Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*	P.A. No. 00-004

To: Enforcement Bureau

RESPONSE TO DESCRIPTION OF EVIDENCE GULF POWER SEEKS TO PRESENT IN SATISFACTION OF THE ELEVENTH CIRCUIT'S TEST

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The Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. ("Complainants"), by their attorneys and pursuant to the Bureau's December 9, 2003 Letter Order, and amending Orders of December 19, 2003 and January 29, 2004, hereby respond to the Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit's Test ("Description") filed by Gulf Power on January 9, 2004.

I. Introduction And Summary

After the Enforcement Bureau issued its ruling granting Complainants' complaint,[1] Gulf Power sought reconsideration[2] arguing, among other things, for the opportunity to submit additional evidence at a hearing to meet the standard set forth in the Eleventh Circuit's decision

[1] *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 at ¶ 14 (rel. May 13, 2003) ("*Bureau Order*").

[2] Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, P.A. No. 00-004 (filed June 23, 2003) ("Petition"). Complainants filed their Opposition to Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing ("Opposition") on July 25, 2003.

in *Alabama Power Co. v. FCC*.[3] On December 9, 2003, the Bureau neither granted nor denied the Petition, but instead ordered Gulf Power to submit a more detailed description of evidence that it would proffer to meet the test set forth in *APCo v. FCC*.[4] As set forth in Complainants' Opposition to Gulf Power's underlying Petition, and as discussed herein, there is no basis for reconsideration of the Bureau's ruling or for a hearing to consider any of the evidence Gulf Power seeks to describe.

First, the test set forth by the Eleventh Circuit in *APCo v. FCC* does not contemplate the type of evidence described by Gulf Power. In *APCo v. FCC*, the Eleventh Circuit affirmed the FCC's resolution of a pole attachment complaint against Alabama Power, Gulf Power's sister company. The FCC, affirmed by the Eleventh Circuit, rejected claims that application of the federal pole rental formula for cable system attachments worked an unconstitutional taking in violation of the just compensation clause of the Fifth Amendment.[5] In its affirmance, the Eleventh Circuit offered up one unique situation – a pole that the parties agree has no more possible capacity – as one exception where a utility might be able to recover *more* than the marginal cost of allowing additional third-party attachments, which was the constitutional minimum required for "just compensation." The Court held:

> In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own

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[3] 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (hereinafter "*APCo v. FCC*").

[4] *See* Letter from Lisa B. Griffin to Messrs. Campbell, Peterson and Seiver (Dec. 9, 2003). Although Gulf Power had objected, and continues to object, to any use of the standard set forth in *APCo v. FCC*, Gulf Power asked in its Request for Evidentiary Hearing for the opportunity to submit evidence under that standard. Petition at 10. In its December 9th letter, the Bureau asked Gulf Power to more specifically describe the evidence Gulf Power had outlined in its Petition in the event the Bureau decided to grant reconsideration.

[5] In a case involving an identical challenge to the federal pole attachment formula for telecommunications attachments, the Commission, again affirmed by the Eleventh Circuit, found the formula constitutional. *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd. 19859 (2002), *aff'd*, 346 F.3d 1043 (11th Cir. 2003). The constitutionality of the formula has been upheld by every court to consider it.

> operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation. While this analysis may create what appears to be an anomaly – a power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation – this result is in accordance with the economic reality that there is no "lost opportunity" foreclosed by the government unless the two factors are present.[6]

Importantly, this standard does not allow for an unregulated rate for "full" poles, but instead for a measure of "just compensation" that exceeds marginal cost. As the Court noted, the formula for cable system attachments already provides "much more" than marginal cost for all of Gulf Power's poles (whether "full" or "not full") so that Gulf Power, under the *Bureau Order* here, is already collecting well in excess of the minimum required for "just compensation."[7] Indeed, if the Eleventh Circuit's test were applied in its entirety, the Bureau would reduce pole rentals for "not full" poles to the constitutional and statutory minimum (*i.e.*, marginal costs) and then only allow rates that exceed marginal costs for the "full" poles. Gulf Power is most assuredly not interested in that result.

In any event, the evidence proffered by Gulf Power does not rise to the level of necessitating reconsideration or a hearing. The proffer is essentially: (1) evidence of an unknown number of pole change-outs to accommodate new attachments of four telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an "unregulated rate" for pole space on some

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[6] *APCo v. FCC*, 311 F.3d at 1370-71 (footnote omitted).

