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

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

**DECISION**

**Appearances**

*John D. Seiver*, *Christopher A. Fedeli*, and *Beth Keating*, on behalf of Florida Cable Telecommunications Association, Inc., et al; *J. Russell Campbell*, *Eric B. Langley*, *Allen M. Estes* and *Ralph A. Peterson*, on behalf of Gulf Power Company; *Lisa Griffin*, *Rhonda Lien,* and *James W. Shook*, on behalf of the Enforcement Bureau.

**Adopted: March 16, 2011** **Released: April 12, 2011**

By the Commission:

## I. INTRODUCTION

1. In this decision, we affirm the Initial Decision of Chief Administrative Law Judge (ALJ) Richard Sippel, who determined that Gulf Power Company (Gulf Power) is not entitled to compensation above the regulated rate for any attachments to its poles by Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C. (the "Cable Operators").[1] We find that Gulf Power failed to meet its burden of proof under the test adopted by the United States Court of Appeals for the Eleventh Circuit in *Alabama Power Co. v. FCC*,[2] which identified circumstances under which a utility would be entitled to compensation above the regulated rate.

[1] *Florida Cable Telecomm'ns Ass'n, Inc. v. Gulf Power Co.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 22 FCC Rcd 1997 (ALJ 2007) (Initial Decision).

[2] 311 F.3d 1357 (11th Cir. 2002).

## II. BACKGROUND

### A. The Pole Attachments Act

2. The Pole Attachments Act,[3] codified in Section 224 of the Communications Act, as amended,[4] authorizes the Commission to regulate the rates, terms, and conditions of access for attachment by cable operators and telecommunications carriers to utility poles, ducts, and rights-of-way. The Pole Attachments Act requires that such rates, terms, and conditions be just and reasonable.[5] Section 224(d)(1) establishes a zone of reasonableness for rates bounded on the lower end by incremental costs and on the upper end by fully allocated costs.[6] Pursuant to Section 224(b)(1), the Commission developed a cost methodology to determine the maximum allowable pole attachment rate under Section 224(d)(1). This methodology, known as the Cable Formula or Cable Rate, is codified at 47 C.F.R. § 1.1409(e)(1).[7]

3. In 1987, in *FCC v. Florida Power Corporation*, the Supreme Court rejected a Fifth Amendment takings challenge to the Pole Attachments Act.[8] The Court held that the Act was not a *per se* taking because it did not, at that time, require utility companies to give cable operators access to space on utility poles.[9] Consequently, the Cable Rate would not violate the Fifth Amendment unless it was "confiscatory."[10] The Court concluded that the Cable Rate, as applied in that case, was not confiscatory because it provided for "the recovery of fully allocated cost, including the actual cost of capital."[11] Accordingly, the Court held that the Act did not "effect a taking of property under the Fifth Amendment."[12]

4. In the Telecommunications Act of 1996, Congress added Section 224(f)(1), which requires a public utility to give a cable television system "nondiscriminatory access to any pole, duct,

[3] Pub. L. No. 95-234, 92 Stat. 35 (1978).

[4] 47 U.S.C. § 224.

[5] *Id.* § 224(b)(1) (providing that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions").

[6] *Id.* § 224(d)(1) (providing that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs attributable to the entire pole"). In the pole attachment context, incremental costs are those that the utility would not have incurred "but for" the cable attachment. *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12109 para. 9 & n.37 (2001) (*Consolidated Partial Order on Reconsideration*); *Amendment of the Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4388, para. 4 (1987) (*Pole Attachment Fee Order*); S. Rep. No. 580, 95th Cong., 1st Sess. at 20 (1977).

[7] *See Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6457, para. 5 (2000) (*2000 Report and Order*); *review denied sub nom. Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12110, para. 10. Section 1.1409(e)(1) specifies the following formula for the maximum rate: Maximum Rate = (Space Occupied by Attachment/Total Usable Space) x Net Cost of Bare Pole x Carrying Charge Rate.

[8] 480 U.S. 245 (1987).

[9] *Id.* at 251-52.

[10] *Id.* at 253.

[11] *Id.* at 254. The Court did not consider the constitutionality of the minimum rate allowable under the Act. *See id.* at n.7.

[12] *Id.* at 254.

conduit, or right-of-way owned or controlled by it."[13] Congress enacted an exception to that requirement in Section 224(f)(2), which provides that a utility may deny a cable television system nondiscriminatory access to any of its poles when "there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[14] The 1996 Act did not amend the range of reasonable rates prescribed by Section 224(d).

5. In June 2002, in *Southern Company v. FCC*,[15] the United States Court of Appeals for the Eleventh Circuit vacated Commission rules that required utilities to expand pole capacity to accommodate new attachments when the parties agree that capacity on a given pole would otherwise be insufficient.[16] The court held that the rules violated the plain language of § 224(f)(2), which authorizes a utility to deny access to a pole when there is insufficient capacity.[17] The court also held that the term "insufficient capacity" is ambiguous, and that utilities do not have "unfettered discretion to determine when capacity is insufficient."[18] The court affirmed the Commission's interpretation of the term "insufficient capacity" to mean "the actual absence of usable physical space on a pole."[19]

6. Five months later, in *Alabama Power v. FCC*, the Eleventh Circuit rejected a Fifth Amendment challenge to the compulsory access regime Congress adopted in 1996. The court affirmed the Commission's finding that the Cable Rate provides just compensation for the use of space on utility poles by cable operators.[20] The court held that, despite the more rigorous standard for just compensation that the court deemed applicable to the *per se* physical taking effected by Section 224(f)(1),[21] the Cable Rate meets the government's obligation to put the aggrieved party "'into the same position monetarily as it would have occupied if the property had not been taken.'"[22] Because the Cable Rate enables utilities to recover more than the marginal costs they incur to accommodate a new attachment, it "necessarily provides just compensation."[23]

7. The court distinguished space on utility poles from ordinary property, such as land, which is "rivalrous – its possession by one party results in a gain that precisely corresponds to the loss endured by the other party."[24] In contrast, a utility pole can potentially serve several attachers at the same time.[25] Because utilities can and routinely do perform "make-ready" work[26] to accommodate new attachers,

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[13] 47 U.S.C. § 224(f)(1).

[14] *Id*. § 224(f)(2).

[15] 293 F.3d 1338 (11th Cir. 2002).

