(undocketed)

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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| GULF POWER COMPANY,<br><br>*Petitioner*,<br><br>v.<br><br>FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES<br><br>*Respondents*. | Case No. 00-15068-D |



**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.'S AND COX COMMUNICATIONS GULF COAST, L.L.C.'S REPLY TO ALABAMA POWER COMPANY'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS**

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**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.**

**COX COMMUNICATIONS GULF COAST, L.L.C.**



Dated: November 9, 2000

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE and Eleventh Circuit Rule 26.1-1, it is hereby certified that the following persons, corporations, or governmental agencies have been associated with or have an interest in the outcome of this case:

Adelphia Communications Corporation (owner of Century Cullman Corporation and Century Enterprise Corporation, parties to Docket No. PA 00-003 before the Federal Communications Commission)

Alabama Cable Telecommunications Association (party to Docket No. PA 00-003 before the Federal Communications Commission)

Alabama Power Company (affiliate of Petitioner and party to Docket No. PA 00-003 before the Federal Communications Commission)

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ComLink (party to Docket No. PA 00-003 before the Federal Communications Commission)

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Kathleen Costello, Acting Division Chief, Financial Analysis & Compliance, Cable Services Bureau, Federal Communications Commission

Cox Communications Gulf Coast, L.L.C. (party to Docket No. PA 00-004 before the Federal Communications Commission)

CVI of Alabama, Inc., d/b/a Time Warner Cable (party to Docket No. PA 00-003 before the Federal Communications Commission)

Demopolis CATV Company (party to Docket No. PA 00-003 before the Federal Communications Commission)

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James Oglethorpe, Representative for Graceba Total Communication (party to Docket No. PA 00-003 before the Federal Communications Commission)

Federal Communications Commission (Respondent)

William H. Garner, Representative Twin County Cable (party to Docket No. PA 00-003 before the Federal Communications Commission)

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Lynn Goldman, Representative for Demopolis CATV Company (party to Docket No. PA 00-003 before the Federal Communications Commission)

John D. Gosch, Vice President for Cable One (party to Docket No. PA 00-003 before the Federal Communications Commission)

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MediaCom Southeast, LLC (party to Docket No. PA 00-004 before the Federal Communications Commission)

Mobile Energy Services Company, L.L.C. (affiliate of Petitioner)

Northland Cable Properties (party to Docket No. PA 00-003 before the Federal Communications Commission)

Scott Peden, General Manager for AT&T Cable Services (party to Docket No. PA 00-003 before the Federal Communications Commission)

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Leonard J. Rozek, Representative for Comcast (party to Docket No. PA 00-003 before the Federal Communications Commission)

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Jeffrey Smith, Representative for Coosa Cable Company and Cablevision Services (party to Docket No. PA 00-003 before the Federal Communications Commission)

Jim Smith, Representative for Time Warner Cable (party to Docket No. PA 00-003 before the Federal Communications Commission)

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Southern Company Capital Trust If (affiliate of Petitioner)

Southern Electric Generating Company (affiliate of petitioner)

Southern Electric International Trinidad, Inc. (affiliate of Petitioner)

Southern Electric Generating Company (affiliate of petitioner)

Southern Electric International Trinidad, Inc. (affiliate of Petitioner)

Southern Investments UTC P.L.C. (affiliate of Petitioner)

The Southern Company (parent of Petitioner)

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Time Warner Entertainment Advance Newhouse (party to Docket No. PA 00-003 before the Federal Communications Commission)

Andrew W. Tunnell (counsel for Petitioner)

Twin County Cable (party to Docket No. PA 00-003 before the Federal Communications Commission)

D. H. Ward, III, Representative for Sky Cablevision, Ltd. (party to Docket No. PA 00-003 before the Federal Communications Commission)

## CORPORATE DISCLOSURE STATEMENT

The Florida Cable Telecommunications Association, Inc. ("FCTA"), is a not-for-profit Florida corporation representing the interests of cable telecommunications operators before government and regulatory bodies in the state of Florida. FCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1

Cox Communications Gulf Coast, L.L.C., a Delaware limited liability corporation, provides cable television services in the state of Florida. Cox Communications Gulf Coast, L.L.C., through various subsidiaries and affiliates, is owned and controlled by Cox Communications, Inc., a Delaware corporation. Cox Communications, Inc., in turn, is 63.34% owned by Cox Holdings, Inc., a Delaware corporation, and 4.48% owned by Cox DNS, Inc., a Delaware corporation. Both Cox Holdings, Inc. and Cox DNS, Inc. are ultimately owned 100% by Cox Enterprises, Inc., a privately-held Delaware corporation. The remaining 32.18% of Cox Communications, Inc. is publicly held.