[7] In addition to the costs of providing access (make-ready), the federal formula provides for a pole rental based on all the costs associated with the operating and maintaining the pole, costs of the pole itself and a reasonable profit. "The Commission has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that *exceeds* just compensation." *Bureau Order*, ¶ 15 (citing *APCO Review Order*, ¶¶ 32-61) (emphasis added). In point of fact, Section 224 creates a range of compensation, the low end of which is the incremental costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment). 47 U.S.C. § 224(d). The FCC has long interpreted the statute to provide that when it is reducing a utility's annual rate for pole attachments, it reduces it to the statutory maximum, the high end of the range of compensation. *FCC v. Florida Power, Corp.*, 480 U.S. 245, 254 (1987).

poles[8]; (2) evidence of make-ready for twelve different cable operators (and their geographic overlap) that have paid for change-outs of unspecified poles over an unspecified period of time[9]; (3) unspecified load studies and business plans addressing the potential impact of unforetold third-party attachments[10]; (4) evidence depicting what crowded poles look like[11]; and (5) unspecified "other" evidence that Gulf Power may later discover.[12]

None of this evidence merits requiring a hearing or granting reconsideration. First, it is not part of the *APCo v. FCC* test to suggest that the fact of new or anticipated attachers means that existing attachers' rates should rise. This would transform the rate dispute in this case into a case about access.

Second, the fact that some of the new telecom attachers pay a high rate (without evidence that these telecom attachers filed an access complaint or sought the protection of Section 224 and lost) only shows that some attachers may trade quick access for higher rates. But this does not mean that existing attachers should be forced to pay rental as if they had made such an unnecessary and potentially illegal trade-off. Moreover, constitutional concepts of "just compensation" have never included monopolistic or hold-up values, even if such values could have been obtained in the market.

Third, there is no basis to assume that immediately before any of the change-outs, poles must have been "full" or "crowded" so as to allow the recovery of more than marginal costs on those poles from existing attachers. Change-outs occur for multiple reasons and, more importantly, are paid for entirely by the new attacher or parties requesting modification, thus

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[8] Description at ¶¶ 4, 5 and 11.

[9] Description at ¶¶ 6 and 7.

[10] Description at ¶ 8.

[11] Description at ¶¶ 9 and 10.

[12] Description at ¶ 12.

creating additional space for rental without crowding. Gulf Power thus has no "lost opportunity" within the meaning of the *APCo v FCC* test as against existing attachers or even new attachers when it receives compensation in the form of make-ready, rental and pro-rata operating costs.

Fourth, Gulf Power has made no effort to identify the marginal costs of allowing an attachment on any "full" pole so as to compare those costs with the actual make-ready reimbursement, pole rental and other reimbursements to determine how much more than marginal cost Gulf Power already receives on each "full" pole from existing or new attachers. In that regard, Gulf Power does not indicate that all the poles are "full" or even offer to designate which ones are full, preferring instead to use a presumption – in stark contrast to the Eleventh Circuit's express requirement – that all of its poles are "full" due to change-outs performed for third parties *after* Complainants had already been attached to the poles.

Fifth, the *APCo v. FCC* standard cannot be construed to mean that a pole must be changed-out at the attachers' expense and the rental may thereafter rise to an unspecified level. Indeed, Gulf Power's approach to "crowding" shows that it would charge higher rates even *before* a change-out is needed or requested, and without identifying individual poles. That clearly does not come within the exception identified in *APCo v. FCC*. Even if Gulf Power could identify specific crowded poles now, its proffer of evidence from different or unspecified years, based on unknown reasons for change-outs or modifications, to justify rates either above marginal cost or outside the formula for *existing* attachers does not satisfy any reasonable interpretation of the *APCo v. FCC* test.[13]

[13] Gulf Power also mentions that it might seek discovery against Complainants although it provides no description of what evidence it thinks it might obtain (let alone specify such "with particularity"), and does not indicate how such evidence would support its showing under the *APCo v. FCC* test. *See* Description at n.3. As owner of the pole, Gulf Power has the detailed inventory of every pole and receives attachers' permit applications. If it does not, then it could not demonstrate any "lost opportunity" to rent space at higher rates.

Most of Gulf Power's evidence, if used to support a rental in excess of the statutory maximum under Section 224, would also violate the provisions of 47 U.S.C. § 224(i) that require new attachers to pay for change-outs and rearrangements, *not* the existing attachers either directly or indirectly in the form of higher rent. Moreover, if any modifications or change-outs were necessitated by governmental entities, charging additional expenses or raising rental (beyond the incremental cost of necessary rearrangements) for existing attachers would violate Section 224 as well.[14] *APCo v. FCC* simply does not sanction a utility charging the costs of accommodating new attachers to existing attachers and then collecting multiple higher rentals under the guise of just compensation for leasing space on a crowded pole.

Gulf Power also does not have "unqualified" power to make the sole determination of when a pole has "insufficient capacity" in attempting to satisfy the first prong of *APCo v. FCC*. The parties first must agree that an expansion of capacity is not possible.[15] Further, Gulf Power's informal load studies, plans and testimony concerning its potential, future need for pole space are irrelevant. Reservations of pole capacity may only be made pursuant to a bona fide development plan that "reasonably and specifically" forecasts a need for the space. Gulf Power may not establish a "higher-valued use" by claiming a need to reserve surplus pole capacity and thereby evade proof under the second prong of the *APCo v. FCC* test.

In sum, Gulf Power's evidentiary proffer request is overbroad and seeks to introduce evidence irrelevant to Complainants' pole attachments. For these reasons, the Bureau should deny Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing.

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[14] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 106 (1999) (hereinafter "*1999 Reconsideration Order*"), *aff'd in part and rev'd in part sub nom. Southern Company v. FCC*, 293 F.3d 1338, 1352 (11th Cir. 2002).

[15] *Southern Co. v. FCC*, 293 F.3d at 1347.

II. The Evidence Proffered By Gulf Power Does Not Satisfy The Eleventh Circuit's *APCO v. FCC* Test, Nor Does It Warrant Reconsideration Or An Evidentiary Hearing

A. Evidence Of Pole Change-Outs For Telecommunications Carriers And Payment Of Unregulated Rates Fail To Meet The *APCO v. FCC* Test

Gulf Power seeks to introduce evidence of attachment requests by four non-party telecommunications carriers for access to Gulf Power's poles.[16] Gulf Power contends that its history of performing *voluntary* pole replacements (*i.e.*, change-outs) to accommodate new attachments for Knology, KMC Telecom II, Adelphia Business Solutions and Southern Light, LLC is "indisputable evidence of 'full capacity' or 'crowding'"[17] and entitles it to a rate that exceeds marginal cost.[18] Gulf Power's common, uncontroversial practice for change-outs does not justify higher rates to new *and* existing attachers.

1. Gulf Power's Evidence Of New Attachers' Pole Access Requests May Not Be Used To Raise Existing Attachers' Pole Rents

There is no question here that the pole rental rates found by the FCC to be "just and reasonable" under the formula in Section 224, and objected to by Gulf Power, already exceed marginal cost and thus are well above the constitutional minimum required for just compensation.[19] Nonetheless, Gulf Power's position appears to be that whenever it changes out a pole in response to a *new* attacher's request for access, the pole necessarily must be already at "full capacity," and the pole rental rates of all *existing* attachers must increase. This is Gulf power's position notwithstanding that make-ready reimburses Gulf Power for all costs and the pole rental already provides it a profit, all well in excess of the constitutional minimum required for just compensation.

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[16] Description at ¶¶ 4-6.

[17] *Id.* at ¶ 4.

[18] *Id.*

[19] *See supra* n.7.

The first problem here is that evidence of pole change-outs is relevant only to issues of *access*; Gulf Power's reasoning would transform this rate dispute (and all future rate disputes) into an *access* dispute.[20] Gulf Power apparently believes that the moment it claims that a pole is at "full capacity" and there exists another attacher seeking access, it can charge a higher rate to all attachers. It would, therefore, have an incentive to refuse to change-out to a pole with higher capacity, thereby denying access to the potential attacher and charge existing attacher higher rates. This case, however, is not about access, as Complainants have already been attached to Gulf Power's poles for more than two decades.[21]

Second, even without identifying specific poles, Gulf Power asserts its poles are "crowded"[22] to raise rates to some unspecified level above marginal cost for its alleged lost opportunity, *even though* the federal cable formula rates plus make-ready already well exceeds marginal costs[23] and, as a result of make-ready, additional capacity is created for other attachers. Accepting Gulf Power's arguments and evidence would lead to the unintended consequence of the limited exception for poles that could not reasonably be changed-out to accommodate new attachers swallowing the entire rule of "just and reasonable" rates under Section 224.

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[20] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 at ¶¶ 1161-64 (Aug. 8, 1996) (hereinafter "*Local Competition Order*"); *1999 Reconsideration Order* at ¶¶ 47-53 (1999).

[21] *See, e.g.*, Complaint at ¶ 11, Exhibit 7 at ¶ 15 and Exhibit 8 at ¶ 5.

[22] "Crowding" is not the same as "full capacity." *See* Description at n.5 and ¶ 10. Gulf Power apparently seeks to satisfy some or all of the Eleventh Circuit's test by showing "crowding" which, though not defined by Gulf Power, appears to contemplate something less than full pole capacity. *See* Gulf Power Company's Reply to Complainants' Opposition to Petition for Reconsideration at 6-7 and n.4 (stating that one foot of remaining space on a pole for an additional attacher, after presuming attachments by electric, ILEC, CLEC and cable, was sufficient evidence of "crowding" to demonstrate lost opportunity under the *APCo v. FCC* standard) (filed Aug. 13, 2003); Description at n.4 (explaining that weight and wind loading on a pole may result in crowding on the pole) and ¶ 10 (suggesting generally that it intends to introduce testimony concerning pole "crowding" and the rivalrous attribute of pole space). However, the plain language of the Eleventh Circuit's test requires the utility to show "full capacity" on each pole, and nothing less. *APCo v. FCC* at 1370.

[23] *See infra* Section II.A.4.

Turning to the specifics of Gulf Power's proffer, Gulf Power's Description does not detail the circumstances of the four telecommunications carriers' requests for access or whether Section 224(f)(1) was invoked. For example, we do not know whether: (1) good faith, meaningful negotiations for access and accompanying pole attachment agreements ensued or were determined on a take-it-or-leave-it basis, (2) these attachers were aware of their rights to regulated pole attachment rental rates, or (3) these entities filed complaints for access and lost. As was the case with numerous competitive local exchange carriers ("CLECs") in the wake of the Telecommunications Act of 1996, these carriers may have made a business decision that gaining immediate access to poles at whatever monopoly rent Gulf Power was extracting outweighed the disadvantages of prolonged negotiations or potential litigation that would impede their service rollout in a highly competitive market where time-to-market was crucial. The fact that those telecommunications carriers may have chosen to pay exorbitant pole attachment rental fees to implement their own business plans does not mean that Complainants may be saddled with these charges as well. In short, critical differences exist between requests for access by new attachers and rental rates paid by existing attachers. Because the ultimate burden of proof will be on Gulf Power, in order to show any need for reconsideration or a hearing, its proffer, to be effective, would have had to address these issues.

In addition, Gulf Power provides no support for its assertion that individual poles must be assumed to be at "full capacity" immediately prior to pole change-outs in its attempt to recover more than marginal costs from existing attachers.[24] There are numerous reasons why poles may have to be replaced, including land use changes, local government mandates, car accidents, or requests for modifications by others. But these factors do not mean that poles are suddenly at

[24] Description at ¶¶ 4-6.

"full capacity," "rivalrous" or otherwise such that Gulf Power may charge higher rates. This is particularly true given that pole change-outs necessitated by a new attacher are paid for in full by that attacher. Gulf Power's proffer of evidence does not indicate who requested the change-out, why it was needed, or whether, for example, its own telecommunications affiliates occupy space on the pole.

Moreover, Section 224(i) prevents Gulf Power from charging existing attachers the costs of rearrangements or replacement of attachments if the modification "is required as a result of an additional attachment or the modification of an existing attachment *sought by any other entity.*"[25] In addition, passing on additional make-ready charges or raising pole rents above the marginal costs required for any modifications or change-outs mandated by governmental entities would similarly violate Section 224.[26] Unspecified change-outs for telecommunications carriers on unspecified poles during a four-year period beyond the scope of the Complaint proceeding simply cannot justify higher rates for Complainants back to 2000.

2. Gulf Power May Not Claim That A Pole Is Full After Agreeing To Expand Capacity

Contrary to Gulf Power's assertion, the Eleventh Circuit's standard does not stand for the proposition that poles that once may have been of "insufficient capacity" are frozen in time and must forever be treated as "rivalrous."[27] Gulf Power's evidence of pole replacements, performed voluntarily for non-parties and Complainants, at requesting attachers' expense (*i.e.*, all marginal costs are paid by the attacher),[28] is not what the Eleventh Circuit's test addresses.[29] This

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[25] 47 U.S.C. § 224(i) (emphasis added).

[26] *1999 Reconsideration Order* at ¶ 106; *Southern Co. v. Federal Communications Commission*, 293 F.3d 1338, 1352 (11th Cir. 2002).

[27] *See* Description at 3-4 and n.7. *See APCo v. FCC* at 1370-71.

[28] *See* Complaint, Exhibits 3, 4 and 5 at ¶ 12; Supplement, Exhibit 5, ¶ 12 (Pole Attachment Agreements between Gulf Power and Complainants). *See also APCO v. FCC* at 1368-69.

evidence merely shows past instances in which the parties agreed that pole capacity could be expanded and did so. The actual pole replacement creates surplus space that can be rented to others and enhances Gulf Power's distribution network,[30] precluding any claim of "lost opportunity" or rivalrous nature of the pole.[31] Adequate capacity exists in the form of a replacement from Gulf Power's extensive inventory of taller poles. In short, change-outs for Gulf Power are evidence of a net "gain," not a "lost opportunity." This evidence does not and could not satisfy the test in *APCo v. FCC*.

3. Gulf Power May Not Unilaterally Determine When Capacity Is Insufficient

Gulf Power also asserts an "unqualified right to deny access for reasons related to capacity" in an attempt to satisfy the "full capacity" prong of the *APCo v. FCC* test.[32] However, neither the text of Section 224(f)(2), nor the Eleventh Circuit decision in *Southern Co. v. FCC* construing utilities' access obligations under the statute, gives Gulf Power the right to unilaterally determine "insufficient capacity."[33] Rather, the Eleventh Circuit specified that utilities may not be required to expand the capacity of a pole only "*when it is agreed* that

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[29] Gulf Power protests that it should not have to bear the burden of proof or describe how it intends to meet the *APCo v. FCC* test and that the Commission staff and Complaints should detail their positions. *See* Description at ¶¶ 2-3, 13-15. This is wrong. First, Gulf Power requested reconsideration and an evidentiary hearing to meet *APCo v. FCC* test, pursuant to 47 C.F.R. § 1.106. Second, it is well-established that the burden of proof in a just compensation case is on the party claiming the loss. *See APCo v. FCC* at 1370 ("the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking") (quoting *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948).

[30] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12103 at ¶¶ 58 (2001) ("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.")

[31] *APCo v. FCC* at 1370.

[32] Description at ¶ 4.

[33] *Southern Co .v. FCC*, 293 F.3d 1338, 1347-49 (11th Cir. 2002).

capacity is insufficient."[34] As a matter of law, Gulf Power may not declare insufficient capacity at its sole discretion or change the terms of those agreements unilaterally.

Nor can Gulf Power credibly claim an "unqualified right" to impose its own narrow definition of the statutory term "insufficient capacity" or its reach. The Eleventh Circuit affirmed the Commission in rejecting utilities' arguments that Section 224(f)(2) entrusted them with "unfettered discretion" to determine "insufficient capacity," noting that this interpretation bears no support in the Pole Attachment Act, as amended by the Telecommunications Act of 1996 (the "Act").[35] The Court concluded that the term is "ambiguous."[36]

In this case, there may be no need to define the statutory term, given Gulf Power's past pole change-outs, pole attachment agreements with Complainants and expansion practices. As noted *supra*, Gulf Power and requesting attachers actually have agreed to change-out to taller poles, thereby demonstrating that capacity is sufficient. In addition, in pole attachment agreements with Complainants, Gulf Power expressly agreed to substitute poles where an existing pole is "too short, or inadequate," provided that Complainants reimburse Gulf Power for all necessary make-ready involved.[37] By the same token, Gulf Power could accommodate additional attachments through the use of extension arms and boxing arrangements, with the reasonable requirement that these arrangements must comply with the National Electrical Safety Code and other applicable safety standards. Given that Gulf Power already employs these

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[34] *Id.* at 1347 (11th Cir. 2002) (emphasis added). This agreement between the parties also is consistent with the nondiscrimination requirement underlying Section 224(f) and the terms of the parties' pole attachment agreements.

[35] *Id.*

[36] *Id.* at 1348, 1349. In fact, the Court emphasized that the Act does not define the statutory term "insufficient capacity" and does not describe the conditions that would indicate when capacity is insufficient. *Id.* The Court further explained that the statute "is silent on the scope and parameters of the term 'insufficient capacity...'" and accorded Chevron deference to the Commission's reasonable interpretation regarding reservation of pole space to fill the "gap in the statutory scheme." *Id.*

[37] *See* Complaint at ¶ 12, Exhibits 3, 4 and 5 and Supplement, Exhibit 5, ¶ 12 (Pole Attachment Agreements between Gulf Power and Complainants). The reimbursement by Complainants in the form of make-ready expenses for all costs incurred with pole change-outs ensures that Gulf Power incurs no loss and, as explained *supra* Section II.A.2, Gulf Power actually receives a net "gain" from a change-out.

methods for its own electrical conductor attachments,[38] it "must allow other attachers to do the same," consistent with its nondiscrimination obligations under the Act.[39]

Accordingly, Gulf Power may not itself declare capacity to be "insufficient" in an attempt to satisfy the test in *APCo v. FCC.*

4. Gulf Power's Evidence Of A Purported Market Rate Disregards Its Actual Loss And Has Already Been Considered In This Proceeding

Gulf Power also seeks to avoid accepting a genuine "just compensation" rate that accurately reflects the loss to which it is purportedly entitled. First, the *APCo v. FCC* test only contemplates a just compensation rate above marginal costs where a particular pole is full.[40] Here, Gulf Power fails to identify these marginal costs and thus precludes a comparison to the combination of actual make-ready reimbursement plus fully-loaded pole rental to evaluate exactly how much in excess of marginal cost Gulf Power already receives on each "full" pole from existing or new attachers. This showing is critical, as it would verify the fact that Gulf Power actually receives just compensation through payment of make-ready expenses and rental rates, even on poles that are "full." *APCo v. FCC* only held that a utility meeting both prongs of its standard may "seek compensation above marginal cost," not that it may charge whatever hold-up price a new attacher may be forced to pay.[41]

Indeed, Gulf Power appears to be claiming that the $40.60 rate paid by some CLECs is "just," although the Commission has already determined that such a rate is based upon flawed

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[38] *See* Response of Gulf Power, Third Dunn Affidavit - Attachment A, Question (2) (listing amount of Gulf Power's investment in crossarms subtracted from gross pole investment).

[39] *Cavalier Telephone, LLC v. Virginia Elec. and Power Co.*, 15 FCC Rcd. 9563, ¶ 19 (2000) (noting that "[p]erhaps [utility's] allowance of extension arms and boxing will preclude the need for taller poles."), *vacated by settlement* 2002 FCC LEXIS 6385 (2002) (in issuing the *vacatur*, the FCC specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusion contained in" the underlying decision).

[40] *APCo v. FCC* at 1370-71.

[41] *Id.*

methodologies, improper cost accounts, and inapposite analogues,[42] and thus could not represent the "active, unsuppressed market price for the pole space at issue."[43] Yet Gulf Power previously submitted – and the Bureau considered and rejected – evidence supporting this alleged market price in the underlying proceeding.[44] In any event, these "market values" are irrelevant to any "just compensation" evaluation. For example, in *United States v. Commodities Trading Corp.*, the Court held that "fair and equitable" ceiling prices set by the government in wartime were the measure of "just compensation" for requisitioned pepper without any regard to higher peacetime "market" value if the requisitioned pepper could have been held and sold later to private parties.[45] In *Lord Mfg. Co. v. United States*, the Court of Claims held that the "list price" for which the plaintiff's engine mountings could have been sold was not the measure of "just compensation" for the forced sale of those mountings to the government.[46]

Moreover, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[47] the decision upon which the *APCo v. FCC* and earlier courts relied for the conclusion that the mandatory access

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[42] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12103 at ¶¶ 54-61 (2001); *Bureau Order* at ¶¶ 14-17.

[43] Description at ¶ 11. Gulf Power erroneously implies that Adelphia Business Solutions, which is allegedly paying a $40.60 annual rental charge, is a member of the Florida Cable Telecommunications Association ("FCTA"). Description at n.9 and ¶ 11, n.16. This is incorrect. While Adelphia Cable Communications is a member of the FCTA, Adelphia Business Solutions, a separate and independent telecommunications carrier, is not. Adelphia Cable Communications is not paying a rate that exceeds the Commission's pole attachment rental formula.

[44] *See* Response at 49-51, Wise Affid. at 26; Notice of Filing Supplemental Authority, Second Wise Affid. At 5-7 (filed Sept. 11, 2000); *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 at ¶ 14 (rel. May 13, 2003) ("*Bureau Order*"). Gulf Power asserts that it violates just compensation principles to ignore a higher rent reached through "arm's length negotiation between a willing buyer and willing seller" for space on the same pole. *See* Description at n.18. The Commission, however has determined that no non-monopoly market exists for pole space and "any rents [a utility] negotiates with other service providers not covered by the Commission's pole attachment rate formula reflect a monopoly value." *Alabama Cable Telecommunications Ass'n,*, 16 FCC Rcd. 12103 at ¶ 55. *See also APCo v. FCC* at 1368. Moreover, in the absence of proving both prongs of the *APCo v. FCC* standard, it is "irrelevant" that telecommunications carriers pay a higher rate for the same pole space than cable operators, as the marginal costs paid by attachers provide Gulf Power with just compensation. *See APCo v. FCC* at 1371, n.23.

[45] 339 U.S. 121, 123-28 (1950).

[46] 114 Ct. Cl. 199, 269 (1949), *cert. denied*, 339 U.S. 956 (1950).

[47] 458 U.S. 419 (1982).

provisions in Section 224 constituted a taking of property,[48] the Supreme Court noted that any pre-existing indication of "market value" measured by the voluntary payment Teleprompter made to Ms. Loretto *before* the advent of the mandatory access law that was substantially in excess of the statutory presumptive payment was not evidence of what "just compensation" would be for a taking.[49] Instead, the Court left it to the New York courts to decide the issue.[50] A level of "just compensation" for mandatory access based on the amount of prior "market value" payments was never accepted by any court.[51]

5. Any Evidence Accepted By The Bureau Must Address With Specificity *Actual* "Full Capacity" On *Each Pole*

Gulf Power's suggestion that it should be entitled to utilize a presumption of "full capacity" on its poles suggests that it cannot meet the per-pole test in *APCo v. FCC*.[52] Gulf Power's proposed submission, therefore, is inconsistent with the express language of the Eleventh Circuit's standard requiring a per-pole showing[53] and illogical.[54] Even if Gulf Power could proffer that a particular pole was at "full capacity" before a cable operator sought access

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[48] *APCo v. FCC*, 311 F.3d at 1364, 1365; at *Gulf Power Co. v. United States,* 187 F.3d 1324, 1328-29 (11th Cir. 1999).

[49] *Loretto*, 458 U.S. at 441.

[50] *Id.*

[51] *See, e.g., Loretto v. Group W. Cable*, 135 A.D.2d 444, 448, (N.Y. App. Div. 1987) (likely award of one dollar), *appeal denied*, 522 N.E.2d 1066 (N.Y. 1988) (Table), *cert. denied*, 488 U.S. 827 (1988).

[52] Description at ¶ 3 and n.2. Gulf Power argues that a pole-by-pole analysis should not be done even though that is what the *APCo v. FCC* test requires and the Bureau found. *See Bureau Order*, ¶ 15 (quoting the Eleventh Circuit's statement that: "[w]ithout such proof [of actual lost opportunity], any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation." *APCo v. FCC* at 1370-71).

[53] *APCo v. FCC* at 1370. While Gulf Power objects to the lawfulness and binding nature of the Eleventh Circuit's *APCo v. FCC* decision on the Commission, Description at ¶¶ 1-3, the fact of the matter is that the Bureau is without authority to overturn or modify the test set forth in *APCo v. FCC*. To the extent that Gulf Power seeks a presumption concerning weight and wind loading on its poles, the Commission has previously rejected similar arguments. *See In re Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd. 6453 at ¶¶ 27-30 (2000) (declining utilities' petition for reconsideration urging Commission to adopt presumptions in the Cable Formula specifically to address weight and wind load factors). Where Gulf Power has agreed to change-out a pole with a taller, stronger replacement, it has no claim concerning full capacity due to weight or wind loading.

[54] For example, Gulf Power's argument is akin to creating a presumption that would credit a "takings" claim by a property owner in DeFuniak Springs, Florida for a condemnor's taking of a different owner's property in Pensacola, Florida.

and that Gulf power had another buyer "waiting in the wings" for that same space – which it did not do – Gulf Power could not credibly claim that *all of its poles* are already at full capacity. Where the applicable standard for determining just compensation is "loss to the owner," Gulf Power may not satisfy its burden of establishing rivalrous use and lost opportunity simply by claiming all its poles are at "full capacity."[55] In the end, Gulf Power's evidence concerning pole change-outs for new attachments by telecommunications carriers is irrelevant and should be rejected.

B. Evidence Of Pole Change-Outs For Cable Operators And Evidence Of Geographic Overlap of Non-Complainants Is Similarly Irrelevant

Gulf Power seeks to introduce similar evidence of voluntary pole change-outs that it performed on behalf of cable operators to establish that these unspecified poles were at "full capacity."[56] For the reasons explained above addressing pole change-outs for telecommunications attachers, this evidence fails to show that any poles are presently at "full capacity," were actually changed-out due to "full capacity," or that Gulf Power may charge rental rates higher than marginal cost or higher than the rates currently set well above marginal cost. Gulf Power describes neither the particular cable operators for whom it performed the unspecified pole change-outs, nor the period in which these change-outs occurred. Indeed, Gulf Power seeks to submit evidence of change-outs for twelve cable operators, only four of whom have attachments at issue in this proceeding, and provides no indication that the change-outs occurred on poles at issue in the underlying Complaint proceeding.

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[55] *See United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948). *See also Bauman v. Ross*, 167 U.S. 548, 574 (1897) (the constitutional measure of just compensation is the loss to the person whose property is taken). Gulf Power fails to identify the "considerable friction" it claims exists between the rebuttable presumptions and the Eleventh Circuit's per-pole standard. Description at ¶ 3. The Commission's rebuttable presumptions are just that: rebuttable. *See, e.g., Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (sustaining validity of Commission's rebuttable presumptions). Gulf Power knows this, as it attempted, albeit unsuccessfully, to claim that its poles were actually 40 feet in height, with only 11.5 feet of usable space.

[56] Description at ¶ 6.

Further, Gulf Power seeks to introduce evidence purportedly showing geographic overlap of non-party cable operator attachers, in which more than one cable operator may be attached to Gulf Power's poles to support a showing of "full capacity."[57] But Gulf Power concedes that no such overlap exists for any of the poles to which Complainants are attached.[58] In any event, the mere existence of geographic overlap is meaningless in the absence of an affirmative showing of "insufficient capacity." Therefore, this evidence is inappropriate and does not support rehearing.

C. Gulf Power's Speculative Load And Planning Evidence Of Unforetold Third-Party Attachments Is Irrelevant

Gulf Power next suggests that it would seek to introduce load study reports and testimony "regarding the planning/economic impact of *unforetold* third-party attachments."[59] The dates and relevance of this speculative "evidence" concerning Gulf Power's potential, future need for additional pole space are not given; rather, this evidence boils down to a conclusory reservation of capacity at some unspecified point in time in an effort to meet the "full capacity" and "higher-valued use" standards presumably for Complainants' attachments as of nearly four years ago.[60] Even if such a retroactive plan could be relevant, this evidence would be unavailing because Gulf Power may only reserve space pursuant to a bona fide development plan, which Gulf Power does not identify in its Description. Even then, attachers may utilize the space until such time as the utility actually needs it and at a just and reasonable rate under Section 224.

The Commission has previously addressed utilities' attempts to reserve pole space "to meet anticipated future demand for their 'core utility services'"[61] and concluded that utilities may only reserve capacity for their own use under "a bona fide development plan that reasonably

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[57] Description at ¶ 7.

[58] Description at n.10.

[59] Description at ¶ 8 (emphasis added).

[60] *See APCO v. FCC* at 1370.

[61] *1999 Reconsideration Order* at ¶ 65.

and specifically projects a need for that space in the provision of its core utility service."[62] The Commission emphasized that allowing utilities to reserve capacity without a realistic development plan would contravene Congress's goals by "'allowing space to go unused when a cable operator or telecommunications carrier could make use of it....'"[63]

Gulf Power also argues that principles of just compensation should allow it to decide whether reserving pole space for a potential, future use has a higher value than hosting a communications attacher.[64] Under this approach, any and all poles would be deemed "at full capacity" due to Gulf Power's unfettered reservation of pole space for its future use, subjecting the poles to a utility-mandated "higher-valued use."[65] Providing any utility this unchecked authority would eviscerate the *APCo v. FCC* test and render the Act a nullity.[66] Gulf Power cannot credibly argue that this reasoning was contemplated by the Eleventh Circuit's *APCo v. FCC* test.[67]

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[62] *Local Competition Order* at ¶ 1169.

[63] *1999 Reconsideration Order* at ¶ 65 (quoting *Local Competition Order* at ¶ 1168), *aff'd Southern Co v. FCC*, 293 F.3d 1338, 1348-49 (11th Cir. 2002) (affirming Commission's bona fide development plan requirement as "an eminently reasonable mechanism to ensure that when utilities reserve space on a pole and deny attachers access on the basis of insufficient capacity, capacity is actually insufficient."). To the extent Gulf Power is making its proffer this way, it is untimely seeking a further reconsideration.

[64] Description at ¶ 8.

[65] *APCo v. FCC* at 1370.

[66] Description at ¶ 8. Gulf Power's request to introduce evidence concerning past pole change-outs at its own expense for its core utility purposes, allegedly due to lack of capacity, is also irrelevant. *Id.* The Commission and Eleventh Circuit have held that a utility may reasonably recover reserved space in which it has permitted communications entities to attach. *See 1999 Reconsideration Order* at ¶¶ 68 ("in the instance of a utility's recapture of reserve space occupied by an attaching entity, the utility is not required to share in the modification costs the attaching entity may incur as a result of the need to modify the facilities ..."); *Southern Co v. FCC*, 293 F.3d at 1349. Assuming Gulf Power properly reserves this space, it is under no obligation to assume the costs of pole change-outs upon recapture.

[67] This is not mere speculation. In an interesting twist, another of Gulf Power's affiliates, Georgia Power, has proposed a pole attachment agreement where all of the space on the pole is purportedly "reserved" and every cable operator's existing and future attachments are deemed to be in the reserved space.

Instead, Gulf Power would have to demonstrate that it is "able to put the space to a higher-valued use with its own operations," not simply a reservation of space for *possible* use.[68] Gulf Power may not speculatively reserve additional pole space, given that it already reserves 10.5 feet of the presumed 13.5 feet of total usable space for itself and the incumbent local exchange carrier ("ILEC") joint user, without demonstrating a specific, actual need, and use that to prove a pole is "full."[69] Thus, because Gulf Power may only reserve pole capacity pursuant to a bona fide development plan and attachers may utilize such reserved capacity until the space is actually needed, Gulf Power's unspecified loading studies and business plans supporting a retroactive rate increase for poles attached to four years earlier should be denied.

D. Gulf Power's Fear Of Potential "Confusion" Regarding The Appearance Of Its Poles Does Not Warrant Admission Of This Evidence

Gulf Power argues that the Eleventh Circuit's analysis in *APCo v. FCC* assumed actual poles towering one million feet in the air "with unlimited usable space."[70] In fact, the Court's hypothetical example illustrating the concept of nonrivalrous use of a utility's poles expressly recognized that a pole could reach "full capacity" and become rivalrous.[71] The Court simply required utilities to prove that this situation led to an actual loss.[72] Gulf Power cannot claim that this evidence is necessary to address the Court's hypothetical, nor does it offer any indication that the photographic and engineering evidence it seeks to proffer even corresponds to poles on which Complainants are attached.

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[68] *APCo v. FCC* at 1370.

[69] *See* Gulf Power Company's Reply to Complainants' Opposition to Petition for Reconsideration at 6-7.

[70] Description at ¶ 8.

[71] *APCo v. FCC* at 1369.

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

E. Gulf Power Fails To "Describe With Particularity" The Unspecified Other Evidence That It May Seek To Introduce In The Future

Finally, the Bureau should dismiss Gulf Power's request for "an appropriate degree of flexibility" in attempting to proffer unidentified, non-specific evidence that allegedly may be relevant to satisfying the standard set forth in *APCo v. FCC*.[73] Gulf Power's request fails to meet the Bureau's Letter Order requiring that the utility "describe with particularity" the evidence it wishes to submit.[74]

III. CONCLUSION

Accordingly, for the reasons set forth above and in Complainants' Opposition to Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, the Bureau should deny Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing.

Respectfully submitted,

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[73] *Id.* at ¶ 12.

[74] *See* Letter from Lisa B. Griffin to Messrs. Campbell, Peterson and Seiver (Dec. 9, 2003).

CERTIFICATE OF SERVICE

I, Linda Drake Blair, hereby certify that a copy of this "Response to Description of Evidence Gulf Power Seeks to Present in Satisfaction of the Eleventh Circuit's Test" has been served upon the following by United States mail, hand delivery (*) and via Fedex (**), on this 6th day of February 2004:

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