[16] *Id.* at 1346-47.

[17] *Id.* at 1346.

[18] *Id.* at 1348.

[19] *Id.* at 1349.

[20] 311 F.3d at 1368-71.

[21] *Id.* at 1367-68.

[22] *Id.* at 1370 (quoting *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287, 297 (2d Cir. 1986)).

[23] *Id*. at 1371.

[24] *Id.* at 1369.

[25] *Id*.

[26] "Make-ready" generally refers to the modification of poles or lines or the installation of equipment to accommodate new attachments. A "change-out" is the replacement of a pole with a longer pole. *See, e.g.*, *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 20536, 20542, para. 20 (2007); *2000 Report and*

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space on utility poles is "nonrivalrous," which "means that use by one entity does not necessarily diminish the use and enjoyment of others."[27] Consequently, requiring utilities to allow attachments by cable companies does not result in any "lost opportunity" to the utilities, and reimbursement of marginal costs provides just compensation.[28]

8. The Eleventh Circuit held that a utility would be entitled to compensation above the Cable Rate only if it could demonstrate rivalry for pole space. To meet the burden, a utility must show with regard to each pole that "(1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use in its own operations."[29] Referring to Section 224(f)(2), which confers an exemption to the forced-attachment regime "where there is insufficient capacity," the court noted that "Congress contemplated a scenario in which poles would reach full capacity."[30] In the "full capacity" situation, the court explained, "it is the zero-sum nature of pole space, like land, that is key."[31] "When a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm – a missed opportunity that does not exist in the nonrivalrous scenario."[32] On the other hand, absent evidence that a pole is at full capacity and that a buyer is waiting in the wings or the power company has a higher valued use, pole space is nonrivalrous and the recovery of the Cable Rate is constitutionally sufficient.[33] Alabama Power had no claim, the court concluded, because it had not "allege[d] that [its] network of poles is currently crowded" and, as such, had not met its burden of establishing loss attributable to the claimed taking that was not adequately compensated by the Cable Rate.[34]

### B. The Parties' Dispute

9. The Cable Operators provide service throughout Florida. They entered into pole attachment contracts with Gulf Power and, pursuant to the Cable Formula, paid annual pole attachment rates of roughly $6.00 per pole.[35] In addition, the contracts required the Cable Operators to pay the cost of all make-ready work necessary to accommodate their attachments, plus a 15 percent markup if Gulf Power performed the make-ready work.[36] Because the Cable Operators directly compensated Gulf Power

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*Order*, 15 FCC Rcd at 6459, para. 7 n.40; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, 18056, para. 21 n.50 (1999) (subsequent history omitted).

[27] 311 F.3d at 1369.

[28] *Id.* at 1371.

[29] *Id.* at 1370-71.

[30] *Id.* at 1370.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1370-71.

[34] *Id.* at 1370 (citing *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1940) (holding that the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking)). The court also dismissed for lack of standing a petition for review filed by Gulf Power, which, like Alabama Power, is an affiliate of the Southern Company. *Id.* at 1366.

[35] Initial Decision, 22 FCC Rcd at 2000-01, paras. 9-10; *see also Florida Cable Telecomm'ns Ass'n. Inc. v. Gulf Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 9599, 9601, para. 2 (Enf. Bur. 2003) (*Florida Cable v. Gulf Power*).

[36] Initial Decision, 22 FCC Rcd at 2001, para. 11.

for make-ready costs, Gulf Power was required to exclude those costs from the Cable Formula to ensure that the Cable Operators were not charged twice for the same costs.[37]

10. In 2000, Gulf Power sent the Cable Operators notices that their annual pole attachment rates would increase to $38.06, which exceeds the Cable Rate by more than 500 percent.[38] The Cable Operators responded by filing a complaint against Gulf Power for violating Section 224 of the Act and the Commission's pole attachment rules.[39] The complaint alleged that Gulf Power unilaterally terminated existing pole attachment agreements, forced the cable operators to execute new pole attachment agreements containing much higher pole attachment rates, and refused to negotiate new agreements in good faith in accordance with the Cable Formula. In response, Gulf Power argued, *inter alia*, that the Commission's Cable Formula would not provide just compensation as required by the Fifth Amendment and that an alternative cost methodology should be employed to calculate an appropriate rate.

11. The Enforcement Bureau granted the complaint.[40] The Bureau determined that Gulf Power's proposed rate of $38.06 was unjust and unreasonable and ordered the parties to negotiate new pole attachment agreements, using the formula in Section 1.1409(e) of the Commission's rules[41] as a guide for determining a reasonable rate. In particular, the Bureau rejected Gulf Power's assertion that the Cable Formula does not provide just compensation and therefore violates the Takings Clause of the Fifth Amendment. The Bureau relied on the Commission's determination, as affirmed by the Eleventh Circuit in *Alabama Power v. FCC*, that the Cable Formula provides just compensation.

12. Gulf Power did not base the proposed $38.06 rate on the Cable Formula, or submit any evidence to satisfy the test articulated in *Alabama Power* for justifying compensation above the Cable Rate. Thus, the Bureau ordered Gulf Power to allow the cable operators to remain attached to Gulf Power's poles at the rates under their former contracts pending the negotiation of new contracts. It also ordered Gulf Power to refund amounts charged over the amounts specified in the parties' prior pole attachment agreements.[42]

13. In response to a petition for reconsideration and request for evidentiary hearing filed by Gulf Power, the Enforcement Bureau designated the above-captioned complaint proceeding for hearing before an ALJ to consider "the facts Gulf Power intends to proffer in an effort to satisfy the *Alabama Power Decision's* standard."[43] The Hearing Designation Order directed the ALJ to determine "[w]hether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles

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[37] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC 2d 59, 72, para. 27 (1979) ("[W]here a utility has been directly reimbursed by a CATV operator for non-recurring costs, . . . such costs must be subtracted from the utility's corresponding pole line capital account to insure that CATV operators are not charged twice for the same costs."); *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12103, para. 77 ("Make-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.").

[38] Initial Decision, 22 FCC Rcd at 1999, para. 4 & n.5.

[39] Pursuant to the Pole Attachments Act, the Commission has adopted rules that authorize aggrieved parties to file complaints when they have a dispute with a utility concerning pole attachments. *See* 47 C.F.R. §§ 1.1401-1.1418.

