

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.*

Complainants,

P.A. No. 00-004

v.

GULF POWER COMPANY,

Respondent.

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To: Cable Services Bureau

**GULF POWER COMPANY'S MOTION TO STRIKE THE  
COMPLAINANTS' SUPPLEMENT OR, IN THE ALTERNATIVE,  
MOTION TO DISMISS**

Gulf Power Company ("Gulf Power") files this Motion to Strike the Complainants' Supplement ("Supplement") filed in the above-described proceeding. As discussed below, the Supplement violates the Commission's regulations, is beyond the scope of the Pole Attachment Act<sup>1</sup> and the Commission's jurisdiction, and is due to be summarily rejected. Alternatively, should the Commission refuse to strike the Supplement as improper, it should be dismissed. Time Warner lacks any "injury in fact" and therefore has no claim. 47 C.F.R. § 1.1406(b).

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<sup>1</sup> 47 U.S.C. § 224.

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## **I. Background**

This proceeding involves a complaint under the Commission's pole attachment complaint procedures. 47 C.F.R. § 1.1401 *et seq.* This proceeding has been fully briefed and adjudicated under those rules. Specifically, the Complaint and Petition for Temporary Stay were submitted on July 10, 2000; Gulf Power's Answer to Petition for Temporary Stay was filed on July 20, 2000; Gulf Power's Answer to the Complaint was filed on August 9, 2000; and the Complainants' Reply was filed on August 29, 2000. Under the Commission's rules, the filing of a Reply is the last pleading allowed unless such other pleading is "authorized by the Commission." 47 C.F.R. § 1.1407(a).<sup>2</sup>

## **II. The FCC Lacks Jurisdiction over the Proceeding**

On September 8, 2000, the Commission's Cable Service Bureau entered an order adjudicating a Complaint against Alabama Power Company which raised facts and issues that were virtually identical to those raised in the Complaint against Gulf Power. (FCC Docket No. 00-003). That Order announced several Commission positions which adversely affect and severely limit the rights of utilities, such as Gulf Power, who are subject to Commission's regulation under the Pole Attachment Act.

Because Gulf Power was (and is) aggrieved by the Order (which effectively disposed of this Complaint proceeding against it), Gulf Power filed a petition for review of that Order with the United States Court of Appeals for the Eleventh Circuit pursuant to 47 U.S.C. § 402 and 28 U.S.C. §§ 2341 to 2350 on September 27, 2000. Upon Gulf Power's

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<sup>2</sup> Gulf Power did file several pleadings (such as a Motion for Confidential Treatment) in addition to those specifically contemplated by the Commission's regulations. Gulf Power, however, always sought authorization from the Commission by filing contemporaneously with those pleadings a Motion for Leave to File.

filing its petition, the Eleventh Circuit obtained jurisdiction over the proceeding. 28 U.S.C. § 2349(a) (“The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review.”); 47 U.S.C. § 402(c) (“Upon the filing of such [petition], the court shall have jurisdiction of the proceedings and of the questions determined therein . . .”).<sup>3</sup> Now that Gulf Power has placed the proceeding squarely before the Eleventh Circuit, the FCC may no longer exercise authority over the case. For this reason alone, the Complainants’ Supplement should be struck. This agency has adjudicated the case. At this point, there is nothing to supplement.<sup>4</sup>

### **III. The Supplement Violates the Commission’s Regulations and the Pole Attachment Act**

Even assuming *arguendo* that the Commission retains jurisdiction of this matter, the Supplement is still improper. The Commission’s regulations expressly limit the pleadings that can be filed in a pole attachment complaint proceeding: “[e]xcept as otherwise provided in § 1.1403, no other filings and no motions other than for extension of time will be considered unless authorized by the Commission.” 47 C.F.R. § 1.1407(a). The Supplement was filed in blatant disregard to this Commission directive. The pole attachment procedures contemplate the filing of a Complaint, a Response, a Reply, and

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<sup>3</sup> Gulf Power has consistently demonstrated that the Eleventh Circuit’s jurisdiction over the proceedings is *exclusive*. See *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 550-51 (D.C. Cir. 1992); *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 & 77 (D.C. Cir. 1984). Also thoroughly briefed is fact that the FCC’s unlawful actions effected through the Order give the Eleventh Circuit *immediate* jurisdiction over the proceedings. See *id.*; 28 U.S.C. § 1651.

<sup>4</sup> The Commission also lacks jurisdiction over this matter for the reasons discussed in Gulf Power’s other pleadings filed in this proceeding. In this regard, specific reference is made to the Motion of Gulf Power Company to Dismiss Complaint and Complainants’ Petition for Temporary Stay for Lack of Jurisdiction that was filed on July 20, 2000.

possibly a Petition for Temporary Stay and an Answer to that petition. The Supplement is none of the above. Moreover, the Complainants did not even bother to seek Commission authorization for this filing. Accordingly, the Supplement violates Section 1.1407 of the Commission's rules and should be rejected.

The Complainants are apparently trying to overcome this procedural infirmity by classifying their submittal as nothing more than a "Supplement" to the Complaint. This attempt is factually unsupportable. The purpose of the Supplement is to significantly expand the scope of these proceedings by adding Time Warner as a new party. However, as of the date of the Complaint, Time Warner apparently had no problem with the price it was being charged by Gulf Power for pole attachments. Indeed, and as shown in the documents filed in the Supplement, Time Warner did not even receive notice that the price for its pole attachments was going to be changed until October 26, 2000, and that change did not become effective until January 1, 2001 - - nearly half-a-year after the Complaint was filed. See Supplement, Exhibit 9. Clearly, as of July 10, 2000, Time Warner could not have possibly suffered an alleged injury.<sup>5</sup>

This lack of a cognizable injury is important for several reasons. As an initial matter, it means that Time Warner could not file a legally sustainable complaint on that date under the Commission's regulations. A complaint is defined as:

[A] filing by a cable television system operator . . . alleging that it has been denied access to a utility pole, duct, conduit, or

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<sup>5</sup> Of course, whatever injury that Time Warner might perceive that it has suffered related to Gulf Power's charge for pole attachment is alleged only. As established in the other pleadings filed in this proceeding, Gulf Power's charge for pole attachments is consistent with notions of just compensation and is due to be enforced.

right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not reasonable.

