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

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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATIONS GULF COAST, L.L.C., *et al.*

000000-PU

Complainants,

P.A. No. 00-004

vs.

GULF POWER COMPANY,

Respondent.

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To: Cable Services Bureau

## SECOND AFFIDAVIT OF MICHAEL R. DUNN

I, Michael R. Dunn, being duly sworn, depose, and state as follows:

### I. Background

1. I am employed by Gulf Power Company ("Gulf"), One Energy Place, Pensacola, Florida 32520-0302. I have been employed with Gulf since 1968. In my position as Project Services Manager, I have management responsibility over attachments made by third parties to Gulf's distribution poles, including responsibility over pole attachments that are subject to the Pole Attachment Act, 47 U.S.C. § 224.

### II. Previous Affidavit

2. In their opposition to Gulf's motion to dismiss, the Complainants repeat many of the arguments made in their petition for stay that were refuted in my previous affidavit

("First Affidavit") filed in this proceeding and attached to Gulf's answer to petition for temporary stay. In particular, in the First Affidavit I presented evidence refuting Complainants' arguments pertaining to the termination of pole attachment agreements and Gulf's willingness to engage in negotiations and provide information to the cable companies. The evidence that I submitted in the First Affidavit equally applies to the similar arguments made in the motion to dismiss, and I hereby incorporate by reference the First Affidavit in its entirety.

**III. Complainants' Failure to Negotiate**

3. Paragraph 26 of each of the Complainants' previous pole attachment agreements, as provided in Attachments A, B, C and D of my First Affidavit, requires that all notices to Gulf under those agreements be addressed to the person holding the position at Gulf that I have occupied for the past seven years. Along with this designation as the point of contact at Gulf for such notices and communications, I have the responsibility to negotiate any agreement changes. After the initial meetings with the designated points of contact for Complainants Comcast Cablevision of Panama City, Inc. ("Comcast") and Mediacom Southeast LLC ("Mediacom"), which were initiated by me to explain the new Pole Attachment Agreement, neither of these companies has attempted to meet to negotiate any changes to Gulf's proposal. Cox Communications Gulf Coast, L.L.C. ("CCGC") has not accepted any of my offers to meet and discuss the new Pole Attachment Agreement. Contrary to the assertions in the petitioner's opposition to motion to dismiss, I have *not* said that "no negotiation was possible." It is simply false to say that I have refused to negotiate with any of the Complainants at any time. I have repeatedly offered to explain Gulf's use

of replacement cost in an attempt to establish a fair payment by Complainants that approaches just compensation.

4. As demonstrated in Section II of my First Affidavit, ample notice of changes and a willingness to negotiate have been provided in all cases. Indeed, I have offered to discuss just compensation with all the Complainants, but they have deliberately ignored my offer and refused to engage in any meaningful discussions. It is the Complainants who have failed to negotiate by refusing to pursue any discussion of just compensation. However, the Complainants' failure to discuss just compensation or otherwise negotiate with Gulf follows the course being set by them in their rhetoric about maintaining the "status quo." The Complainants openly declare in their filings before the Commission that their idea of status quo is requiring Gulf's customers to continue their over 20-year subsidization of Complainants with artificially low pole attachment fees. Complainants consciously avoid even mentioning that the Eleventh Circuit has mandated in *Gulf Power I* that the actual status quo now includes just compensation from attachers to the utilities' poles.

5. Because they want to maintain subsidized pole attachment fees as their concept of "status quo", the Complainants made it clear, both when Gulf tried to engage them in meaningful negotiations and in their filings with the Commission, that they have no intention of discussing just compensation for their taking of Gulf's property. Real negotiations would put an end to the Complainants' attempts to have both mandatory access and a fee based on a formula that amounts to 12% of Gulf's replacement cost fee. Contrary to the claim in the Complainants' opposition to motion to dismiss, it is the Complainants, not Gulf, who are seeking to "have it both ways." Now that the Complainants have the right of mandatory

access to Gulf's property, they cannot avoid their legal obligation to pay a full and perfect price for taking that property.

**IV. Increase on Cost per Customer Basis**

6. In footnote 13 (at pages 14-15) of their opposition to the motion to dismiss, Complainants take issue with the otherwise uncontroverted fact that the Complainants are only alleging monetary harm that is of the degree of cost normally absorbed by businesses. They attempt to do this by challenging whether there is any methodology to support my statement in the First Affidavit (which statement is neither disputed nor contradicted by Complainants in their opposition) that "if Cox were to pass through 100% of the increase to its customers (which it would not have to do), the increase from the previous rate calculation to just compensation amounts to approximately $1.10 per Cox customer per month." First Affidavit at ¶ 11. The method of calculation is not confounding.