[40] *Florida Cable v. Gulf Power*, 18 FCC Rcd at 9599; *see also* 47 C.F.R. §§ 1.1401-1.1418 (Pole Attachment Complaint Procedures); 47 C.F.R. §§ 0.111(a)(12), 0.311 (authority delegated to the Enforcement Bureau to resolve complaints regarding pole attachments filed under Section 224 of the Communications Act).

[41] 47 C.F.R. § 1.1409(e).

[42] 18 FCC Rcd at 9609, paras. 3-5.

[43] *Florida Cable Telecomm'ns Ass'n, Inc. v. Gulf Power Co.*, Hearing Designation Order, 19 FCC Rcd 18718, 18722 n.21 (Enf. Bur. 2004).

belonging to the Cable Operators, and, if so, the amount of any such compensation."[44] In accordance with *Alabama Power*, the Hearing Designation Order assigned to Gulf Power "the burden of proving it is entitled to compensation above marginal cost with respect to specific poles."[45]

### C. The ALJ's Initial Decision

14. After an evidentiary hearing, the ALJ determined that Gulf Power had not made the requisite showing under *Alabama Power* to receive compensation above the Cable Rate for any of the attachments belonging to the Cable Operators. The ALJ found that Gulf Power failed to satisfy the *Alabama Power* test because it "failed to show that any pole is at full capacity and that (1) the Cable Formula has cost it an opportunity to rent space to someone else at a higher rate or that (2) it is prevented from putting the space to a higher valued use within its own operations."[46] Gulf Power failed to identify any instance in which "it was prevented from accommodating an attachment because of cable attachments."[47] Gulf Power admitted that "a rearrangeable pole would not be at full capacity" and that its practice was to perform any necessary make-ready work whenever possible.[48] Gulf Power also failed to offer "proof that potential users will pay higher rent, or proof of higher valued uses of the space by Gulf Power which were foreclosed by Complainants' cable attachments."[49] Consequently, the ALJ held, "Gulf Power has not lost any opportunity."[50]

15. Gulf Power relied on a survey known as the "Osmose study" to show that its poles were at full capacity. Osmose surveyed 9,663 of Gulf Power's poles and concluded that 7,120 poles were "crowded" because adding a new attachment to those poles, without any make-ready work, would result in a safety code violation.[51] The record also includes evidence concerning 100 exemplar poles. Like the Osmose survey, Gulf Power assumed that these poles are at full capacity if any make-ready work would be required to accommodate a new attacher.[52] The ALJ concluded that Gulf Power could not meet its burden under the *Alabama Power* test by "merely pointing to the need for rearrangement of existing attachments and/or compliance with safety codes in order to accommodate new attachments."[53] The ALJ held that when capacity is available through rearrangement of existing attachments or expansion of a pole's height, the pole is not full because no entity is excluded from the pole and there is no foreclosed or missed opportunity. Make-ready work, the ALJ found, is the means of providing space for new attachments on poles with the capacity to expand, and practically all of Gulf Power's poles have this capacity.[54] Given that a showing of lost opportunity is critical under *Alabama Power*, the ALJ reasoned

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[44] *Id.* at 18722, para. 11.

[45] *Id.* at 18721-22, para. 8 & n.26; *see also Alabama Power*, 311 F.3d at 1370 (noting that "the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking") (citing *U.S. v. John J. Felin & Co.*, 334 U.S. at 641).

[46] Initial Decision, 22 FCC Rcd at 2006, para. 26.

[47] *Id.* at 2005, para. 23.

[48] *Id.* at 2005, paras. 22-23.

[49] *Id.* at 2004, para. 20.

[50] *Id.*

[51] *Id.* at 2002, para. 16.

[52] *See* Gulf Power's Proposed Findings of Fact and Conclusions of Law at 20-21, paras. 43, 46 ("Gulf Power's Proposed Findings").

[53] Initial Decision, 22 FCC Rcd at 2003, para. 19.

[54] *Id.* at 2006, para. 25. Referring specifically to the 15% above cost Gulf Power receives for any make-ready work it performs, which is the responsibility of the attaching cable operator under the parties' pole attachment agreements

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that a pole that can be readily expanded to accommodate new users, at no out-of-pocket cost to Gulf Power, did not demonstrate the sort of crowding that would render pole space rivalrous and enable its owner to seek more than the regulated rate.[55] The ALJ concluded that Gulf Power's "historical willingness to accommodate new attachers by performing make-ready [work]," which Gulf Power had admitted during discovery, must be taken into account in determining whether a pole's insufficient capacity resulted in a missed opportunity.[56] "Gulf Power always has the ability to adjust poles at the expense of new attachers thus showing that Gulf Power's poles lack full capacity and are nonrivalrous."[57]

16. The ALJ distinguished the Eleventh Circuit's holding in *Southern Company v. FCC* that a utility may not be required to provide access to a pole "[w]hen it is agreed that capacity is insufficient."[58] The ALJ found this holding was not significant to any specified issue because there was never an agreement between the Cable Operators and Gulf Power regarding pole capacity.[59] The ALJ also noted that *Southern Company* held that the statutory term "insufficient capacity" in Section 224(f)(2), which exempts a utility from having to provide access to its poles, does not give utilities unfettered discretion to decide when capacity is insufficient.[60]

17. The ALJ did not determine the level of compensation that would have been appropriate had Gulf Power made the requisite showing under the *Alabama Power* test that it was entitled to compensation above marginal costs for one or more specific poles.[61] The ALJ found that Gulf Power failed to prove that there was "insufficient capacity" on any of its poles within the meaning of Section 224(f)(2), or that it lost an opportunity to put space on its poles to a higher valued use.[62] The ALJ reasoned that when capacity is available through routine make-ready work, the pole is not full, there has been no exclusion or lost opportunity, and remuneration based on the Cable Formula provides sufficient compensation.[63] The evidence showed that the Cable Operators occupy pole space that would otherwise be vacant, so the regulated rate, which provides for the recovery of allocated costs, provides a fair return.[64] Because Gulf Power had not met its burden of proving by a preponderance of the evidence that but for the Commission's mandatory pole attachment regulation it would have been able to rent space to someone else at a higher rate, or use the space for its own higher-valued use, the ALJ found that the Cable Rate provides just compensation.[65]

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and which is not incorporated into the Cable Rate, the ALJ commented that Gulf Power is not operating at a financial loss in complying with the Cable Rate. *Id.* at 2001, para. 11.