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Pursuant to Fed. R. App. 27 and Eleventh Circuit Rule 27-1, Intervenors, the Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. ("FCTA/Cox"), respectfully submit this Reply to Gulf Power Company's ("Gulf Power") Response to Respondents' Motion to Dismiss APCo's premature appeal of a *non-final* order issued by the Cable Services Bureau ("Bureau") of the Federal Communications Commissions ("FCC" or "Commission") entitled *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Order, File No. P.A. 00-003, DA 00-2078 (released Sept. 8, 2000)("*Bureau Order*").[1] As discussed below, Gulf Power's Response ignores the applicable law requiring dismissal of appeals of Bureau decisions that have not been addressed by the Commission and

[1] Despite all of Gulf Power's rhetoric regarding standing to Petition for Review of the *Bureau Order*, the proper way to participate in this appeal is to intervene, rather than institute a separate, unnecessary Petition for Review. *See* FCTA/Cox Motion to Intervene (filed Oct. 26, 2000).

relies upon inapposite authority. Accordingly, this Court should grant Respondents' Motion to Dismiss.

## BACKGROUND

In this appeal, Gulf Power and APCo, electric utility companies, are improperly seeking to bypass the Commission's review of a decision made by the Bureau which found that APCo violated 47 U.S.C. § 224 ("Section 224") when it suddenly and unilaterally terminated Alabama utility pole attachment contracts and demanded an extortionate increase in pole attachment rates of more than 500 percent. In its Complaint before the Bureau, the Alabama Cable Telecommunications Association and Comcast ("ACTA/Comcast") explained that APCo's actions violate the statutory provisions governing pole attachment compensation, as well as the parties' course of dealing and the Commission's rules requiring good faith negotiation. In addition, ACTA/Comcast showed, with the support of expert written testimony, that the Constitution does not support APCo's disingenuous argument that it is entitled to a higher pole attachment rate (as "just compensation") than that which has long been calculated in accordance with Section 224 and the FCC's regulations.

On September 8, 2000, the Bureau granted ACTA and Comcast's Complaint in part. *See* Attachment A. The Bureau determined that APCo's regulatory arguments in support of changing the FCC's cable pole rental formula had been addressed and rejected in prior Commission Orders and that the Supreme Court has upheld the constitutional sufficiency of the formula in calculating pole attachment rates. *Bureau Order* at ¶ 5 (*citing FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)). The Bureau specifically rejected APCo's argument that the Commission's regulations do not provide "just compensation" for attachments by cable operators. The *Bureau Order* explained that "a utility is compensated in full for any [pole]

make-ready or change-out costs associated with [an] attachment" and that, in addition, the cable formula "allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital." *Id.* at ¶ 6. Further, the *Bureau Order* declared void APCo's pole attachment rental rate of $38.81 and reinstated the current $7.47 rate, which had previously been agreed upon by the parties. *See id.* at ¶¶ 7, 9. The Order also required good faith negotiation of a new rate under the FCC's formula and a new agreement. *See id.*

Since the *Bureau Order*, Gulf Power and APCo have filed supplemental materials for the Bureau's consideration and APCo has filed an Application for Review with the Commission. Without giving the agency a chance to consider its arguments, however, Gulf Power and APCo have also filed premature appeals and a motion for a stay, in an effort to skip over the FCC's development of a full record.[2]

## ARGUMENT

### Under the Communications Act, A Petition For Review Filed After A Bureau Decision But Before Resolution By The Full Commission Is Incurably Premature

For much of its Response to Respondents' Motion to Dismiss, Gulf Power avoids the point – Gulf Power's and APCo's Petitions for Review are premature because Section 155(c)(7) of the Communications Act makes clear that the Commission must be allowed to review decisions made by its bureaus under delegated authority prior to the commencement of an appeal.

> The filing of an application for review shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection.

[2] Intervenors ACTA/Comcast filed their Opposition to APCo's Motion for Stay on November 6, 2000 ("ACTA Opposition").

