i.e., historical and forward looking -- may likely produce similar cost results in the pole attachment context.[152] In addition, cable attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles.[153] Thus, because attachers frequently do not face a realistic "make or buy" decision, the benefits of giving proper cost signals to new entrants are less pronounced in the pole attachment context. Moreover, the pole attachment formula does account for the costs incurred when poles are replaced by utilities in the normal course of their business because the formula uses actual year end asset and expense data from records maintained and publicly reported as part of the utilities' regulated core electric or telephone business services. In fact, if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.[154]

70. We have recognized that the continued use of the historical cost based pole attachment formula brings certainty to the regulatory process. For more than two decades,[155] the pole attachment formula has provided a stable and certain regulatory framework, which may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[156] We have found that switching to a methodology based on forward-looking economic costs

[151] *See* 47 C.F.R. § 51.505(b)(1) (forward-looking cost "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration").

[152] *See Local Competition Order*, 11 FCC Rcd at 1585 (¶ 705) (stating that it cannot be determined in the abstract whether a forward-looking cost approach or a historical approach will produce higher cost figures in a particular setting).

[153] In addition, it is not clear that a policy which would encourage the erection of multiple duplicative poles in the public right of way is consistent with the Pole Attachment Act.

[154] If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole. The Commission has never held that the Pole Attachment Act, which anticipates a range of reasonable rates, prohibits a utility from being directly compensated by an attacher for such incremental, non-recurring costs. Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility. *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 28 (2000).

[155] *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

[156] *See* 1977 *Senate Report* at 21 (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and

would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations.[157] We have acknowledged that, in certain contexts, setting prices on the basis of forward-looking economic costs has advantages, such as giving the appropriate signal for new entrants to invest in network facilities; but, as explained above, these advantages are less pronounced in the pole attachment context because pole attachers are less likely to build, or may be prohibited from building, their own poles and conduit.[158] We have concluded and continue to find that, in the context of pole attachments, the continued use of historical costs accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and encouraging negotiation among the parties by providing regulatory certainty.[159] We conclude that the Bureau's application of the Commission's pole attachment formula is neither arbitrary nor capricious.

V. CONCLUSION AND ORDERING CLAUSE

71. For the reasons discussed above, we conclude that Respondent's application for review and petition for emergency stay should be denied.

72. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of Alabama Power Company seeking reversal of In the Matter of Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company, PA 00-003, DA 00-2078 (released September 8, 2000), IS DENIED and the referenced Petition for Emergency Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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procedures consistent with fair and efficient regulation").

[157] *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

[158] *Id.*

[159] *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 10 (2000).

EXHIBIT

List of Documents Filed in PA 00-003

Complaint
Complainant's Petition for Temporary Stay
Respondent's Motion to Dismiss Complaint and Petition for Stay
Respondent's Answer to Petition for Temporary Stay
Complainant's Opposition to Motion to Dismiss Complaint and Petition for Stay
Respondent's Motion for Leave to File Motion for Confidential Treatment of Commercial and Financial Information
Respondent's Response to Complaint and Motion for Confidential Treatment and Financial Information
Complainant's Motion for Extension of Time
Respondent's Motion to Strike
Respondent's Declaration of R.E. Prater
Respondent's Declaration of R.E. Prater (original signature)
Order, DA 00-1847
Complainant's Opposition to Respondent's Motion to Dismiss
Complainant's Supplement (to amend Exhibits 1,2,3,4,9 and 15 of the Complaint)
Respondent's Letter regarding Confidentiality Agreement
Complainant's Reply to Response and Opposition to Motion for Confidential Treatment
Complainant's Second Supplement (to amend Exhibits 1,2,4,9 and 15 of the Complaint)
Respondent's Motion to Strike and Reply to Opposition to Motion for Confidential Treatment
Order, DA 00-2078
Respondent's Resume of Rodney W. Frame (Part of Mr. Frame's Affidavit)
Application for Review
Emergency Petition for Stay Pending Judicial Review
Respondent's Motion for Leave to File Supplemental Authority
Respondent's Notice of Filing Supplemental Authority (affidavit of Henry Wise)
Respondent's two Letters which were inadvertently omitted from its Emergency Petition for Stay
Respondent's Original Affidavit (with original signature of Henry J. Wise)
Respondent's Letter (transmitting electronic documents)
Complainant's Opposition to Application for Review, Emergency Petition for Stay and Motion for Leave to File Supplemental Authority
Respondent's Reply to Opposition to Motion for Leave to File Supplemental Authority
Respondent's Reply to Opposition to Application for Review
Complainant's Letter updating the matter of confidential treatment for Respondent

Concurring Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Alabama Cable Telecommunication Association, et. al.

I concur with several of the conclusions reached in this case. While the Commission must be observant of the Fifth Amendment when it implements and enforces Section 224 of the Act, the conclusions it reaches are always subject to judicial review for consistency with the law and the Constitution. The Commission should respect the role of the U.S. Court of Appeals for the 11th Circuit in deciding the question of whether compensation was just in this particular proceeding.

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