[55] *Id.* at 2003-04, paras. 19-20.

[56] *Id.* at 2005, para. 24 (citing *Interlocutory Order*, FCC 05M-50 (Oct. 12, 2005) at 2).

[57] Initial Decision, 22 FCC Rcd at 2004, para. 20.

[58] 293 F.3d at 1347.

[59] Initial Decision, 22 FCC Rcd at 2005, para. 24.

[60] *Id.* (citing 293 F.3d at 1348).

[61] Initial Decision, 22 FCC Rcd at 2006, paras. 26, 28.

[62] *Id.* at 2003-06.

[63] *Id.*

[64] *Id.* at 2006, para. 27.

[65] *Id.* at 2006.

### D. Gulf Power's Exceptions to the ALJ's Initial Decision

18. On March 2, 2007, Gulf Power filed exceptions to the Initial Decision.[66] Gulf Power contends that "[t]he most critical error in the Initial Decision is the determination that there is no such thing as a 'full capacity' pole, so long as capacity can be expanded to accommodate a new attacher – including actually taking a pole out of the ground and replacing it with a larger pole."[67] Gulf Power asserts that if, as the ALJ determined, a pole is not at full capacity if it can be rearranged or changed-out to accommodate new attachments, there is no practical or economically meaningful set of circumstances in which a utility is entitled to rates in excess of the Cable Rate.[68] It posits that the ALJ's ruling is inconsistent with *Alabama Power*, in which the court stated that "a power company whose poles are, in fact, full can seek just compensation."[69] Gulf Power argues that the ALJ's decision likewise cannot be reconciled with Section 224(f)(2) and the Eleventh Circuit's opinion in *Southern Company*, which invalidated a Commission rule requiring utilities to expand capacity on poles as contrary to the plain meaning of Section 224(f)(2).[70] Gulf Power claims that the invalidated rule defined capacity expansion to include steps taken "to rearrange or changeout existing facilities" and required that a utility expand capacity at the request of an attaching cable system.[71]

19. Gulf Power argues that the ALJ's attempts to distinguish *Southern Company* are invalid. Even assuming that the ALJ correctly read the decision to apply only where there is an agreement regarding pole capacity, Gulf Power claims that the ALJ ignored undisputed record evidence that there is virtually never a disagreement between Gulf Power and the Cable Operators as to whether make-ready work is required on a given pole.[72] Gulf Power also points out that the portion of *Southern Company* cited in the Initial Decision, in which the court found ambiguity in the statutory term "insufficient capacity," did not relate to the court's discussion of the capacity expansion issue. Rather, it related to another regulation specifying the conditions under which a utility may reserve pole space for future use.[73] The court upheld the Commission's construction of the term "insufficient capacity" to mean "the actual absence of usable space on a pole."[74]

20. Gulf Power believes that poles requiring expansion are "full" for purposes of the *Alabama Power* standard. Gulf Power claims that the ALJ erred by focusing on "hypothetical" poles, contrary to the *Alabama Power* court's evident concern with the current condition of actual poles,[75] and

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[66] *See* Gulf Power Company's Exceptions To The Initial Decision (Mar. 2, 2007) (Exceptions). The Cable Operators filed a Reply Brief on March 12, 2007. Also pending before the Commission is Gulf Power's Request for Oral Argument on Exceptions to Initial Decision, which was filed on March 19, 2007. Gulf Power requests that the Commission hear oral argument on two issues: (1) the definition of "crowded" or "full capacity" under *Alabama Power*; and (2) the proof required for a utility to obtain pole attachment rents higher than the regulated rate once a pole (or pole network) is shown to be "crowded" or at "full capacity."

[67] Exceptions at 1.

[68] *Id.* at 4-5.

[69] *Id.* at 6 (citing 311 F.3d at 1371).

[70] *Id.* at 6-9.

[71] *Id.* at 7.

[72] *Id.* at 8.

[73] *Id.* at 8-9.

[74] *Id.* at 8-9 (citing 293 F.3d at 1349).

[75] *See* Exceptions at 9-10. In support, Gulf Power cites references in the *Alabama Power* court's opinion to poles either being "currently crowded" or to their "present" capacity. These include the court's ultimate rejection of the power company's claim because "[n]owhere in the record did [it] allege that [its] network of poles is currently

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compounded the error by relying on Gulf Power's historical practice of performing the make-ready work necessary to accommodate new attachments.[76] It maintains that the ALJ erred by suggesting that safety standards "have nothing to do with capacity."[77] Gulf Power also faults the ALJ for ignoring expert testimony defining a full-capacity pole as one that requires any make-ready work to accommodate a new attachment.[78] Gulf Power contends that the ALJ partially quoted the record in concluding that Gulf Power admitted that "a rearrangeable pole would not be at full capacity,"[79] since the witness clarified on redirect that "if a pole requires make-ready it is crowded" and explained that "make-ready" includes "rearrangement or replacement."[80]

21. Finally, Gulf Power claims that there are other potential users of its pole space waiting in the wings who are willing to pay higher rent than the Cable Rate. To support this argument, Gulf Power relies on evidence that the Cable Operators pay higher rates to another utility, and that three other attachers pay more than $40 per attachment on Gulf Power's poles.[81] Gulf Power also submitted testimony that prices in an unregulated market were upwards of $20 per attachment.[82] Gulf Power claims that we should interpret *Alabama Power* to mean that once a utility shows rivalry, it is entitled to compensation in the form of fair market value (or an acceptable proxy).[83]

### E. The Section 224 Order

22. On May 20, 2010, the Commission released an Order and Further Notice of Proposed Rulemaking concerning implementation of section 224 of the Act (*Section 224 Order*).[84] In the Order,

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crowded," 311 F.3d at 1370, and its observation that "the Cable Bureau and the full Commission might have been advised to inquire about the level of capacity presently on APCo's poles," *id.* at 1371.

[76] Exceptions at 10; *see also* 22 FCC Rcd at 2005, para. 24.

[77] Exceptions at 10 (citing 22 FCC Rcd at 2002, para. 14).

[78] Exceptions at 12-13.

[79] 22 FCC Rcd at 2005, para. 22.

[80] Exceptions at 12 & n.7 (citing Dunn Re-Direct, Tr. 849-50).