47 U.S.C. § 155(c)(7). Gulf Power argues that APCo has complied with the statute merely by the act of filing an Application for Review on September 11, 2000. Gulf Power's Response, 10-11. However, the law makes clear that Gulf Power's Petition for Review in this Court, which was filed on September 27, 2000, is fundamentally premature. In *International Telecard Ass'n v. Federal Communications Commission*, 166 F.3d 387 (D.C. Cir. 1999), the appellant sought to appeal an order by the FCC's Common Carrier Bureau issued pursuant to delegated authority under 47 U.S.C. § 155(c)(1). The court noted that

> The question presented . . . is whether judicial review can be obtained when Commission review has been sought, but not yet obtained. In other words, is the act of filing a request for Commission review in itself sufficient to satisfy the judicial review prerequisites of § 155(c)(7). *We hold that it is not.*

*Id.* (emphasis added). The court firmly rejected the appellant's argument that Section 155(c)(7) did not require a petitioner to await the Commission's disposition. It reiterated:

> Lest there be any misunderstanding, *we expressly hold that a petition for review filed after a bureau decision but before resolution by the full Commission is subject to dismissal as incurably premature.* Ongoing agency review renders an order nonfinal for purposes of judicial review, and a petition for review of the order is incurably premature.

*Id.* at 388 (emphasis added).

This principle – that an appeal of a Bureau decision not yet reviewed by the Commission must be dismissed – is supported by numerous decisions from different courts of appeals. *See State University of New York v. FCC*, 1998 U.S. App. LEXIS 12916 (D.C. Cir. May 29, 1998)("Commission staff orders are not subject to judicial review"); *Simon v. FCC*, 1996 U.S. App. LEXIS 20297 (D.C. Cir. July 16, 1996)("an application for agency review must be filed *and disposed of* by the Commission"); *Richman Bros. Records v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997)("There is every reason to think, therefore, that the Congress did not intend that the court

review a staff decision that has not been adopted by the Commission itself"); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2nd Cir. 2000)("Our review is limited to *final orders* of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(a)"); *City of Mount Clemens, Michigan v. FCC*, 1996 U.S. App. LEXIS 3511 (6th Cir. Feb. 6, 1996)("Section 155(c)(7) does not provide any exception to review by the Commission on the grounds that such review would be futile").

This Circuit and its predecessor have also rejected attempts to appeal non-final federal agency actions. In the only decision from this Circuit involving Title 47, Section 155 of which counsel are aware, *McClendon v. Jackson Television*, 603 F.2d 1174 (5th Cir. 1979),[3] the Court rejected an attempt to challenge judicially an agency's interlocutory ruling and affirmed a finding that the plaintiff had not exhausted his administrative remedies. The Court wrote: "'No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id.* at 1176, *citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). In *McClendon*, the Court also rejected the plaintiff's attempt to use "conclusory allegations" to argue that he should be excused from exhausting his administrative remedies. *Id.* at 1177. In addition, in *Kabeller v. Busey*, 999 F.2d 1417 (11th Cir. 1993), this Court affirmed the dismissal of a suit filed in federal district court that challenged a federal agency's alleged failure to address a claim. Significantly, the Court affirmed the district court's decision

> that it would not be in the interest of justice to transfer this case to the Eleventh Circuit Court of Appeals because FAA action of this matter was *not final*, and the case did not pose the type of extraordinary situation warranting the drastic remedy of mandamus.

[3] Under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), decisions of the Fifth Circuit issued prior to September 30, 1981 are binding authority in the Eleventh Circuit.

*Id.* at 1419 (emphasis added).[4] With respect to the lack of finality, this Court observed, "Given that appellant's complaint is still under review, transfer is not 'in the interest of justice.'" *Id.* at 1423. *Accord, Curtis McNair Arnold v. Commodity Futures Trading Commission*, 987 F.Supp. 1463 (S.D. Fla. 1997)(following *Kabeller* and finding that "With ongoing proceedings before the CFTC, this Court is also unwilling to disrupt that CFTC enforcement proceeding any more than has occurred to date").

Despite this plethora of contrary legal authority, Gulf Power argues that its Petition for Review is not premature because the *Bureau Order* (1) violates the statute; (2) violates the Constitution; (3) causes irreparable harm; and (4) would be "futile" to bring to the Commission. However, none of Gulf Power's arguments have merit.

First, Gulf Power's contention that the *Bureau Order* constitutes an act of "statutory defiance," Gulf Power's Response, 10-14, is incorrect. Gulf Power's contention that the Bureau violated a statute is contingent upon two premises – its theory that this Court's decision in *Gulf Power, et al. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)("*Gulf Power II*"), is a binding judgment upon the FCC, and its claim that APCo has made a sufficient factual showing that "Internet" services will be provided over every Alabama attachment to every customer. The first premise is wrong, and the second has not been proved. By Order dated October 12, 2000, this Court stayed the issuance of the mandate in *Gulf Power II*. The stay means that judgment has not been entered and that Gulf Power may not use *Gulf Power II* as a device for eliminating the

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[4] In rejecting the appellant's request for mandamus or the application of the All Writs Act, the Court also found that only "truly extraordinary" circumstances would "justify our interference with nonfinal agency action" since the "court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts." *Id.* The Court also pointed out that delays of several months, and even a few years, were "not so unreasonable as to warrant mandamus." *Id.* In this appeal, Gulf Power cannot allege "unreasonable delay" because it only filed its Application for Review with the Commission just over one month ago, on September 27, 2000.

Commission's review in this case. Further, APCo failed to mount anything approaching a sufficient evidentiary showing that "Internet" will be provided by all Alabama cable operators over every APCo pole. *See* ACTA Opposition, 13-15.[5] Thus, Gulf Power has not demonstrated an "egregious error" in violation of statute that might justify an exception to the requirement of exhaustion of administrative remedies. *See McClendon*, 603 F.2d at 1177.[6]

Second, Gulf Power's argument that the *Bureau Order* effected an unconstitutional taking of utilities' property, Gulf Power's Response, 10, 13-14, is plainly wrong. Gulf Power contends that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"), provides no "reasonable, certain and adequate" process for recovering just compensation if a court were to conclude that the FCC's pole rate were insufficient. Gulf Power's Response, 8-10. But as this Court held in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999)("*Gulf Power I*"), the 1996 Act gives the Court the authority to issue an order that will ensure the provision of adequate compensation:

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[5] The existence nationwide of only 2.2 million cable Internet lines readily shows that not all of Alabama accesses the Internet over cable. *See High Speed Services for Internet Access: Subscribership as of June 30, 2000*, FCC Common Carrier Bureau (Oct. 2000).

[6] None of the authorities cited by Gulf Power for its claim of statutory defiance, Gulf Power's Response, 6-9, support its argument that this Court should bar the Commission from reviewing the *Bureau Order* on pole attachment rates and prematurely accept this appeal. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1985), involved a free speech claim where the Supreme Court vacated an appellate court judgment for lack of jurisdiction; *United States v. Corrick*, 298 U.S. 435 (1936), involved the Packers and Stockyards Act and the unremarkable proposition that a federal court cannot exceed its subject matter jurisdiction; *Lobue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996), involved federal extradition statutes and a district court's lack of jurisdiction; *Ukiah Adventist Hospital v. Federal Trade Commission*, 981 F.3d 543 (D.C. Cir. 1992), *cert. denied*, 510 U.S. 825 (1993), merely held that a district court did not have jurisdiction over a complaint against the FTC; and *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984), held that a writ of mandamus was *not* appropriate because the agency action was not final and the agency was moving to resolve the claims at issue, and that it was appropriate to retain supervisory

> Directing the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision will ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate.

*Id.* at 1335. Thus, Section 224 clearly does provide a "reasonable, certain and adequate" process for receiving just compensation. With the 1996 Act's provisions for judicial review of Commission decisions, Gulf Power's reliance upon "conclusory allegations" like "[t]he FCC's price misses the constitutional mark" does not constitute the "substantial showing" of a constitutional violation that might constitute an exception to the requirement of exhaustion of administrative remedies. *See McClendon*, 603 F.2d at 1177.[7]

Third, Gulf Power ignores the fact that APCo failed to establish that the *Bureau Order* is causing it "irreparable harm." For Gulf Power and APCo, the *Bureau Order* is only about money – it declared void APCo's new, exorbitant $38.81 pole rate and required a return to the current $7.47 rate while the parties commence negotiations over a new contract. *Bureau Order*, ¶ 7. There is no harm to APCo or, if applicable, Gulf Power, that cannot be rectified by a later monetary payment, as this Court explained in *Gulf Power I*, by judicial review after the development of a full record before the Commission and, if appropriate, the imposition of a new rate order that "ensure[s] a utility receives just compensation both prospectively and in the period

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jurisdiction only because the agency had, after years of delay, repeatedly missed self-imposed deadlines, a very different case than that involving Gulf Power and APCo.

[7] Gulf Power incorrectly relies upon *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). That case involved a dispute between a state agency and the federal government over transportation rates, and the court refused to require the United States to first bring a claim before the state agency because the "only question" was whether the state could constitutionally apply its procedures to the federal government. In contrast, the FCC should not be bypassed in this appeal because determining a just and reasonable pole attachment rate requires the consideration of factual evidence and the application of regulatory principles before reaching any constitutional question.

prior to the court's determination of the just compensation rate." *Gulf Power I*, 187 F.3d at 1335.[8]

Finally, Gulf Power's arguments that Commission review of the *Bureau Order* would be "futile," Gulf Power's Response, 15-17, are unpersuasive. Gulf Power simply postulates that what it calls the just compensation price will be higher than the statutory maximum. Gulf Power's Response, 16-17. However, the Bureau explained that a utility receives not only the current costs of preparing the poles for attachments, or "makeready" payments, but also "an annual pole attachment rate [that] allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital." *Bureau Order*, ¶ 6.[9]

Gulf Power's other "futility" argument – that the Commission has "predetermined the issue before it" – is simply false. The full Commission has not had an opportunity to review the "issue" of whether Gulf Power and APCo can show that the 1996 Act's provision of nondiscriminatory access in Section 224(f) changes the amount of compensation required by the Constitution for the use of the very same utility pole space that has been used for decades. Both

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[8] Gulf Power's citation to *McCarthy v. Madigan*, 503 U.S. 140 (1992), and *Bowen v. City of New York*, 476 U.S. 467 (1986), are inapposite. In *McCarthy*, which involved a prisoner's compliance with the Bureau of Prison's internal grievance procedures, the court held that Congress had not clearly required exhaustion, and in *Bowen*, which involved Social Security disability claims, the court excused exhaustion when not doing so would have barred filing of claims.

[9] Gulf Power fails to justify to this Court, as APCo failed to justify to the Bureau, how "just" compensation could possibly exceed the combination of (1) makeready payments; (2) reimbursement of costs for space used by the attachment; and (3) a return on capital. As the Supreme Court has previously stated in examining utility pole attachment rates, "nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory." *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Moreover, even if this Court were to find, after the full development of the record, the FCC cable rate formula to be insufficient, it could order the FCC to revise its formula accordingly, while holding that Section 224's broad standard of "fully allocated costs" remains constitutionally adequate. *See Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985).

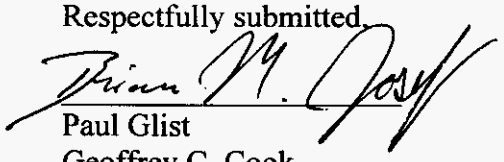
the *Bureau Order* in APCo's case and the order in *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 F.C.C.R. 9563 (2000), are interlocutory. The other "issue" to which Gulf Power refers, the question in *Gulf Power II* about the applicability of Section 224 to attachments that carry Internet services together with cable or telecommunications services, is not a valid "issue" at all, unless and until this Court lifts its stay of the mandate in that case *and* Gulf Power and APCo show that all Florida and Alabama pole attachments carry Internet.

Finally, as the Supreme Court has stated, courts do not have discretion to label further administrative review "futile" where exhaustion of remedies is statutorily required. "Where Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. *See also Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)(holding that where exhaustion is a statutorily specified jurisdictional prerequisite, "the requirement . . . may not be dispensed with merely by a judicial conclusion of futility").

## CONCLUSION

For the foregoing reasons, this Court should dismiss Gulf Power's Petition for Review.

Respectfully submitted,

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**Cox Communications Gulf Coast, L.L.C.**


Dated: November 9, 2000

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

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| Alabama Cable Telecommunications Association; Comcast Cablevision of Dothan, Inc. et al. Complainant, | ) | |
| | ) | File No. PA 00-003 |
| v. | ) | |
| Alabama Power Company, Respondent. | ) | |

# ORDER

**Adopted: September 8, 2000** **Released: September 8, 2000**

By the Deputy Chief, Cable Services Bureau:

1. On June 23, 2000, the above-captioned Complainant filed a pole attachment complaint ("Complaint") with the Federal Communications Commission ("Commission") against the above-captioned Respondent pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")[1] and Subpart J of the Commission's Rules.[2] Complainant also filed a Petition for Temporary Stay ("Petition"). Respondent filed its Response on July 14, 2000. Along with its Response, Respondent filed a Motion to Dismiss the Complaint for lack of jurisdiction, a Motion for Confidential Treatment of its financial information and an opposition to Complainant's Petition. Complainant filed its Reply on August 29, 2000, along with its opposition to Respondent's Motion for Confidential Treatment.[3] Our rules require that the parties seek first to resolve their differences by negotiation.[4] Based on our review of the record, we believe that further negotiations between the two parties are likely to be fruitless.[5] In this Order, we deny Respondent's Motion to Dismiss, we grant the Complaint in part, we temporarily grant Respondent's Motion for Confidential Treatment in part and we dismiss the Petition for Stay as moot.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The

[1] 47 U.S.C. §224.

[2] 47 C.F.R. §§1.1401–1.1418.

[3] We granted Complainant an extension of time to file its Reply. *See* In the Matter of Alabama Cable Telecommunications Association, et al. v. Alabama Power Company, File No. PA 00-003, DA 00-1847 (released August 11, 2000). On August 11, 2000, the parties reached an agreement concerning the confidential treatment of information provided to the Complainant by the Respondent, and Complainant was provided with an unredacted copy of the Response. *See* letter dated August 22, 2000 to Kathleen F. Costello, Cable Services Bureau, from Raymond A. Kowalski, counsel for Respondent.

[4] 47 C.F.R. § 1.1404 (l) (1999).

[5] Complaint at ¶ 20.

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

3. The parties to this Complaint have been engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee to Respondent. For a

[6] 47 U.S.C. §224 (b) (1).

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

[8] 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd*, Monongahela Power Co. v. FCC, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000).

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

[10] 47 U.S.C. § 153(44).

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

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

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

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

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

number of years prior to this Complaint, the parties' have used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole.[16] Complainant has not challenged that rate. In June of this year, Respondent announced that it was rescinding all existing agreements and desired Complainant to enter into new agreements, effective September 11, 2000, which are similar to the old agreements except that the annual rate charged is $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, we apply our Cable Formula using public data when available. Both parties submitted pole attachment rate calculations that drew similar conclusions. Complainant even submitted calculations that took into account arguments raised by Respondent, which increased the maximum rate calculation.[17] Complainant has agreed to pay an annual pole attachment rate of $7.47, which exceeds the maximum rate either party calculated using the formula prescribed by the Pole Attachment Act, and therefore exceeds Respondent's fully allocated costs associated with the attachment.

4. Respondent does not attempt to justify its $38.81 rate using the Cable Formula. Instead Respondent argues first that we dismiss the Complaint for lack of jurisdiction, based on the recent decision in Gulf Power, et al. v. FCC[18] ("Gulf Power II"). Gulf Power II disposed of consolidated petitions for review of the Commission's Order[19] implementing 47 USC § 224, as amended by the 1996 Act. Further litigation in this matter is in progress and as a consequence, the mandate in the Gulf Power II proceeding has not been issued by the Court. Pending the issuance of a mandate from the Court, or a clarification of the Gulf Power II decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications service providers. Therefore, we will deny Respondent's Motion to Dismiss.

5. Respondent next poses a variety of arguments in support of changing the Cable Formula. All of these arguments have been addressed and rejected in prior Commission Orders. For two decades the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[20] Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission ("FERC").[21] Further, the United States Supreme Court has upheld the Cable Formula for

[16] *See* Complaint at Exhibit 4.

[17] We decline to address the parties' specific issues relating to the application of the formula because, under any scenario proposed by the Respondent, Complainant's agreed rate of $7.47 exceeds the fully allocated costs.

[18] Gulf Power, et al. v. FCC and USA, 208 F. 3d 1263 (11th Cir., released April 11, 2000).

[19] Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777 (1998).

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

[21] *Id.*

calculating pole attachment rates.[22] Respondent bases its arguments on the 1996 Act amendments to the Pole Attachment Act, which imposed upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[23] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[24] Because the Court in Gulf Power, et al. v. FCC[25] ("Gulf Power I"), held that application of the mandatory access provisions of the amended Pole Attachment Act effect a taking of utility property under the Fifth Amendment to the United States Constitution,[26] Respondent proffers that this change in the Pole Attachment Act has changed the nature of its relationship with Complainant from a voluntary relationship to an involuntary relationship. Due to this change, Respondent argues that the pole attachment fee must now satisfy the constitutional requirement of just compensation.

6. The Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act.[27] Under the Commission's rules, a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[28] Although our rules do not allow a utility to recover twice for these costs,[29] the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital. In order to avoid a prolonged and complex methodology, our policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used in the Cable Formula. The inclusion of unrelated expenses in certain accounts is balanced by the exclusion

[22] FCC v. Florida Power Corporation, 480 U.S. 245 (1987); *see also,* Gulf Power v. USA, 998 F. Supp. 1386 (N.D. Fla 1998), *aff'd,* 187 F.3d 1324 (11th Cir. 1999).

[23] 47 U.S.C. § 224 (f) (1).

[24] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996).

[25] Gulf Power, et al. v. USA and FCC, 187 F.3d 1324 (11th Cir. 1999).

[26] U.S. Const., amend V (private property shall not be taken for public use without just compensation).

[27] The Supreme Court found that Congress enacted this legislation "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service." FCC v. Florida Power Corp., 480 U.S. 245, 247 (1987). By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space. *Id.* at 247-48. *See also* Alabama Power Co. v. FCC, 773 F.2d 363, 364 (D.C. Cir. 1985).

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

[29] We have stated on numerous occasions that the attaching entity should not be charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account. See Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 7 (2000).

of minor expenses that may have a legitimate nexus to pole attachments in other accounts. The continued use of a clear rate formula by the Commission is essential to encourage parties to negotiate for pole attachment rates, terms and conditions and to avoid a prolonged and expensive complaint process. We believe the Cable Formula accomplishes these objectives and provides just compensation to the utility for the space occupied on the pole.

7. We do not believe that an attacher that is already attached to a utility's poles needs to file a complaint for access under the Commission's rules. However, to avoid any confusion, we will order Respondent to allow the Complainant to continue to remain attached at the current rate of $7.47, pending the satisfactory negotiation of a new agreement. Because Respondent failed to justify its proposed annual pole attachment rate of $38.81, we find that rate to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. We will order the parties to negotiate a new agreement in good faith using the Cable Formula as a guide to establishing a reasonable rate. To the extent that Complainant has paid the $38.81 rate, we will order refunds of any charges over the $7.47 amount.

8. Finally, Respondent requests confidential treatment of its commercial and financial information. Because the parties have reached an agreement on the terms of disclosure of this information to the Complainant, it is not essential to a resolution of this Complaint to make a final determination of this issue at this time. We are hard put to find justification for the confidential treatment of public documents but due to the changing nature of utility regulation, we will reserve this issue for further review. In the interim, we will continue to withhold the requested material from public disclosure. However, we emphasize that it is never appropriate to withhold FERC Form 1 data and other essential data from an attacher, nor is it ever appropriate to require an attaching entity to agree to any curtailment of its statutory right to access this information and to file a complaint along with its analysis of the information with the Commission. We also emphasize the necessity of Respondent filing a complete, unredacted copy of the FERC Form 1 with the Commission. Additionally, because we resolve the Complaint herein, we will dismiss the Petition for Stay as moot.

9. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the complaint referenced herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion to Dismiss IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion for Confidential Treatment is GRANTED IN PART TO THE EXTENT INDICATED HEREIN, pending our further review.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Complainant's Petition for Temporary Stay IS DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent continue to GRANT

ACCESS to Complainant on the terms of the existing agreements pending the negotiation of new agreements and that the pole attachment agreements between Respondent and Complainant ARE MODIFIED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $38.81, IS UNREASONABLE and IS TERMINATED.

15. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $7.47 IS CONTINUED, pending further negotiations.

16. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent, SHALL REFUND to Complainant, within thirty (30) days of the release of this Order, that portion of the amount paid in excess of $7.47, plus interest to the date of refund, for the period from June 23, 2000 to the present, plus interest.

17. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent and Complainant SHALL NEGOTIATE IN GOOD FAITH, new pole attachment agreements with a just and reasonable annual pole attachment rate, in accordance with the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

## CERTIFICATE OF SERVICE

I, Debra Sloan, hereby certify that on this 9th day of November, 2000, I caused a copy of the foregoing *Florida Cable Telecommunications Association, Inc.'s and Cox Communications Gulf Coast, L.L.C.'s Reply to Alabama Power Company's Response to Respondents' Motion to Dismiss* to be sent via FedEx (*), hand delivery (**), or U.S. Mail to the following:

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