7. Gulf used a readily available and locally obtained cable industry estimate of approximately 150,000 subscribers to CCGC in Gulf's service area. This figure is within 6% of the number of subscribers (160,000) that Mr. Gregory, Vice President and General Manager of CCGC, specified in his first affidavit, Exhibit 7 of the Complaint. The potential increase rate per month per customer is then derived from a simple calculation: The total annual cost difference divided by the number of CCGC subscribers divided by 12 months per year. This resulted in Gulf's calculation of $1.10, but using the data relied upon by Mr. Gregory, CCGC, and Complainants in their exhibits, the rate is even less, as is the actual corresponding impact on Complainants. Using Mr. Gregory's own numbers of 160,000 subscribers and 61,581 poles owned by Gulf, the increase becomes $1.02 per CCGC

customer per month. It is CCGC's sole prerogative whether any or all of this increase is actually passed through to its customers or absorbed in the business.

8. I have reviewed reports of the Commission and other documents in the public domain that were submitted by Alabama Power Company ("APCO") as exhibits to its answer to the complaint in *Alabama Cable Telecommunications Association*, FCC P.A. No. 00-003, reveal that cable rates have been steadily increasing over the years with no drop in demand.

9. The Commission recognized in its *Report on Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 12 FCC Rcd. 3239 (Jan. 2, 1997) ("*Report on Cable Industry Prices*"), that from January 1990 to April 1993 (prior to cable regulation), there was an average annual growth rate in cable rates of 8%. The Commission's report also noted that even after regulation (from April 1993 to November 1996), cable rates continued to rise at a 2.2% annual rate. I have reviewed the U.S. Department of Labor, Bureau of Statistics Consumer Price Index for cable television (Exhibit F to APCO Answer), and it shows that from 1990-2000 cable rates rose an average of 5.83%.

10. In 1997-1998, the Commission reported that average monthly rates for both regulated and unregulated cable companies rose by rates of 6.8% and 8.9%, respectively. *Report on Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 14 FCC Rcd. 8331 (May 7, 1999). The Commission also reported that just last year, in 1999, regulated and unregulated rates rose from 4.6% and 5.8%, respectively. *Report of Cable Industry Priced; Statistical Report on Average Rates*

*for Basic Service, Cable Programming and Equipment*, 2000 WL 767685, *2 (June 5, 2000) ("*2000 Report*"). Yet, Complainant Comcast reported that in a three-month period during 1999 alone, it added 20,600 basic cable customers, representing a 1.3% twelve month trailing growth rate. (Exhibit G to APCO Answer.) During first quarter 1999, Comcast added more than 20,000 customers to its high speed data service, and in April alone added 5,700 new digital cable subscribers. (Exhibit G to APCO Answer.) In 1999, basic subscriptions grew cable industry wide 1.8% to 67.3 million. (Exhibit D, at 6, to APCO Answer) There was also an industry-wide surge in the "new services sector." Cable added 1.4 million high-speed data customers in 1999. (Exhibit D, at 6 to APCO Answer) Digital subscriptions "increased to over 5.1 million, from just 1.4 million at year end 1998." (Exhibit D, at 6, to APCO Answer) Analysts project that by 2010, there will be 59 million digital set top boxes in the field, with 31 million cablephone subscribers and 25 million high-speed modem users. (Exhibit D, at 5, to APCO Answer)

11. The Commission's own studies explain the counter-intuitive fact that even as cable companies continue to increase their rates, they continue to add subscribers. The Commission found that "[competitive status, non-urban population, and average monthly rate[s]" are all variables which have an inverse effect on the demand for cable services. (*2000 Report* at *16) As these variables increase, the demand for cable services decrease. In the end, however, the Commission concluded that "demand for cable service is [only] somewhat sensitive to changes in cable rates." (*2000 Report* at *18) The *2000 Report* also explained that any downward pressure on the demand for cable services caused by increased rates is more than offset by the upward momentum enjoyed by cable companies from increase in

such variables as "median household income, number of homes passed, and number of satellite channels offered." (*2000 Report* at *16) That is, as these variables increase, the demand for cable services increases. With further improvements and expansion, it is intuitive that cable companies are going to continue to increase rates as they continue to provide more services and better quality. At the same time, they will continue to add customers, expand revenues and reap more profits.

12. The Commission recognized the trend in a recent report titled *1999 Assessment of the Status of Competition in Markets for the Market Delivery of Video Programming*. (MVCG, March 2000) at 1. (Exhibit H, at 1, to APCO Answer) The Commission found that "[d]espite . . . increased competition, . . . cable rates rose faster than inflation." (Exhibit H, at 1, to APCO Answer) The Commission also determined that notwithstanding the rate increases, "the cable industry continued to grow in terms of subscriber penetration, channel capacity, the number of programming services available, revenues, audience ratings, and expenditures on programming." (Exhibit H, at 2, to APCO Answer) Cable customers are well adjusted to and undeterred by the fact that cable rates have historically increased and will continue to do so. From the Commission reports and studies and the other public studies, it is evident that there is little to no real likelihood that the increase in expenses attributable to pole attachments will result in any lost customers to cable companies.

13. According to an article in *Network World Article* (4/24/00), (Exhibit J to APCO Answer), the top seven cable companies (which includes the Complainants) "invested between $9 billion and $11 billion [in 1999] to upgrade their networks." (Exhibit J, at 3, to APCO Answer) "That is on top of about $6 billion they spent in 1998." (Exhibit J, at 3, to

APCO Answer) From a prudent, business standpoint, it is difficult, if not impossible, to perceive that these companies would take on multi-billion dollar expansions without foreseeing incredible expansion in revenues. Revenues generated from multi-billion dollar expansions will obviously dwarf the increase in pole attachment fees. There is no indication in these events or historically that these multi-billion dollar expansion efforts will be halted because pole expenses climb from less than 1% of the cable companies' operating expenses to as little as 4%.

14. Paul Kagan Associates, Inc., a cable industry analyst, believes most of the expenses for expansions are complete. (*The Cable TV Financial Databook 2000*, Paul Kagan Associates, Inc., Exhibit D to APCO Answer) The activities of Comcast confirm Kagan's observations. Comcast has reported that "83% of the subscribers are in rebuilt systems." Exhibit K (*Multichannel Video Compliance Guide* - 11/15/99, at 8, Exhibit K to APCO Answer) Paul Kagan Associates, Inc. stated, "Operators have a diminishing amount of build-out work ahead, and they are already realizing meaningful revenues from those services they spent so lavishly to deploy." (Exhibit D to APCO Answer, at 149) It is evident that increases in pole attachment fees are not likely to reverse expansion already completed or to slow down the incredible momentum cable companies currently enjoy.

**V. Internet Access**

15. In his second declaration, Mr. Gregory states that "[c]ontrary to Gulf Power's assertions, Internet service is not available on portions of Cox Gulf Coast's cable systems that are attached to Gulf Power's utility poles." Gregory Second Declaration at ¶ 3. Complainants then make the bald assertion in their opposition to the motion to dismiss that

*"no* Internet service is available on portions of Cox Gulf Coast's cable systems that are attached to Gulf Power's utility poles." Opposition at 6. These statements are unsupported by any evidence. The representations are at best grossly misleading, if not patently false. Complainants have submitted no evidence to refute the evidence already submitted by Gulf as Exhibit 1 to the motion to dismiss. Attachment C to this affidavit contains even more information, brochures, and pictures of billboard advertising generated by CCGC itself that undeniably establish that CCGC is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

16. Supplementing the information already provided in Exhibit 1 to the motion to dismiss, Attachment A to this affidavit contains information, brochures, and pictures of billboard advertising generated by Comcast itself that undeniably establish that Comcast is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

17. Supplementing the information already provided in Exhibit 1 to the motion to dismiss, Attachment B to this affidavit contains information, brochures, and pictures of billboard advertising generated by Mediacom itself that undeniably establish that Mediacom is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

**VI. Document Authentication**

18. I hereby verify under penalty of perjury under the laws of the United States of America that I am familiar with the documents attached as Exhibit 1 to the motion to dismiss and Attachments A-C to this affidavit; that they are true and correct copies of documents I

have obtained or compiled from Complainants or their resources, or are summaries of the attached documents from Complainants that have been compiled by me or under my direction and supervision; and that they are true and correct copies of the documents for the purpose that they were submitted.

Affiant says nothing further.

Michael R. Dunn

Michael R. Dunn

STATE OF FLORIDA )
} ss.
COUNTY OF ESCAMBIA )

BEFORE ME, the undersigned notary public, appeared Michael R. Dunn, who is personally known to me and who, being first duly sworn, stated and verified under oath that the facts, matters, and things set forth in the above affidavit are true and correct to the best of his knowledge, information, and belief.

SWORN AND SUBSCRIBED before me this 7th day of August, 2000.

Linda C. Webb

Printed Name: LINDA C. Webb
NOTARY PUBLIC
STATE OF FLORIDA AT-LARGE
Commission No.: CC 725969
My Commission Expires: May 31, 2002

NOTARY PUBLIC STATE OF FLORIDA

LINDA C. WEBB
Notary Public-State of FL
Comm. Exp: May 31, 2002
Comm. No: CC 725969

## CERTIFICATE OF SERVICE

I, Cassandra Hall, a secretary in the law firm of Keller and Heckman LLP, certify that I have served a copy of this Motion to Strike upon the following on this the 7th day of August, 2000:

Michael A. Gross (by federal express)
Vice President
Regulatory Affairs and Regulatory Counsel
Florida Cable Telecommunications Association, Inc.
310 North Monroe Street
Tallahassee, Florida 32301

Paul Glist (by courier)
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