[81] Exceptions at 17.

[82] *Id.*

[83] *Id*. at 6.

[84] *Implementation of Section 224 of the Act*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010), *clarified*, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011) (*Order on Reconsideration*). Several parties filed petitions for reconsideration or clarification of the *Section 224 Order*. Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Electric Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (Sept. 2, 2010) (asking the Commission to clarify that utilities are not required to perform make-ready within the electric space on a pole to accommodate new attachments, and seeking reconsideration on other points); Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (Sept. 2, 2010) (seeking reconsideration or clarification that the nondiscriminatory access requirement only applies within the communications space, among other findings); Petition for Reconsideration and Request for Clarification of Oncor Electric Delivery Company LLC, WC Docket No. 07-245, GN Docket No. 09-51 (Sept. 2, 2010) (joining the petitions of the Florida Investor-Owned Utilities and the Coalition of Concerned Utilities); Petition for Reconsideration or Clarification of the Alabama Cable Telecommunications Association *et al.*, WC Docket No. 07-245, GN Docket No. 09-51 (Sept. 2, 2010) (seeking a requirement that utilities replace poles when taller poles are needed to accommodate attachments). On reconsideration, the Commission clarified that a utility's use of an attachment technique in the electric space does not obligate it to allow the same technique in the communications space. *See Order on Reconsideration* at para. 299. The Commission also clarified that there is not "insufficient capacity" simply because a utility must rearrange
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the Commission determined that the nondiscriminatory access obligation in section 224(f)(1) requires a utility to allow cable operators to use pole attachment techniques, such as boxing and bracketing,[85] that the utility itself uses in similar circumstances, subject to applicable safety codes.[86] The Commission acknowledged the Eleventh Circuit's ruling in *Southern Company* that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment, but concluded that a pole does not have "insufficient capacity" for purposes of section 224(f)(2) if a utility could accommodate another attachment using conventional methods that it employs in its own operations.[87] The Commission noted that techniques like boxing and bracketing take advantage of usable physical space on an existing pole.[88]

## III. DISCUSSION

23. The central issue to be decided here is whether Gulf Power made the evidentiary showing required by the Eleventh Circuit's opinion in *Alabama Power* to seek compensation in excess of the Cable Rate for the Cable Operators' attachments. We find that Gulf Power did not satisfy the test elucidated by the court because it failed to prove that it suffered a "lost opportunity" for which it was not justly compensated.[89] We affirm the ALJ's determination that Gulf Power failed to adduce persuasive evidence that any specific poles were at full capacity. The ALJ found, and Gulf Power does not dispute, that the record reflects no instance in which Gulf Power was unable to accommodate a new attachment because of cable attachments.[90] We likewise affirm the ALJ's determination that Gulf Power failed to show either that another potential user of the Cable Operators' space was waiting in the wings or that Gulf Power would have been able to put the space to a higher-valued use in its own operations.[91] We therefore find that the Cable Rate provides just compensation to Gulf Power for the use of pole space by the Cable Operators.

### A. Gulf Power Failed To Show That Its Poles Are at Full Capacity

24. To meet its burden of proof, Gulf Power relied on the Osmose survey, which assumed that a pole is full if, in its current state, without any make-ready work, adding a new attachment would result in a code violation. Gulf Power made the same assumption with respect to exemplar poles that were included in the record.[92] We reject that assumption. In accord with our *Section 224 Order* and *Order on Reconsideration*, we find that when an electric utility can accommodate a new attachment, in compliance with applicable safety codes, by using conventional techniques that the utility uses in its own operations, the pole cannot reasonably be described as having "insufficient capacity" within the meaning

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its electric facilities to accommodate an attachment. *See id.* para. 231. Rather, "where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not 'insufficient capacity' under section 224(f)(2)." *Id.*

[85] "Boxing" refers to the installation of communications on both sides of the same pole at approximately the same height. "Bracketing" refers to the installation of "extension arms," which extend from the pole to support communications lines at the same level as existing lines attached to the pole. *Id.* at para. 8 nn.36-37.

[86] *Id.* at paras. 8-13.

[87] *Id.* at para. 14.

[88] *Id.* at paras. 14-16.

[89] *Alabama Power*, 311 F.3d at 1371.

[90] Initial Decision, 22 FCC Rcd at 2005, para. 23.

[91] *Id.* at 2005-06, paras. 20, 26.

[92] *See supra* para. 15.

of section 224(f)(2), or described as "at full capacity" within the meaning of the *Alabama Power* decision.[93] When a new attacher could be accommodated by rearranging existing attachments or with conventional attachment techniques to the same extent that the utility uses them, such as boxing and bracketing, the pole is not at full capacity.[94] Indeed, as the ALJ noted, a witness for Gulf Power "admitted that 'a rearrangeable pole would not be at full capacity.'"[95] We therefore affirm the ALJ's finding that "merely pointing to the need for rearrangement of existing attachments and/or compliance with safety codes in order to accommodate new attachments [does] not meet Gulf Power's burden."[96] This finding reflects the reality that repositioning existing attachments is a routine practice. In reaching this finding, we do not rely on the ALJ's conclusion that a pole is not at full capacity when a utility can change it out and replace it with a longer pole.[97]

25. Gulf Power had the burden of proving full capacity "with regard to each pole."[98] The fundamental flaw in Gulf Power's evidentiary case is that Gulf Power assumed that a pole is at full capacity whenever any make-ready work would be required to accommodate a new attachment, and did not differentiate between poles that would require mere repositioning of existing attachments or use of conventional attachment techniques versus poles that would require replacement.[99] The Osmose study did not address the amount of make-ready work that would be required to make room for a new attachment on any given pole. Rather, the study assumed that a pole is at full capacity if any make-ready would be required, no matter how insignificant.[100] Gulf Power made the same assumption with respect to the 100 exemplar poles in the record.[101] Because we find that a pole is not at full capacity if a new attachment could be accommodated with techniques that Gulf Power uses in its own operations, to meet its burden of proof Gulf Power needed to identify poles that could not accommodate a new attachment

[93] *See, e.g.*, *Order on Reconsideration* at para. 232 ("We do not equate capacity expansion with facility rearrangement in existing space.").

