UPDATE: FCC and Court Rulings on Joint Use

National Joint Use Conference 2003
Orlando, Florida

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Jurisdictional Overview

• The Pole Attachments Act
  - Federal Jurisdiction
  - State “Reverse” Preemption
Relevant Issues

• Transmission Facilities
• Wireless Attachments
• Capacity Expansion
• Unauthorized Attachments
• Number of Attaching Entities
• Just Compensation
Transmission Facilities

- FCC Jurisdiction hinges on the distinction between transmission and local distribution - (Gulf Power III)
- Practical application
- Wireless attachments
Wireless Attachments

• Transmission facilities (Gulf Power II, Omnipoint)
• Just and reasonable rates determined on a case by case basis
• Factors in determining rates
Expansion of Capacity

- Section 224(f): capacity, safety, reliability, and generally applicable engineering purposes (Gulf Power III)
- Denials based on capacity
- Voluntary expansion
Unauthorized Attachments

- Audits and costs
- Unauthorized attachment fees and safety considerations (Public Service Co. of Colorado)
Number of Attaching Entities/ Surveys

- Rebuttable presumptions established by FCC
  - 3 attachers (Non-urbanized, < 50,000)
  - 5 attachers (Urbanized, > 50,000)
- Classification by utility service area
- Rebutting an FCC presumption
Just Compensation

• Occupation of utility property under the Pole Attachments Act constitutes a taking under the Fifth Amendment (Gulf Power I, Gulf Power II)

• Multiple cases pending before the Supreme Court, Courts of Appeals and the FCC regarding how to determine the compensation due: (Alabama Power, Georgia Power Co., and Florida Cable Ass’n v. Gulf Power)
Issues in Pending Complaint Cases

- Make-Ready
- Dark Fiber
- Conduit Rates
Q and A
Appendix of Decisions

• Gulf Power Co. v. FCC, 187 F.3d 1324 (11th Cir. 1999) (Gulf Power I).
• Southern Co. v. FCC, 2002 U.S. App. LEXIS 11626 (11th Cir. 2002) (Gulf Power III).
• Southern Co. v. FCC, 313 F.3d 574 (D.C. Cir. 2002) (Gulf Power IV).
• Georgia Power Co. v. FCC, Docket No. 02-10222 (11th Cir. argued May 1, 2003).
Appendix of Decisions

• Public Service Co. of Colorado v. FCC, 328 F.3d 675 (DC Cir. 2003).
• Florida Cable Ass’n v. Gulf Power, PA 00-004, DA 03-1555, (pet. recon. filed June 23, 2003).
• Cable Television Ass’n of Georgia v. Gulf Power Co., PA 01-002, DA 03-2613 (Aug. 8, 2003).
• Fiber Technologies Networks v. Duquesne Light, EB-03-MD-005 (filed April 8, 2003).