47 C.F.R. § 1.1402(d). As of July 10, 2000, Time Warner could not have claimed that it had been denied access or had been subjected to an unreasonable rate, term, or condition.

This factual infirmity necessarily means that Time Warner lacks standing to be party to the Complaint and that the Commission would have lacked jurisdiction over that entity. To have standing, the plaintiff must have suffered an “injury in fact” and must establish that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 151, 153 (1970). With regard to pricing issues for pole attachments, the zone of interests governed by the Pole Attachment Act and the scope of the Commission’s jurisdiction is limited to the establishment of “just and reasonable” rates. 47 C.F.R. § 224(b); see *Lotus Suites, Inc. v. N.L.R.B.*, 32 F.3d 588, 592 (D.C. Cir. 1994) (holding that the National Labor Relations Board lacked jurisdiction over complaints containing vague factual allegations because adjudicating a claim “unbounded by any specific facts, is ‘tantamount to allowing the Board to enlarge its jurisdiction beyond that given it by Congress’”) (quoting *G.W. Galloway Co. v. N.L.R.B.*, 856 F.2d 275, 280 (D.C. Cir. 1988)). Since Time Warner cannot claim that it was being charged an unreasonable rate on July 10, 2000, it suffered no legal injury before that date; whatever interests it might have sought to vindicate would have been far beyond the “zone of interests” contemplated by

the Act; and adjudicating the matter would have been beyond the Commission's jurisdiction.

In addition, the Administrative Procedure Act requires that agency action be supported "by substantial evidence." 5 U.S.C. § 706(2)(E). As discussed previously, the Complaint was filed more than three months before Time Warner even received notice that its rate was to be changed and more than six months before that change became effective. To pretend that Time Warner could legally have filed a complaint on July 10, 2000 would ignore the facts. Such a complaint would be supported by **no** evidence, let alone substantial evidence. See *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 462 (D.C. Cir. 1967) ("[T]he court must 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . .'" (quoting 5 U.S.C. § 706(2)(E)).<sup>6</sup>

#### **IV. The Supplement is an Unlawful Attempt to Obtain Refund Protection Retroactive to January 1, 2001.**

The Supplement is apparently a thinly disguised attempt by Time Warner to evade Section 1.1410 of the Commission's regulations. That provision provides that if the complainant should win on the merits, the Commission shall order refund "from the date that the complaint, as acceptable, was filed, plus interest." 47 C.F.R. § 1.1411(c). For whatever reason, Time Warner failed to file a complaint to Gulf Power's January 1, 2001 change in its charge for Time Warner's pole attachments. In filing the Supplement, Time

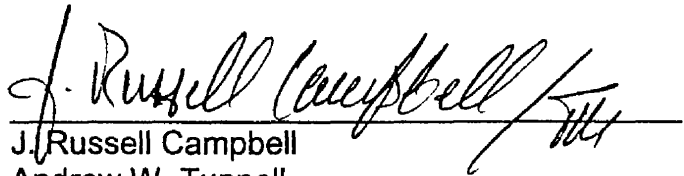
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<sup>6</sup> If the Commission should erroneously allow the Supplement to amend the Complaint, then Gulf Power reserves the right to file additional pleadings in this proceeding by filing within thirty days of any such Commission order a "supplement" to Gulf Power's Reply. 47 C.F.R. § 1.1407(a).

Warner is obviously attempting to evade this failure by trying to take advantage of the earlier filed Complaint. This attempt to evade the Commission's regulations and surreptitiously broaden the Commission's jurisdiction should not and cannot be tolerated.<sup>7</sup>

**WHEREFORE**, Gulf Power respectfully urges the Commission to strike the Supplement for the foregoing reasons.

Respectfully submitted,



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**DATED: April 11, 2001**

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<sup>7</sup> If the Commission should fail to follow its regulations and instead provide Time Warner refund protection before Time Warner files a formal complaint, then the Commission's failure would constitute arbitrary and capricious agency action under 5 U.S.C. § 706(2)(A). See, e.g., *Sierra Club v. Martin*, 168 F.3d 1, 4-5 (11<sup>th</sup> Cir. 1999) ("[C]ourts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."). Moreover, if the Supplement were to be accepted, then this tardy addition to the Complaint would necessarily mean that the Complaint as originally filed was substantially deficient. Under the Commission's rules, such deficient complaints are to be dismissed. 47 C.F.R. § 1.1406(b).

## CERTIFICATE OF SERVICE

I, Cassandra L. Hall, a secretary in the law firm of Keller and Heckman LLP, certify that I have served a copy of this "Motion to Strike the Complainants' Supplement Or, In The Alternative, Motion to Dismiss" upon the following on this the 11th day of April, 2001:

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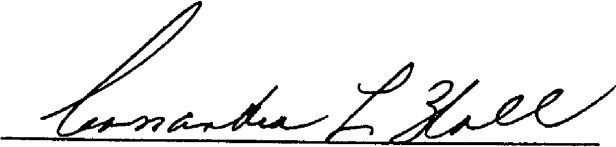
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