[94] For purposes of our analysis, we accept Gulf Power's argument that it intended the word "crowded," as used in the Osmose study, to be synonymous with "full capacity" under *Alabama Power*. *See* Exceptions at 5. The *Alabama Power* court used these terms interchangeably to describe poles on which space is rivalrous. *See* 311 F.3d at 1370. Thus, we find that a pole is "crowded" if Gulf Power could not accommodate another attacher using conventional attachment techniques to the same extent that Gulf Power uses them in its own operations. To the extent the ALJ drew a distinction between the terms "crowded" and "full capacity," we do not rely on that distinction.

[95] 22 FCC Rcd at 2005, para. 22. We recognize that Gulf Power attempted to rehabilitate its witness on redirect examination. *See* Exceptions at 12 n.7. Nevertheless, we find that the witness's admission on cross-examination is correct – a pole is not at full capacity when a utility can accommodate an additional attachment by rearranging existing attachments.

[96] *Id.* at 2003, para. 19.

[97] *Cf. Order on Reconsideration* at para. 226 (declining to address petition for clarification requesting that the Commission "clarify that pole owners may not refuse to replace or change out an existing pole with a taller replacement pole where a taller pole is needed to accommodate existing or prospective attachers").

[98] *Alabama Power*, 311 F.3d at 1370.

[99] *See* Gulf Power's Proposed Findings at 3, para. 3 ("a rivalrous condition exists on any pole where make-ready would be required in order to accommodate an additional attacher").

[100] *Id.* at 25, para. 53 ("The Osmose Poles are examples of the varying conditions in the field, with at least one thing in common – each would require make-ready (ranging from rearrangement of existing facilities to poles being changed out) to accommodate an additional attachment").

[101] *Id.* at 21, para. 46 ("Gulf Power asserts that if make-ready must be performed to host an additional attachment, the pole is rivalrous").

unless Gulf Power employed a unique attachment technique or the pole was changed out.[102] Gulf Power did not meet that burden. Indeed, Gulf Power conceded that "[a] correct finding may well be that a small percentage of poles require change-out (as opposed to rearrangement)."[103] We cannot identify, based on the evidence in the record, any specific Gulf Power poles that are at full capacity in the sense that a new attacher could not be accommodated though rearrangement of existing attachments or use of conventional attachment techniques. We therefore find that Gulf Power failed to meet its burden of proof.[104]

26. We reject Gulf Power's argument that this approach is somehow inconsistent with the Eleventh Circuit's decision in *Southern Company* and Section 224(f)(2), which authorizes a utility to deny access to its utility poles "where there is insufficient capacity." In *Southern Company*, the court invalidated Commission regulations that required utilities, when the parties agreed that capacity on a given pole was insufficient, to expand capacity to accommodate a proposed attachment. The court reasoned that "Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers."[105] Consequently, "the FCC lacks authority to order utilities to expand the capacity of their infrastructure to accommodate third-party attachers in situations where it is agreed that existing capacity is insufficient."[106] The court also recognized, however, that the meaning of the term "insufficient capacity" is ambiguous, and upheld the Commission's interpretation of the term to mean "the actual absence of usable physical space on a pole."[107] In the *Section 224 Order*, we concluded that a pole does not have "insufficient capacity" if it could accommodate an additional attachment using conventional methods of attachment to the same extent that a utility uses them in its own operations, such as boxing and bracketing.[108] These techniques take advantage of usable physical space on the existing pole.[109]

27. Our decision in this proceeding is consistent with the Eleventh Circuit's interpretation of Section 224(f)(2). We find that when a utility can make room for a new attachment using conventional techniques, as described above, there is usable physical space on the pole, *i.e.*, there is sufficient capacity.

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[102] *See Section 224 Order* at paras. 8-13; *Order on Reconsideration* at paras. 231-36 (explaining that utilities must allow cable operators to use the same attachment techniques that the utility uses in its own operations in similar circumstances). Even if Gulf Power were correct that certain of its poles are at full capacity, Gulf Power would not be entitled to compensation above the regulated rate for the independent reason that it also failed to show that other attachers were "waiting in the wings" or that it could have put attachment space to a higher-valued use within its own operations. *See infra* part II.B.

[103] Gulf Power's Reply to Complainants' Proposed Findings of Fact and Conclusions of Law at 11, para. 20.

[104] Gulf Power claims that it showed "structural" and "systemic" rivalry on its poles. Exceptions at 2. Gulf Power alleges that "structural" rivalry exists because a typical joint use pole has 11.5 feet of usable space for attachments, and "systemic" rivalry exists because of the spacing requirements that apply when a pole has multiple attachers. *See* Gulf Power's Proposed Findings at 15-20. These facts do not show rivalry. Gulf Power can and does accommodate multiple attachers on its poles, and it failed to identify a single instance when it was unable to accommodate a new attacher because of existing cable attachments. Consequently, Gulf Power failed to meet its burden of showing that the mandatory access requirement in section 224 foreclosed "an opportunity to sell space to another bidding firm – a missed opportunity that does not exist in the nonrivalrous scenario." *Alabama Power*, 311 F.3d at 1370. Moreover, the notion of "systemic" rivalry is inconsistent with the *Alabama Power* test, which requires a showing of rivalry "with regard to each pole." *Id.*

[105] *Southern Company*, 293 F.3d at 1346-47.

[106] *Id.* at 1352.

[107] *Id.* at 1349.

[108] *Section 224 Order* at para. 14.

[109] We disagree with Gulf Power's claim that the Commission previously defined "capacity expansion" to include rearrangement of connections on a pole. *See id.* at para. 16 n.56.

Gulf Power's argument that the *Southern Company* court affirmed the Commission's interpretation of Section 224(f)(2) with regard to a different rule, which governed reserved space on poles, is irrelevant.[110] The court upheld the Commission's interpretation of the statute. We are applying the same interpretation of the same statutory term here. We find that a pole has insufficient capacity only when there is no usable space on the pole.

28. Gulf Power also claims that the ALJ erred by suggesting that "routine changes are made . . . to observe safety standards which are conditions requiring correction having nothing to do with capacity."[111] We agree with Gulf Power that safety codes may be relevant in determining whether a pole is at full capacity, but that is not grounds for reversal of the ALJ's ultimate finding that Gulf Power failed to meet its burden of proof. In determining whether a new attachment can be accommodated, a utility may not assume, as Gulf Power did in this case, that its existing attachments on a pole are static. We find that if a utility could accommodate a new attachment by repositioning existing attachments or by using attachment methods to the same extent that that Gulf Power itself uses such methods, in full compliance with applicable safety codes, the pole is not at full capacity. We reject Gulf Power's contrary view because it would give utilities the ability to avoid their statutory obligation to provide access to useable pole space based solely on the placement of their own attachments. We do not believe that Congress intended that perverse result, which would reward inefficient use of available pole space.

