

IN THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE ELEVENTH CIRCUIT

GULF POWER COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 FEDERAL COMMUNICATIONS )  
 COMMISSION and the )  
 UNITED STATES, )  
 )  
 Respondents. )

Consolidated Cases  
 00-14763-I & 00-15068-D

GULF POWER COMPANY'S  
 REPLY TO RESPONDENTS' OPPOSITION TO  
 MOTION FOR EXTRAORDINARY RELIEF

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<b>GULF POWER COMPANY,</b>	)	
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<b>Petitioner,</b>	)	<b>No. 00-15068-D</b>
	)	
<b>vs.</b>	)	
	)	
<b>FEDERAL COMMUNICATIONS</b>	)	
<b>COMMISSIONS AND UNITED STATES,</b>	)	
	)	
<b>Respondents.</b>	)	
	)	

**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 or governmental agencies have been associated with or have an interest in the outcome of this case:

Adelphia (party 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)

AT&T Cable Services (party to Docket No. PA-00-003 before the Federal Communications Commission)

Balch & Bingham, LLP (counsel for Petitioner)

Richard Beelend, Representative for Northland Cable Properties (party to Docket No.

PA-00-003 before the Federal Communications Commission)

Beggs & Lane LLP (counsel for Petitioner)

Jane Belford, Representative of Mediacom Southeast LLC (party to Docket No. PA-

00-004 before the Federal Communications Commission)

Barry Breithaupt, Representative of Torrence Cablevision USA, Inc.

Jennifer M. Buettner (counsel for Petitioner)

Ramona Byrd, Representative for CVI of Alabama, Inc., d/b/a Time Warner Cable

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

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

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

Cablevision Services (party to Docket No. PA-00-003 before the Federal  
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Cindy Cade, Representative for Comcast Cable (party to Docket No. PA-00-003  
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John Russell Campbell (counsel for Petitioner)

Charter Communications, LLC (party to Docket No. PA-00-003 before the Federal  
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Century Cullman Corporation (party to Docket No. PA-00-003 before the Federal Communications Commission)

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

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Ronnie G. Colvin, Representative of Comcast Cablevision of Panama City, Inc. (party to Docket No. PA-00-004 before the Federal Communications Commission)

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

Geoffrey C. Cook (counsel for parties to Docket No. PA-00-003 before the Federal Communications Commission)

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

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)

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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)

Paul Glist (counsel for parties to Docket No. PA-00-003 before the Federal Communications Commission)

Bruce Gluckman, Representative of Mediacom Southeast LLC (party to Docket No. PA-00-004 before the Federal Communications Commission)

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)

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

M. C. Grigsby, Representative for Century Cullman Corporation (party to Docket No. PA-00-003 before the Federal Communications Commission)

Mike Hugunin, Representative for Birmingham Division of Time Warner Cable (party to Docket No. PA-00-003 before the Federal Communications Commission)

James Cable Partners, LP (party to Docket No. PA-00-003 before the Federal Communications Commission)

Ron Johnson, VP of Operations for Charter Communications, LLC (party to Docket No. PA-00-003 before the Federal Communications Commission)

William Johnson, Deputy Bureau Chief, Cable Services Bureau, Federal Communications Commission

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Keller and Heckman LLP (counsel for Petitioner)

Cheryl King, Staff Attorney, Federal Communications Commission

Raymond A. Kowalski (counsel for Petitioner)

Deborah Lathen, Chief, Cable Services Bureau, Federal Communications  
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Mediacom Southeast LLC (party to Docket No. PA-00-004 before the Federal  
Communications Commission)

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-  
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Ralph A. Peterson (counsel for Petitioner)

Phoenix Cable T.V. (party to Docket No. PA-00-003 before the Federal  
Communications Commission)

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

Daniel K. Shoemaker, President of DKS Holdings, Inc., (subsidiary to James Cable Partners, LP) (party to Docket No. PA-00-003 before the Federal Communications Commission)

Sky Cablevision, Ltd. (party to Docket No. PA-00-003 before the Federal Communications Commission)

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)

JoAnn Stone, Representative for Adelphia (party to Docket No. PA-00-003 before the Federal Communications Commission)

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

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

Torrence Cablevision USA, Inc.

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)

It also is certified that the following corporations have an interest in the outcome of this case:

Alabama Power Company (affiliate of Petitioner)

Empresa Eléctrica del Norte Grande, S.A. (Edelnor) (affiliate of Petitioner)

Georgia Power Company (affiliate of Petitioner)

Gulf Power Company (Petitioner)

Hidroeléctrica Alicura, S.A. (affiliate of Petitioner)

Integrated Communication Systems, Inc. (affiliate of Petitioner)

Mississippi Power Company (affiliate of Petitioner)

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

Savannah Electric and Power Company (affiliate of Petitioner)

Southern Company Capital Trust I (affiliate of Petitioner)


Southern Company Capital Trust II (affiliate of Petitioner)

Southern Electric Generating Company (affiliate of Petitioner)

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

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

The Southern Company (parent of Petitioner)

  
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<b>COMMISSION and the</b>	)	
<b>UNITED STATES,</b>	)	
	)	
<b>Respondents.</b>	)	

**GULF POWER COMPANY’S  
REPLY TO RESPONDENTS’ OPPOSITION TO  
MOTION FOR EXTRAORDINARY RELIEF**

Gulf Power Company submits this Reply to the separately filed Oppositions of the FCC and the Intervenor Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, LLC (“FCTA/Cox”) to its Motion for Extraordinary Relief. Although Gulf Power refutes the criticisms raised in the Oppositions, it echoes the FCC’s sentiment that the issues have been briefed to the point of redundancy. Accordingly, this Reply will briefly refute the specific arguments raised in the Oppositions with reference to the appropriate portions of earlier pleadings.

**I. Gulf Power is Entitled to Extraordinary Relief.** Gulf Power has met this Court’s required showing for extraordinary relief. The statutory and case law, set forth in Gulf Power’s pleadings, clearly states that federal appellate courts have the power, pursuant to their authority under the All Writs Act (28 U.S.C. § 1651), to entertain “any suit seeking relief that might affect [their]

future jurisdiction,”<sup>1</sup> and particularly to review “all challenges to an agency’s jurisdiction in the context of nonfinal agency action.”<sup>2</sup> Gulf Power, and APCo, have gone to great lengths to demonstrate how these legal precedents give this Court the power to grant their petitions for review and award the remedies they seek. (Gulf Power’s Response to Motion to Dismiss, at 6-10; APCo’s Response to Motion to Dismiss, at 6-11; Gulf Power’s Motion, at 5-8). Gulf Power’s request for extraordinary relief echoes these arguments the Respondents have consistently ignored. Because this case involves jurisdictional challenges, continuing constitutional violations, and claims that there exists no alternative form of relief to that sought here, this Court may properly review Gulf Power’s claims at this time and grant the extraordinary relief it seeks. Gulf Power has, in both its instant Motion and in prior pleadings, adequately demonstrated that it satisfies all three elements necessary to obtain extraordinary relief: a clear right to the relief sought; lack of adequate alternatives to obtain the relief sought; and the FCC’s usurpation of power and abuse of its discretion.<sup>3</sup>

**II. The Record in this Case Has Been Fully Developed.** Gulf Power is astonished by FCTA/Cox’s assertion that its Motion is an attempt to avoid the “FCC’s development of a full record” and its belief that the administrative record has not been fully developed. (FCTA/Cox, at 3, 11). A review of the administrative record conclusively establishes that Gulf Power has fully met every evidentiary showing required by the statute and the Commission’s regulations.<sup>4</sup> One is also

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<sup>1</sup> *Telecommunications Research Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984).

<sup>2</sup> *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 551 (D.C. Cir. 1992).

<sup>3</sup> *Mallard v. U.S. District Court of the Southern District of Iowa*, 490 U.S. 296, 309 (1989); *In re Paradyne Corp.*, 803 F.2d 604, 612 (11<sup>th</sup> Cir. 1986).

<sup>4</sup> Gulf Power’s (and APCo’s) satisfaction of the evidentiary standards allows for a review of both the Cable Rate and the fully-phased in Telecom Rate. Also, Gulf Power has provided more

left to wonder how, without acting in an arbitrary and capricious manner, the Cable Bureau could have issued an Order in favor of all cable companies who seek access to pole space without a fully developed record. The Cable Bureau Order, which was entered only 2 ½ months after the complaint in APCo's case was filed, clearly states that the FCC is applying a simple standard: if a utility's pole attachment price exceeds the statutory Cable Rate, it will be rejected. The record in this case, which has been before the FCC for over 6 months, is fully developed and establishes very clearly that Gulf Power's charge exceeds the Cable Rate. Gulf Power's case does not differ from APCo's in any meaningful manner. The alleged need for further development of the record before the FCC is disingenuous at best.

The Bureau's delay in formalizing its decision by issuing an order in Gulf Power's case is unwarranted. Gulf Power merely seeks either a dismissal of the proceedings, suspension of the constitutional violation it is suffering, or a formal resolution of the futile administrative proceedings. This Court has the power to grant all of these requests. (Gulf Power's Response to Motion to Dismiss, at 5-10; Gulf Power's Motion, at 5-11).

**III. Because Further Administrative Proceedings Would be Futile, Extraordinary Relief is Necessary.** FCTA/Cox's renewed exhaustion argument is merely an effort to allow them to continue to reap the favorable effects the FCC's unlawful conduct affords them. The Respondents attempt to create the appearance that the FCC is still considering the issue by labeling Gulf Power's

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than adequate evidence to demonstrate that the price it seeks to charge attaching entities is consistent with notions of just compensation. (Gulf Power's Response to Complaint, at 48-51; Gulf Power's Notice of Filing of Supplemental Authority). Moreover, the FCC's counsel and Cable Bureau, acting on behalf of the full Commission, as well as the full Commission itself, have thoroughly demonstrated that the FCC has predetermined the issue and believes that the only relevant evidence is that necessary to determine the Cable Rate. (September 8, 2000 Cable Bureau Order, at ¶¶ 3, 6, 7, & fn.17; FCC's Opposition to Stay, at 7-8; 14-19).

Motion as “ludicrous” and by suggesting that the issues have “yet to be decided.” (FCC, at 3; FCTA/Cox, at 1). Respondents have glossed over the panoply of exhaustion exceptions triggered by the FCC’s own statements and actions. (Gulf Power’s Response to Motion to Dismiss, at 10-18; Gulf Power’s Motion, at 15-18). By way of example only, the FCC’s counsel in this proceeding has dramatically (and inappropriately) called APCo’s replacement cost pricing methodology a “claim of right to monopoly rates” which has “no merit at all.” (FCC’s Opposition to Motion for Stay Pending Review, at 11).<sup>5</sup> Stronger words indicating the FCC’s opinion are difficult to imagine.

All of these arguments demonstrate that neither the procedural errors committed by the agency nor the absence of adequate administrative remedies can ever be cured by administrative proceedings. These errors and deficiencies, as thoroughly briefed in prior pleadings and highlighted below, make this case ripe for review and give Gulf Power a “clear right to relief.” (Gulf Power’s Response to Motion to Dismiss, at 10-18; Gulf Power’s Motion, at 15-18; APCo’s Response to Motion to Dismiss, at 11-19; APCo’s Reply to Opposition to Petition for Stay, at 3).

**IV. The FCC Lacks Jurisdiction Over the Case.** FCTA/Cox consistently refuse to acknowledge that *Gulf Power II* disposes of their complaint. In defiance of this Court’s ruling in that case that the FCC lacks jurisdiction over Internet service providers, FCTA/Cox recycle their flawed argument that the stay of the mandate in *Gulf Power II* means the FCC is not bound by the ruling in that case.<sup>6</sup> Previous filings in this proceeding have exhaustively explained that staying the issuance

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<sup>5</sup>The record establishes that Gulf Power’s replacement cost methodology is identical to APCo’s.

<sup>6</sup>Gulf Power and APCo have been forced to repeatedly refer the Cable Associations to the applicable legal authority for the correct burden of proof on the issue of the FCC’s jurisdiction over the underlying complaint proceedings. (See, e.g., APCo’s Reply to Opposition to Stay, at 4-5; APCo’s Motion to Strike, at 3-6; Gulf Power’s Motion to Strike, at 3-6 (relying on *Selcke v. New*

of a mandate does not alter the binding precedential effect of the ruling in this Circuit. Nor does it weaken the fact that judicial proceedings in this Circuit are governed by the law of that case.<sup>7</sup> (Gulf Power's Motion, at 8-11; Gulf Power's Response to Motion to Dismiss, at 5-8; APCo's Response to Motion to Dismiss, at 6-9; APCo's Reply to Opposition to Petition for Stay, at 4-5). Although FCTA/Cox wish the law stated otherwise, *Gulf Power II* is binding authority in any case within the Eleventh Circuit. As such, the appellate court and the lower courts of the Eleventh Circuit must "apply now the precedent established by [*Gulf Power II*] as binding authority."<sup>8</sup> Accordingly, Gulf

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*England Ins. Co.*, 2 F.3d 790, 792 (7<sup>th</sup> Cir. 1993) and *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5<sup>th</sup> Cir. 1980)). The burden is squarely upon the Associations - not APCo and/or Gulf Power. The Cable Associations have failed to meet their burden and have presented nothing more than conclusory statements to rebut the voluminous evidence developed before the FCC proving that Association members are providing Internet services. (Gulf Power's Motion, at 8; APCo's Petition for Stay, at 7). Cable companies cannot deny the changing nature of their business. Instead, they attempt to obfuscate and shift the standard by asserting that Gulf Power must make a "factual showing that 'Internet' services will be provided over every Florida attachment to every customer." There is no authority supporting this new, impractical, and unrealistic standard, and the clear holding of *Gulf Power II* cannot be so easily evaded. (FCTA/Cox, at 3).

<sup>7</sup>FCTA/Cox's refusal to admit the relevance of *Generali v. D'Amico* is baffling. (FCTA/Cox, at n.4). *Generali* states the simple rule that "[t]his Court is bound by the law of the Eleventh Circuit." 766 F.2d 485, 489 (11<sup>th</sup> Cir. 1985). In other words, this Court must follow its ruling in *Gulf Power II* and dismiss their complaint because the FCC does not have jurisdiction to hear it.

*Generali* also disposes of FCTA/Cox's attempt to confuse the fact that the FCC lacks jurisdiction over this case by pointing out that federal courts in other circuits have reached different conclusions on the Internet issue. (FCTA/Cox, at 5-6). Under *Generali*, "authority from one circuit of the United States Court of Appeals is not binding upon another circuit." 766 F.2d at 489. Whatever the Ninth Circuit appellate court and a district court in the Fourth Circuit decided with respect to the FCC's jurisdiction over providers of Internet services is irrelevant to Gulf Power's case.

<sup>8</sup>*Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11<sup>th</sup> Cir. 1992) (citing *United States v. Machado*, 804 F.2d 1537, 1543 (11<sup>th</sup> Cir. 1986)); see also Eleventh Circuit I.O.P. 36-2. Even FCTA/Cox did not and cannot argue that the Eleventh Circuit may deviate from its holding in *Gulf Power II*.

Power and APCo are clearly entitled to an order from this Court mandating that the FCC dismiss the Complainants' case for lack of jurisdiction.

**V. Gulf Power Has a Clear Right to Receive Just Compensation Pending Judicial Review.** Gulf Power's request for an order requiring the cable company Complainants to pay the just compensation price pending judicial review is based on Supreme Court authority and this Court's decision in *Gulf Power I*. As previously explained, the FCC has failed to provide Gulf Power with the "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking that is required by the Fifth Amendment.<sup>9</sup> (Gulf Power's Motion, at 11-14; APCo's Petition for Stay, at 4-6; Gulf Power's Opposition to Motion to Dismiss, at 8-10; APCo's Opposition to Motion to Dismiss, at 9-11). The FCC's regulations provide no such protection. Despite having assured this Court and Petitioners to *Gulf Power I* that it would provide a process sufficient to meet the constitutional standards, the FCC has yet to implement the promised procedures in this case to avoid an unconstitutional taking of Gulf Power's property. Accordingly, Gulf Power is entitled to an order that requires the Complainants to pay the amount Gulf Power believes to be just compensation, subject to refund, while this Court resolves the just compensation issue.

**VI. The Cable Rate does not Provide Just Compensation.** Perhaps no issue has been more thoroughly briefed than the one belittled by FCTA/Cox that lies at the heart of the instant pole attachment litigation. FCTA/Cox deny the fact that there exists a genuine dispute over whether the pre-1996 Act's statutory Cable Rate satisfies the stringent just compensation requirement effected

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<sup>9</sup>*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985).



by the mandatory access provision of the 1996 Act. (FCTA/Cox, at 9).<sup>10</sup> Gulf Power asserts that the Cable Rate does not come close to the just compensation price the statute requires because it does not allow recovery for the unusable space on the pole, it is improperly based on embedded cost methodology, it does not include all appropriate FERC accounts, and it denies utilities of market rents.<sup>11</sup> (APCo's Petition for Stay, at 10-17; APCo's Reply to Opposition to Stay, at 5-10). Because the Congressionally imposed Cable Rate does not meet the Constitution's requirements, Gulf Power is entitled to a judicial remedy that dismisses the case before the FCC so that this Court may properly exercise jurisdiction over the serious constitutional and statutory questions that are ripe for review.<sup>12</sup>

**VII. Gulf Power Has No Alternative Remedy.** FCTA/Cox argue that *Gulf Power I* provides an adequate remedy for Gulf Power because, as they view the case, that decision allows this

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<sup>10</sup>FCTA/Cox assert that the full Commission has not had a chance to review whether the nondiscriminatory access provision of the 1996 Act authorizes Gulf Power to charge a price higher than the Cable Rate. (FCTA/Cox, at 9). To the contrary, the full Commission has considered and consistently rejected Gulf Power's position that the statutory Cable Rate does not satisfy Fifth Amendment just compensation requirements. See, e.g., *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-325, ¶¶ 1187-92 (August 8, 1996). While the Commission recognizes that it has "no power to declare any provision of the Communications Act unconstitutional," it nevertheless believes that the Cable Rate provided by the Act satisfies constitutional standards. *Local Competition Order*, at ¶ 1192.

<sup>11</sup>Once again, contrary to FCTA/Cox's claims, the Commission has fully considered the issue of whether the Cable Rate appropriately compensates utilities in *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (April 3, 2000). The FCC rejected the arguments of over 20 utilities thoroughly describing the numerous ways in which the Cable Rate falls short, including, without limitation, issues concerning recovery for unusable space, the Commission's reliance on embedded cost methodology, and the Commission's failure to include all appropriate FERC accounts. These very same issues are central in the disputes now before this Court. The FCC has made its position clear and this case is ripe for review.

<sup>12</sup>This Court indicated in *Gulf Power I* and *Gulf Power II* that an as applied constitutional challenge to the 1996 Act would be ripe for appellate court review. 187 F.3d 1324, 1336-37 (11<sup>th</sup> Cir. 1999); 208 F.3d 1263, 1272-73 (11<sup>th</sup> Cir. 2000). The proceedings involved in Gulf Power's Petition for Review demonstrate such a case.

Court to grant utilities monetary relief retroactive to the date of the taking. (FCTA/Cox, at 10-11). Once again, and as APCo has already briefed this Court, FCTA/Cox misconstrue *Gulf Power I* because they fail to admit that the Court's ruling there addressed only those situations where judicially determined just compensation "falls within the range of rates specified in 47 U.S.C. § 224(d)-(e)." <sup>13</sup> Here, Gulf Power's price exceeds the statutory maximum rate set forth in 47 U.S.C. § 224(d). The excerpt of *Gulf Power I* that FCTA/Cox rely on does not apply to the case before this Court, and it explicitly declines to address this particular issue. <sup>14</sup>

FCTA/Cox assert that extraordinary relief is not proper because this case is "only about money." (FCTA/Cox, at 11). Their trivialization of the monetary issue ignores the Fifth Amendment to the United States Constitution, the 25-year-old dispute between utilities and cable companies, <sup>15</sup> all of the legal arguments made in *Gulf Power I*, *Gulf Power II*, and the proceedings before the FCC, <sup>16</sup> and even their own cries of allegedly being too financially strapped to pay the price Gulf Power believes satisfies its constitutional right to receive just compensation. <sup>17</sup> Certainly this case is about money, but that is because the Fifth Amendment right to just compensation is about money. Thus, this is an "extraordinary circumstance" calling for an extraordinary remedy. (FCTA/Cox, at 11).

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<sup>13</sup>*Gulf Power I*, 187 F.3d at 1335 & 1338 n.10.

<sup>14</sup>*See* 187 F.3d at 1338 n.10 (noting that the Court was "leav[ing] for another day the issue of what happens if" just compensation exceeds the statutory rate).

<sup>15</sup>*See, e.g.*, Gulf Power's Motion, at 2-5; APCo's Petition for Stay, at 1-4.

<sup>16</sup>*See, e.g., id.*

<sup>17</sup>*See* FCTA's Petition for Temporary Stay, at 10-12; Gulf Power's Response, at 14-19.

**VIII. The FCC has Usurped its Power and Abused its Discretion.** FCTA/Cox assert that the “Bureau’s consideration of FCTA/Cox’s pole complaint is consistent with *Gulf Power II*,” and the FCC, likewise, seeks to convince this Court that it is still considering the issues “pending” in the case before it. (FCTA/Cox, at 12; FCC, at 3). However, the agency’s decision to withhold a formal order is merely its strategy for placating its constituents. In the absence of a formal order on any pleading or motion in Gulf Power’s case, the FCC has effectively granted the relief requested in the Complaint, stayed the proceedings without ensuring Gulf Power is protected from a constitutional violation, and become a party to the cable companies’ unconstitutional taking of Gulf Power’s property. (Gulf Power’s Motion, at 15-18). This delay is certainly unreasonable, and this Court is certainly the body that can remedy the effects of the agency’s abuse of discretion. If the Cable Bureau can rule in the APCo proceeding in just 2 ½ months, why has it yet to rule in an identical proceeding that has been pending for nearly three times as long? Through its All Writs power, this Court may order the FCC either to dismiss the case, require the cable companies to pay just compensation subject to refund pending judicial resolution, or issue a formal order so that Gulf Power may seek judicial relief.

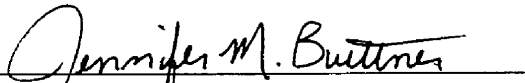
As a final matter, the FCC usurped judicial power by unlawfully assuming jurisdiction over this case in defiance of this Court’s ruling in *Gulf Power II*, abused its discretion by refusing to honor the process it described to this Court in *Gulf Power I* to protect Gulf Power from a constitutional injury, and continues to unreasonably delay resolution of the administrative proceedings. (Gulf Power’s Motion, at 8-11; Gulf Power’s Response to Motion to Dismiss, at 5-8; APCo’s Response to Motion to Dismiss, at 6-9; APCo’s Reply to Opposition to Petition for Stay,

at 4-5). The effects on Gulf Power of the FCC's abuse of authority and dilatory conduct warrant the application of extraordinary relief.

### CONCLUSION

For all of the reasons set out above and in the pleadings referenced herein, Gulf Power respectfully submits that the Respondents have failed to refute its requests for extraordinary relief. Accordingly, this Court may, pursuant to its All Writs power, grant Gulf Power's request for an order mandating that the FCC dismiss its case for lack of jurisdiction. Alternatively, this Court may order the FCC to require the Complainants to pay Gulf Power's just compensation price pending judicial review, or it may compel the FCC to rule on the case so that this Court may resolve the constitutional challenges at the heart of this case. This latter ruling would in no way harm the cable companies. If it is judicially determined that Gulf Power's price is too high, the FCC will order Gulf Power to fully refund cable companies. Gulf Power is not similarly protected.

Respectfully submitted,

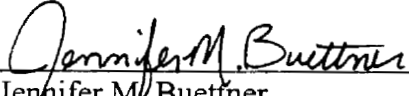
  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petition for Review and Certificate of Interested Persons and Corporate Disclosure Statement were served this 29<sup>th</sup> day of December, 2000, by U.S. Mail First Class postage prepaid to the following persons at the addresses listed below.

  
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