29. Gulf Power's remaining exceptions with regard to this issue can be resolved quickly. Gulf Power contends that the ALJ erred by focusing on "hypothetical" poles.[112] Our decision, however, is based on the record generated concerning the current condition of poles, not hypothetical extensions of poles. There is nothing hypothetical about measuring pole capacity in terms of whether there is sufficient space to accommodate a new attachment. Gulf Power claims that the ALJ further erred by referencing its historical practice of performing make-ready work when necessary to accommodate new attachments.[113] We find that Gulf Power's historical practices are relevant insofar as they demonstrate that Gulf Power can reasonably make room for additional attachments by repositioning existing attachments.

30. Gulf Power also faults the ALJ for ignoring expert testimony defining a full-capacity pole as one that requires any make-ready work to accommodate a new attachment.[114] We view the issue of what constitutes a "full" pole for purposes of just compensation under the *Alabama Power* test to be a legal, rather than a factual, determination, for it arises under (and is properly resolved by) this agency's reasonable interpretation of the statutory phrase "insufficient capacity." In resolving that issue, we have adopted a commonsense approach to what constitutes "full capacity" and have not relied on conflicting expert testimony. Gulf Power does not dispute that make-ready work in the form of repositioning existing attachments does facilitate access.

31. Finally, Gulf Power claims that its poles are not essential facilities,[115] but does not explain how that allegation relates to the issues before us. Section 224 requires Gulf Power to give the Cable Operators nondiscriminatory access to its poles. The Eleventh Circuit held in *Alabama Power* that this access requirement does not run afoul of the Fifth Amendment, and that a utility would be entitled to compensation above the Cable Rate only if it could show that a specific pole is at full capacity and another potential user of space occupied by cable companies is waiting in the wings. We have concluded

[110] Exceptions at 8-9.

[111] 22 FCC Rcd at 2002, para. 14; *see* Exceptions at 10-11.

[112] Exceptions at 9-10.

[113] *Id*. at 10; *see also* 22 FCC Rcd at 2005 para. 24.

[114] Exceptions at 12-13.

[115] *Id.* at 14-15.

that Gulf Power failed to make the requisite showing. The essential facilities doctrine is not relevant to that conclusion.

### B. Gulf Power Failed To Show That Other Buyers Were Waiting in the Wings or That It Had a Higher Valued Use for the Cable Operators' Space on Its Poles

32. We also find that Gulf Power failed to satisfy the second prong of the *Alabama Power* test. Specifically, Gulf Power failed to show with respect to any poles at full capacity that other attachers were waiting in the wings to use the Cable Operators' space, or that Gulf Power would be able to put the Cable Operators' space to a higher-valued use in its own operations.

33. The linchpin of the *Alabama Power* test is proof of rivalry for pole space. To meet its burden of proof, Gulf Power had to adduce evidence that someone was competing with the Cable Operators for space on poles that were at full capacity. "In the 'full capacity' situation, it is the zero sum nature of pole space . . . that is key."[116] "By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself)," the Pole Attachments Act "forecloses an opportunity to sell space to another bidding firm."[117] Absent evidence of rivalry for pole space, "there is no 'lost opportunity' foreclosed by the government."[118]

34. Gulf Power failed to meet its burden of proof. Gulf Power failed to adduce evidence that anyone (including Gulf Power) is competing for the use of space occupied by the Cable Operators on poles that are at full capacity. Gulf Power's evidence that the Cable Operators pay rates above the Cable Rate to another utility[119] sheds no light on whether there is rivalry for space on Gulf Power poles occupied by the Cable Operators. Equally unpersuasive is Gulf Power's evidence that three other attachers pay more than $40 per attachment on Gulf Power's poles.[120] This evidence likewise fails to demonstrate that, as a result of the Cable Operators' attachments, someone is being denied an opportunity to use space on Gulf Power poles. Gulf Power also submitted testimony that prices in an unregulated market were upwards of $20 per attachment,[121] but the relevant market in this case is regulated, as directed by Congress. Absent evidence that the Pole Attachments Act prevented Gulf Power from leasing space on a pole at full capacity to someone other than the Cable Operators, Gulf Power has not suffered a lost opportunity. Since Gulf Power failed to adduce such evidence, the Cable Rate provides just compensation.

35. We reject Gulf Power's suggestion that a buyer "waiting in the wings" is a hypothetical buyer, not an actual buyer.[122] To meet its burden of proof, Gulf Power had to show that "a pole is full and another entity wants to attach."[123] Absent evidence that an actual buyer is waiting in the wings, "there is no 'lost opportunity' foreclosed by the government";[124] the possession of pole space by the Cable

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[116] *Alabama Power*, 311 F.3d at 1370.

[117] *Id.*

[118] *Id.* at 1371.

[119] Exceptions at 17.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 18; *see also* Gulf Power's Proposed Findings at 39-40, para. 80. Rivalry for space on poles at full capacity must be real, not hypothetical. Otherwise, Gulf Power has not suffered any lost opportunity.

[123] *Alabama Power*, 311 F.3d at 1370.

[124] *Id.* at 1371.

Operators does not result "in a gain that precisely corresponds to the loss endured" by another party.[125] Consequently, the Cable Rate provides just compensation because it puts Gulf Power in the same position monetarily as it would have occupied if the Cable Operators' attachments did not exist.[126] Because Gulf Power failed to adduce any evidence identifying a specific lost opportunity caused by the Cable Operators' attachments, it failed to meet its burden of proof.

36. Instead of "point[ing] out with particularity alleged material errors in the decision," as required by Rule 1.277(a),[127] Gulf Power in its Exceptions claims generally that the ALJ "erred by not adopting Gulf Power's Proposed Findings," as well as its Reply Findings.[128] Although our rules do not provide for incorporation by reference,[129] we have closely examined the referenced material and find no error.

37. The record demonstrates that, through a combination of the Cable Rate and contractual provisions covering make-ready costs, Gulf Power was fully compensated for all costs associated with the Cable Operators' attachments. The evidence shows that Gulf Power was put in the same position it would have been in, but for the Cable Operators' attachments. Consequently, Gulf Power has not met its burden of proof to show that it is entitled to compensation above the Cable Rate.

### C. Gulf Power's Other Arguments Lack Merit

38. We reject Gulf Power's argument that the ALJ abused his broad discretion in refusing to strike the pre-filed testimony of Cable Operators' witness, Patricia D. Kravtin.[130] As an economist, Kravtin was qualified to address the economic analysis arising from the *Alabama Power* decision and in particular the concept of rivalry.[131] The ALJ cited Kravtin's testimony for the conclusions that through customary make-ready engineering "Gulf Power has historically been able to accommodate an additional attacher" and that there is no resulting exclusion on a pole "if the additional attacher is or can be accommodated on the pole."[132] Although Gulf Power claims that this testimony related to issues that are outside of Kravtin's area of expertise, Gulf Power conceded its historical willingness to perform make-ready work so long as there is no engineering or safety reason for not allowing the attachment.[133]

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[125] *Id.* at 1369.

[126] *Id.* at 1369-71.

[127] 47 C.F.R. § 1.277(a).

[128] Gulf Power Exceptions at 18-20.

[129] *Chameleon Radio Corp.*, Decision, 13 FCC Rcd 13549, 13554 (1998) (citing *United Broadcasting Co*., Decision, 93 FCC 2d 482, 505 n.97 (1983)).

[130] Exceptions at 19-21.

[131] *See* 47 C.F.R. § 1.313 (except as provided otherwise formal hearings will be governed by the rules of evidence applicable to civil proceedings in matters not involving jury trials in the courts of the United States). The admissibility of expert testimony is governed by Fed. R. Evid. 702, providing generally that opinions offered by an expert witness are admissible if the witness is qualified as an expert in scientific, technical or specialized matters and offers testimony that will assist the trier of fact to understand the evidence or resolve a disputed issue.

[132] Initial Decision, 22 FCC Rcd at 2005, para. 22 n.11.

[133] *Id.* at paras. 23-24; *see also* Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order at 2 (Sept. 30, 2005) ("Gulf Power repeatedly has admitted its historical willingness to accommodate attachers by performing make-ready").

Moreover, as noted above, we view the question of what constitutes a pole at full capacity under *Alabama Power* to be essentially a legal issue.[134] Thus, we have not relied on Kravtin's testimony on that question.

39. We also find no error in the ALJ's refusal to afford Gulf Power an opportunity to cross-examine four Cable Operator representatives, whose depositions were excerpted and designated as part of the Cable Operators' case-in-chief. The ALJ initially directed that two of the representatives be available for cross-examination, but ultimately determined that it was in the best interest of adjudicating this case not to allow cross-examination, because "[t]he areas of cross-examination cited by Gulf Power would be fly-specking in the extreme in light of the theory of recovery advanced by Gulf Power in its 'Pre-Trial Brief'" and would be repetitious of other evidence already admitted and in the excerpted deposition testimony.[135] Gulf Power maintains that it was unfairly deprived of the right to cross-examine witnesses on testimony designated as part of Cable Operators' direct case, as permitted by Section 1.321(d)(3) of our rules.[136] The ALJ's ruling, however, was without prejudice to Gulf Power's right to request their cross-examination on rebuttal upon a solid showing of need. Gulf Power, which had an opportunity to question the witnesses during their depositions, did not show any particular need to further question the four deponents or what purpose would have been served by requiring their presence at the hearing. Gulf Power has not identified any material factual issue that might have been decided differently if it had cross-examined the witnesses at the hearing. Notably, the Initial Decision does not cite or otherwise rely on any of the deposition excerpts in question. In these circumstances, the ALJ did not abuse his broad discretion to control the course of the evidentiary proceeding[137] in not requiring the deponents' presence at the hearing. Gulf Power has not shown that it was prejudiced in any way by the ALJ's decision.[138]

40. Finally, we reject Gulf Power's request for oral argument on its exceptions to the ALJ's Initial Decision. We find that oral argument is not necessary and would not assist the Commission in its resolution of the issues raised by Gulf Power.[139]

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[134] *See supra* para. 30.

[135] *Order*, FCC 06M-11, at 2 & n.1 (Apr. 21, 2006) (noting that the questions on cross-examination would cover such topics as Cable Operators' identified poles, pole measurements, and pole attachment agreement and procedures, and that such proof is available by other evidence).

[136] 47 C.F.R. § 1.321(d)(3) (To the extent that the affirmative direct case of a party is made in writing, the deposition of any witness may be used by any party for any purpose provided the witness is made available for cross-examination).

[137] *Family Broadcasting, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 19332, 19334, para. 11 (2002) (stating that the Commission accords its administrative law judges discretion in regulating the course of evidentiary hearings (citing *Hillebrand Broadcasting, Inc.*, Order, 1 FCC Rcd 419, 419, para. 3 (1986))).

[138] Gulf Power also claims that the ALJ erred by excluding from evidence an American Public Power Association Pole Attachment workbook relied upon by Gulf Power's valuation expert. *See* Exceptions at 21. Because we find that Gulf Power did not meet its burden of proof under the *Alabama Power* test, we need not consider what rate other than the Cable Rate would have been appropriate. Consequently, Gulf Power was not prejudiced by exclusion of this evidence.

[139] *See* 47 C.F.R. § 1.277(c) ("The Commission or delegated authority, in its discretion, will grant oral argument by order only in cases where such oral presentations will assist in the resolution of the issues presented"). We have not considered the merits of any substantive arguments presented in Gulf Power's request for oral argument. These arguments, by supplementing Gulf Power's 23-page Exceptions, exceed the page limit prescribed by Section 1.277(c) and in any event are untimely because Gulf Power submitted them after the time period for filing Exceptions set forth in Section 1.276(a). *See* 47 C.F.R. §§ 1.277(c) and 1.276(a).

## IV. ORDERING CLAUSES

41. ACCORDINGLY, IT IS ORDERED, That the Exceptions to the Initial Decision, filed on March 2, 2007, by Gulf Power Company ARE DENIED and that the Initial Decision of Chief Administrative Law Judge Richard L. Sippel in *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Company* (FCC 07D-01), 22 FCC Rcd 1997 (ALJ 2007), IS AFFIRMED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary