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ORIGINAL

July 31, 2000

**VIA HAND DELIVERY**

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

000000-PU

**Re: Opposition to Motion to Dismiss Complaint and Petition for Temporary Stay for Lack of Jurisdiction, P.A. No. 00-004**

Dear Ms. Salas:

Enclosed please find an original, four copies and a stamp-and-return copy of the Opposition to Motion to Dismiss Complaint and Petition for Temporary Stay for Lack of Jurisdiction, respectfully submitted by the Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C., *et al.* Copies of this document have also been sent to Deborah A. Lathen, William H. Johnson, Kathleen Costello and Cheryl King, and service has been made in accordance with the attached service list.

Kindly stamp the stamp-and-return version of this letter and the Supplement and return them to the Berry Best messenger for return delivery to us. Please do not hesitate to contact the undersigned attorney should you have any questions regarding this filing.

Sincerely,

Brian M. Josef

cc: Deborah A. Lathen, Chief, Cable Services Bureau (w/encl.)
William H. Johnson, Deputy Chief, Cable Services Bureau (w/encl.)
Kathleen Costello, Acting Division Chief, Financial Analysis & Compliance (w/encl.)
Cheryl King, Staff Attorney, Cable Services Bureau (w/encl.)

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

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| FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.*<br><br>*Complainants,*<br><br>v.<br><br>GULF POWER COMPANY,<br><br>*Respondent,* | P.A. No. 00-004 |

TO: Cable Services Bureau

**OPPOSITION TO MOTION TO DISMISS**

**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC**

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


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July 31, 2000

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## SUMMARY

The Commission should deny Gulf Power's Motion to Dismiss. Petitioners' Complaint raises substantial issues concerning the merits of Gulf Power's unilateral termination of pole agreements and its exorbitant pole rate increase. None of Gulf Power's arguments – that the *potential* of Petitioners' attachments to carry *any* Internet traffic divests the Commission of jurisdiction; that Petitioners allegedly raise only "contract" claims, and that the Petition for Temporary Stay is untimely – have merit.

Gulf Power premises its first challenge to the Commission's jurisdiction entirely upon the Eleventh Circuit's ruling in *Gulf Power II*. But that decision is not final. Moreover, even if the Eleventh Circuit were to deny a rehearing, the Ninth Circuit's recent AT&T ruling labeling cable-delivered Internet as a "telecommunication service" and the pending appeal of the Henrico County case before the Fourth Circuit make it far from clear that the panel's decision in *Gulf Power II* is a conclusive determination of the FCC's authority to regulate pole attachments carrying commingled video and Internet services. In addition, Gulf Power has not even shown that the Petitioners actually provide cable-delivered Internet services over every node of every system. Gulf Power has stumbled in its haste to raise rates. It cannot establish either legal or factual support for its attempt to extort monopoly pole rents.

Gulf Power's second argument is also unsupported. This dispute does not involve only the enforcement of contract rights. Indeed, the unreasonableness of Gulf Power's unilateral use of termination as a coercive mechanism for demanding that Petitioners sign a new pole agreement with a more than 514 percent rate increase to $38.06 is central to this case. Petitioners have alleged that both the method and basis for Gulf Power's termination, as well as the specific rates that Gulf Power charges currently and plans to charge in the future, are

unlawful. Petitioners also have challenged both Gulf Power's implied threat to interrupt Petitioners' business should they fail to acquiesce to Gulf Power's demands and its unwillingness to negotiate at all as violations of the Commission's requirement that utilities must negotiate all pole attachment agreements in good faith. The Commission has jurisdiction over all complaints involving the rates, terms, and conditions of pole attachments, including those growing out of a contractual relationship between a utility and a cable operator.

Third, Gulf Power has not established that Petitioners' Petition for Temporary Stay is untimely. On July 10, 2000, only after failed attempts to negotiate a new pole agreement and their receipt on July 6, 2000 of Gulf Power's invoice at the higher rental rate, did Petitioners file the Complaint and Petition for Temporary Stay. The intervening time period between the notice contained in the invoice and the filing of the Petition of the Temporary Stay was clearly less than 15 days. Furthermore, the Commission has the authority to grant a temporary stay in this matter. It has on two previous occasions granted temporary stays against unjust and unreasonable pole practices by electric utilities. The Commission should grant a temporary stay of Gulf Power's implied threat of termination and 514 percent rate increase because a stay will fairly preserve the status quo while the Commission adjudicates Petitioners' Complaint.

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

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| FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.*<br><br>*Complainants,*<br><br>v.<br><br>GULF POWER COMPANY,<br><br>*Respondent,* | P.A. No. 00-004 |

To: Cable Services Bureau

## OPPOSITION TO MOTION TO DISMISS

The Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C., *et al.* ("Petitioners"), pursuant to 47 C.F.R. § 1.45(a), respectfully submit this Opposition to the Motion To Dismiss filed by Gulf Power Company ("Gulf Power") on July 6, 2000. Gulf Power makes three arguments in its Motion to Dismiss: first, that the *potential* of Petitioners' attachments to carry *any* Internet traffic divests the Federal Communications Commission ("Commission" or "FCC") of all jurisdiction to adjudicate this complaint for access and rates; second, that the Petitioners raise only "contract" claims, over which the Commission allegedly lacks jurisdiction; and third, that Petitioners' claim is untimely because they had received notice from Gulf Power more than 15 days prior to filing their Petition for Temporary Stay. These arguments are unsupported in law or fact.

## I. Background

For at least the past two decades, Florida cable operators have attached their facilities to Gulf Power poles based upon voluntarily signed pole contracts. Complaint, Ex. 7, ¶ 15; Ex. 8, ¶ 5. However, recently Gulf Power began informing cable operators of its intention to terminate existing pole attachment agreements, and not to renew those due to expire. Gulf Power informed the Florida operators in its service area that in order for them to continue to remain on Gulf Power poles, they would be required to execute a new pole attachment agreement no later than June 30, 2000. In particular, Gulf Power informed operators that the pole rate in the new contracts will rise in most cases **more than 514 percent (and in one case as high as 550 percent)** from the current annual rate of approximately $6.20 per pole to a new rate of $38.06 per pole. Gulf Power, citing recent federal court decisions,[1] predicated its demand for the inflated pole rental charge on its claim of entitlement to just compensation. Despite numerous attempts to negotiate the new attachment rate and arbitrary June 30 deadline, Gulf Power has refused to modify its position.[2] Complaint, Ex. 12; Ex. 7, ¶¶ 8, 10 & 13; Ex. 15. On July 6, 2000, Florida cable operators received formal notice of the new pole rate when they received an invoice reflecting the $38.06 rate. Complaint, Ex. 6.

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[1] *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (*"Gulf Power I"*) and *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir Apr. 11, 2000) (*"Gulf Power II"*).

[2] For example, on June 23, 2000, Mr. Gregory, Vice President and General Manager of Cox Communications Gulf Coast, L.L.C. ("Cox"), called Mr. Dunn to discuss the possibility of negotiating the terms of a new pole attachment agreement, including the proposed higher rental rate. Mr. Dunn stated that the rate was firm and no negotiation was possible. Mr. Dunn attempts to distinguish this refusal to negotiate the rate with his recollection that he stated any change in the pole rental rate "was unrealistic." Dunn Affidavit at ¶ 6. Mr. Dunn's rejection of Mr. Gregory's request for an extension of time only three days later demonstrates that Gulf Power never had any serious intention of negotiating in good faith. In addition, on July 7, Cox, through its legal counsel, expressed its continued willingness to negotiate a new attachment rate with Gulf Power consistent with the FCC's regulations. Cox has received no response.

On July 10, 2000, Petitioners filed a Petition for Temporary Stay and Complaint against Gulf Power at the Commission, as a result of failed attempts to engage Gulf Power in good faith negotiations and the threat of termination of existing pole agreements. Petitioners took this action in an effort to preserve the status quo until the Commission issues a decision on the merits of the case.

On July 20, 2000, Gulf Power filed a Motion for Leave to File Motion to Dismiss Complaint for Lack of Jurisdiction, a Motion to Dismiss the Complaint and Petition for Temporary Stay for Lack of Jurisdiction, and an Answer to Petition for Temporary Stay. In its Motion to Dismiss, Gulf Power claims that the Commission lacks jurisdiction over Internet service,[3] that Petitioners currently provide or intend to provide Internet services over their cable networks, and that the FCC does not have jurisdiction over one of Petitioners' claims involving a violation of the parties' course of dealing. To prevail on its Motion to Dismiss, Gulf Power must establish that there is no conceivable legal or factual basis upon which relief may be granted. Gulf Power has failed to advance such proof.

## II. The Need to Preserve The Status Quo

Gulf Power has created an untenable situation for Petitioners. First is a unilateral demand for an extraordinary pole rent coupled with a refusal to obey FCC rules for cost support. After years of maintaining joint use of poles with cable operators on negotiated rates, terms and conditions, Gulf Power has unilaterally proposed a mammoth rate increase. In addition, Gulf Power has independently violated its obligation to provide all of the supporting cost data required under 47 C.F.R. § 1.1404(g). Gulf Power's insistence on a "Confidentiality

Agreement" as a condition to release is in itself a violation, because the Confidentiality Agreement contains within it restrictions that would prohibit Petitioners from using the cost data in an FCC pole complaint. This is an attempt to extract a waiver which the FCC has held to be unlawful. *E.g., Danny E. Adams, Esq.*, 6 Comm. Reg. (P & F) 58 (1997), 1997 FCC LEXIS 375 (1997).

Indeed, Gulf Power has specified no harm that would result from its release of the underlying cost-support figures required by FCC rules. Many other utilities reporting to the Federal Energy Regulatory Commission ("FERC") have not designated this information as confidential and have experienced no direct, competitive harm to their operations, despite widespread diversification into competitive telecommunications. Gulf Power's reference to two joint use agreements with telephone companies is no substitute for compliance with FCC rules.[4]

Second is Gulf Power's independent violation of its obligation to negotiate terms and conditions in good faith with cable operators. The proposed agreement contains, for example, clauses that (1) impose penalties for unauthorized attachments that exceed the maximum penalties recently established by the Commission (clause 15);[5] and (2) unilaterally set a pole attachment rate of $38.06 per attachment (Exhibit E). Complaint, Exs. 9, 10 and 11. Gulf Power's new proposed pole agreement has been presented as a take-it-or-leave-it proposition. FCC orders specifically require utilities to negotiate terms and conditions in good faith. *Texas*

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[3] Gulf Power bases this position on its interpretation of *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir Apr. 11, 2000) (*"Gulf Power II"*), *petitions for rehearing pending* (May 26, 2000).

[4] Answer to Petition for Temporary Stay at 18, n. 13 (stating "Gulf Power's history with joint use agreements shows that the telephone companies are more than willing, and certainly able, to pay more accurate and fair rates"). The fees that telephone companies pay to power companies depend on many factors, including reciprocal use, the provision of "normal" poles without makeready, relative space usage, and other terms and conditions.

[5] *Mile Hi Cable Partners, L.P., et al. v. Public Service Company of Colorado,* Order, P.A. 98-003, DA 00-1476 (rel. June 30, 2000).

*Cable & Telecommunications Association v. Entergy Services, Inc.*, Order, 14 FCC Rcd. 9138 at ¶ 12 (1997); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468 (1989) at ¶ 39; *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd. 4387, n. 51 (1987) (explaining good faith requirement to attempt to resolve disputes and noting that Commission may impose sanctions for failure to negotiate in good faith). Gulf Power has offered no reasonable justification for its unilateral decision to terminate decades of contract relations and to ignore its obligations to bargain.

Third is Gulf Power's implicit threat to terminate attachments. The implication is clear that if Petitioners do not accede to Gulf Power's self-help, they will lose contract rights of attachment. There is no viable alternative to Gulf Power's poles. Gulf Power does not contend otherwise, and indeed is counting on its monopoly power to coerce these changes.

Fourth, Gulf Power's incoherent legal theory reveals the need for calm before allowing it to change the status quo. Gulf Power states that *Gulf Power II* dictates that Section 224 of the Act does not apply to cable operators offering, or intending to offer, Internet services and therefore the FCC has no jurisdiction. Motion to Dismiss at 3 (citing *Gulf Power II* for the proposition that "...the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service"). Next, Gulf Power denies that cable operators will suffer irreparable harm because they can, according to Gulf Power, simply demand mandatory physical access to their poles under Section 224. Answer to Petition for Temporary Stay at 15 (stating that "[t]he cable companies lobbied Congress and were victorious in obtaining the right to mandatory access. Petitioners know that they can simply demand and receive access to Gulf Power's facilities.").

Gulf Power cannot have it both ways. Gulf Power is simultaneously arguing Petitioners have no need to fear removal of facilities because they are protected by Section 224, but also claiming that there is no jurisdiction under Section 224. Gulf Power's confused and contradictory legal theories demonstrate the legal infirmities upon which its actions lie, and the need for interim relief.

Finally, Gulf Power's case appears premised on its claim that the *potential* to provide Internet divests the FCC from any authority over all of these attachments.[6] However, even if *Gulf Power II* were final and correct, Gulf Power has made no showing that "Internet" will be provided over every node of every cable system to every subscriber. Gulf Power asserts that "[i]t is beyond dispute that Petitioners CCGC, Mediacom, and Comcast are either using, or intend to use, their facilities to provide Internet services." Motion to Dismiss at 4. Gulf Power did not conduct even the most basic due diligence before starting this battle. For example, no Internet is available on portions of Cox's Florida systems that are attached to Gulf Power's utility poles. Second Declaration of L. Keith Gregory, attached herein as Ex. 1; Complaint, Ex. 7, ¶ 18.

Gulf Power has essentially begun a campaign of civil disobedience to FCC requirements. It has defied the obligation to provide cost support or to bargain. It has offered illegal waivers. It has simultaneously claimed that there is no risk of eviction from the poles while demanding that the FCC divest itself from jurisdiction to protect pole attachments. It has pursued this campaign on an incoherent legal theory without even the most rudimentary of

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[6] Gulf Power argues that the potential for one photon of Internet anywhere on the facility divests the FCC of jurisdiction over the entire facility. This reading makes the entire Act a nullity. A well-built cable system has the potential for carrying telecommunications services and communications services yet unborn. That potential does not remove it from the scope of the Act. Gulf Power's reading creates the absurd result of abolishing the very Act that Congress, the courts, and the FCC have repeatedly upheld. The rules of statutory construction do not permit such absurd results.

factual investigations. It has tacitly admitted that Petitioners will suffer irreparable harm, and identified no harm that it would suffer. These circumstances cry out for exercise of the FCC's jurisdiction to pursue the status quo while sorting out the mess Gulf Power has created.

## III. The Commission Has Jurisdiction to Grant Interim Relief

In its effort to have the Complaint dismissed, Gulf Power attempts to depict this dispute as one involving only the enforcement of legitimate contract rights. To the contrary, in their Complaint and Petition for Temporary Stay, Petitioners have challenged the unreasonableness of Gulf Power's unilateral use of the termination clause as a coercive mechanism for demanding that Petitioners sign a new, one-sided pole agreement with a more than 514 percent rate increase to $38.06. Complaint, ¶ 27. Petitioners have alleged that both the method and basis for Gulf Power's termination, as well as the specific rates that Gulf Power charges currently and plans to charge in the future, are unlawful. Complaint, ¶¶ 19, 27-29 (a)-(h). Petitioners have also challenged both (1) Gulf Power's implied threat to interrupt Petitioners' business should they fail to acquiesce to Gulf Power's demands and (2) its unwillingness to negotiate as violations of the Commission's established requirement under Section 224 that utilities must negotiate all pole attachment agreements in good faith. Petition for Temporary Stay at 9-11. This is precisely the kind of "as applied" challenge the Commission invited in *Cavalier*. *Cavalier Telephone LLC v. Virginia Electric Power Company*, PA 99-005, DA 00-1250 (rel. June 7, 2000).[7]

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[7] Moreover, Gulf Power fails to prove that it has previously exercised its termination provision rights on several similar occasions. The examples provided by Michael R. Dunn, Gulf Power's Project Services Manager, of past instances in which Gulf Power has relied on its termination rights and removed facilities are starkly different from Petitioners' present situation. For example, Mr. Dunn cites terminations due to cable operators' improper reporting of attachments resulting in a failure to pay invoices in full and one cable provider's termination because it to attach any equipment or facilities to Gulf Power's poles. Affidavit of M.R. Dunn at ¶ 3. It is absurd for Gulf Power to claim that its exercise of the termination provision to force Petitioners' into non-negotiated terms and exorbitantly

The FCC clearly has jurisdiction over these matters. It is well-established that "the Commission's jurisdiction encompasses certain practices growing out of a contractual relationship between a utility and a cable operator . . . ." *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 12 FCC Rcd. 10362, 10366 (rel. July 21, 1997). In particular, the Commission's jurisdiction extends to all complaints involving the rates, terms and conditions of pole attachments. *E.g.*, *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 14 FCC Rcd. 3244 (released Feb. 22, 1999)(utility's breach of contract claim is within the FCC's jurisdiction over pole rates, terms and conditions); *Public Service Co. of Colorado v. Mile Hi Cable Partners L.P.*, No. 98CA1666, 1999 Colo. App. LEXIS 334 (Ct. App. Dec. 23, 1999)(same); *Texas Utilities Electric Co. v. Heritage Communications, Inc.*, CA 3-89-3080-R (N.D. Tex. June 22, 1990)(same).

The law is clear that Gulf Power may not "create" new rents or contract terms by unilateral amendment and then immunize them from the FCC's scrutiny.[8] Even the decisions

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higher rental charges is somehow equivalent to Petitioners' failure to pay remaining balances on invoices or attach to Gulf Power's poles.

[8] The FCC has long recognized that Section 224 would be eviscerated if the superior bargaining position of monopoly owners were ignored. Indeed, in its initial rulemaking, the FCC concluded that "Section 224 of the Act and its attendant history [recognize] the Commission's right to abrogate existing contracts. . . . If we did not have such power our ability to rule on the lawfulness of contracts and to prescribe charges would be meaningless." *Second Report & Order in Docket 78-144*, 72 F.C.C.2d 59, 67 (1979), *aff'd*, *Monongahela Power Company v. FCC*, 655 F.2d 1254 (1981). *See Capital Cities Cable, Inc. v. Southwestern Public Service Co.* PA-85-0005, Mimeo No. 5431 (June 28, 1985), *recon. denied*, PA-85-0005, Mimeo No. 6957 (September 13, 1985) (the unequal bargaining relationship between a utility and a cable operator stems from the fact that in most cases the utility enjoys a monopoly over utility poles and that the utility poles may offer the only feasible means of installing cable). In *TCA Management Co. v. Southwestern Public Service Company*, 10 FCC Rcd. 11832 (1995), the utility argued for dismissal of the complaint on the ground that its agreements with the attaching party were products of arm's-length negotiations and, therefore, not unjust or unreasonable. The FCC rejected the utility's argument and explained that Section 224 provides the Commission with broad jurisdiction to resolve complaints regarding attachments to poles. It explained: "In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters. To remedy the effects of that superior bargaining power, Congress gave this Commission jurisdiction to hear and resolve complaints regarding pole attachment rates. The only prerequisites to our exercise of that jurisdiction are that the company providing the pole attachments be a "utility" within Section 224's definition of that term and that no state regulate those attachments. We conclude that the necessary prerequisites have been met . . . and hold that [the utility's] argument does not provide a ground for dismissal." *Id.* at ¶¶ 14-15 (*citing Monongahela Power Co. v,. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) (per curiam); *see Capital Cities v. SPS, supra*, slip. op. at 2, ¶ 4;

relied upon by Gulf Power demonstrate that, in a case such as this where Petitioners have challenged the unreasonable practices and rates of a utility, the FCC has plenary jurisdiction. *See Marcus Cable*, 12 FCC Rcd. at 10363 (FCC has jurisdiction to regulate rates, terms and conditions in pole attachment agreement where "the issues involved alleged unjust and unreasonable contractual rates, terms and conditions"); *Appalachian Power Co. v. Capitol Cablevision Corp.*, 49 Rad. Reg. 2d 574 (1981)(Commission took full jurisdiction over the cable operator's cross-complaint and ruled that the utility had charged fees ranging from two to more than three times the maximum lawful pole rentals).

Gulf Power's attempted termination of Cox's pole attachment agreement provides a textbook example of precisely why the Commission retains jurisdiction over disputes like this one. Gulf Power's attempt to terminate Cox's rights as a result of a "pro forma," affiliate restructuring is simply a pretext for forcing the cable operator to accept a pole attachment agreement at the exorbitantly higher rental rate. In essence, Gulf Power is claiming that form matters over substance. In fact, courts and the Commission have repeatedly held that the opposite is true. In the pole attachment context, the Commission has held that a utility may not allege a breach of an agreement in order to prohibit permissible and reasonable practices by the cable operator. *See Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, Declaratory Ruling and Order, 12 FCC Rcd. 10362 (1997) (holding that utility company improperly alleged a breach of the agreement due to cable operator's sublease of transmission services within its own facilities); *Heritage Cablevision Assocs. of Dallas, L.P. et al v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed,* 7 FCC Rcd. 4192 (1992), *aff'd, Texas Utils Elec. Co. v. FCC*, 997 F.2d 925 (D.C.Cir. 1993)(same). The concept of substance over form is much touted by courts in

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*Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, PA 84-0016, Mimeo 35810, slip. op. at 2, ¶ 4 (released May 17, 1985); *TeleCable Development Corp. v. Appalachian Power Co.*, PA 79-0007, Mimeo 889, slip. op.

the context of corporate law. For example, in assessing issues of liability, courts generally look to the substance of a corporate transaction rather than its form. *See, e.g., Southern Sash Sales & Supply Co. v. Wiley*, 631 So. 2d 968 (Ala. 1994) ("a separate corporate existence will not be recognized where a corporation is so organized and controlled and its business conducted in such a manner as to make it merely an instrumentality of another"); *Whipple v. Industrial Comm'n of Arizona*, 121 P2d 876, 877 (Ariz. 1942) ("The courts will disregard corporate form when justice requires it to look to the substance and not to the shadow."). *See also* 18 C. J. S., Corporations, p. 376, § 6 ("A corporation is merely a legal fiction created for the convenience of conducting business, the true human entity behind it being the stockholders who, in reality, own it and all its property, though the legal title may stand in the name of the corporation.").

The affiliate restructuring allowed Cox and TWC Cable Partners d/b/a Emerald Coast Cable Television ("Emerald") to combine the Florida systems' assets into the wholly owned affiliate Cox Communications Gulf Coast, L.L.C. Complaint, Ex. 12. That is all. The control and management of these Florida systems has not changed, nor have the systems engaged in different businesses as a result of the restructuring. In fact, Cox has retained substantially the same personnel and utility contacts since the restructuring. Ex. 1, ¶ 4. The consolidation of the Pensacola and the Ft. Walton Beach systems into one Cox entity was an action intended to enhance the convenience of conducting business. Gulf Power fails to prove why Cox's restructuring is "more than simply 'a pro forma affiliate transaction'" and therefore unreasonable.[9] Affidavit of M.R. Dunn, Attachment P. Moreover, if Gulf Power *truly* believed that Cox had violated Section 27 of its Agreement, Gulf Power was obligated under Section 23

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at 3 (Com. Car. Bur. released Oct. 31, 1980)).

[9] Indeed, the Commission treated the restructuring as a *pro forma* transaction. *See CAR-50366-08* and *CAR-50367-08* (filed Aug. 20, 1999 and granted Sep. 7, 1999).

of the Agreement to provide thirty (30) days written notice to afford Cox an opportunity to cure the alleged default before proceeding with termination or cancellation of the Agreement. Complaint, Ex. 12. Neither Cox nor Emerald received such written notice from Gulf Power.[10] Therefore, the Agreements remain in effect. Based upon Gulf Power's actions with respect to Cox, it is clear that the utility is attempting to use any excuse to find the pole attachment agreements "null and void" and force Cox to execute a new agreement at the inflated $38.06 annual rate. Gulf Power cannot exercise transfer clauses merely to subvert an agreement it wishes to terminate.

Gulf Power argues that the FCC has no jurisdiction over this complaint nor right to order interim relief. Gulf Power bases its claim on *Gulf Power II*, but is mistaken. Gulf Power and other utilities advanced many arguments in the Eleventh Circuit in an effort to have the Court set aside Section 224 as unconstitutional, but they failed. In both *Gulf Power I*[11] and *Gulf Power II*, separate panels of that Circuit held that Section 224 was constitutional. The FCC's jurisdiction to preserve physical access to poles was upheld as to both voluntarily negotiated attachments and attachments made after 1996 pursuant to Section 224(f) of the Act. *See Gulf Power I*, 187 F.3d at 1327, 1333-36. Petitioner's current arrangements are the product of negotiated access prior to 1996. Gulf Power's argument that the FCC does not have jurisdiction to require it to maintain reasonable rates, terms and conditions with respect to pole

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[10] In its June 2, 2000 letter from Cox's legal counsel to Mr. Dunn, Complaint, Ex. 12, Cox explained the contractual obligation requiring 30 days written notice to give a party an opportunity to cure an alleged default. In that letter, Cox requested, without admitting the applicability of Section 27 to its pro forma affiliate transaction, that Gulf Power give its consent to the assignment of the Agreements to Cox. Gulf Power's May 17, 2000 letter to Cox cannot be construed as providing notice giving Cox an opportunity to cure an alleged default because it had already declared the pole agreements "null and void." In his June 16, 2000 letter responding to Cox's June 2nd letter, Mr. Dunn unreasonably withheld consent to the assignment based upon Gulf Power's entitlement to "payment based on just compensation" and insisted on executing a new pole attachment agreement at the higher rate. Complaint, Ex. 14 (Letter from Michael R. Dunn to J. Christopher Redding re: Pole Attachment Agreement at 2).

[11] *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (*"Gulf Power I"*).

attachments entered into before the 1996 Act is inconsistent with both the Supreme Court's decision in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), and with the holdings of the Eleventh Circuit. The FCC clearly has a congressionally mandated role to play in providing access to essential facilities for cable systems and for competitive telecommunications carriers.

In addition, Gulf Power's attempt to jettison the FCC's pole attachment jurisdiction and exact monopoly rents based upon *Gulf Power II*'s language regarding Internet services is premature because that decision, even assuming it were correct, is not yet final. On or about May 26, 2000, the FCC, the National Cable Television Association, and WorldCom, Inc. all filed petitions for rehearing and/or rehearing en banc with the United States Court of Appeals for the Eleventh Circuit. Those petitions have not been dismissed and are currently pending. In addition, the Eleventh Circuit has not yet issued its mandate to the Commission. In such circumstances, the appellate court has firmly stated that

> **Until the mandate issues, an appellate judgment is not final**; the decision reached in the opinion may be revised by the panel, or reconsidered by the en banc court, or certiorari may be granted by the Supreme Court.

*Flagship Marine Services, Inc. v. Belcher Towing Company*, 23 F.3d 341 (11th Cir. 1994)(emphasis added). Moreover, the Eleventh Circuit's statement is consistent with Federal Rule of Appellate Procedure 41. The advisory committee notes to Rule 41 explain that "A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed." Fed. R. App. P. 41, Adv. Comm. Notes on Subdivision (c). The Commission properly recognized this principle when it denied a similar motion to dismiss by Virginia Electric Power Company and held:

> 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.

*Cavalier Telephone LLC v. Virginia Electric Power Company*, PA 99-005, DA 00-1250, at ¶ 7 (rel. June 7, 2000).[12]

Moreover, although a panel at the Eleventh Circuit ruled that the FCC does not have the authority to regulate the provision of Internet services, other federal courts have disagreed. The recent decision by the United States Court of Appeals for the Ninth Circuit addressing the provision of Internet service over cable networks supports the Commission's jurisdiction over this matter. In *AT&T Corp. v. City of Portland*, 2000 U.S. App. LEXIS 14383 (9th Cir. June 22, 2000), the Ninth Circuit ruled that the FCC has jurisdiction over cable broadband Internet services provided by @Home Corporation because to the extent that @Home provides its subscribers "Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *AT&T Corp.*, 2000 U.S. App. LEXIS 14383 at *18. Indeed, the Court construed Section 224 quite the opposite from the *Gulf II* Panel.

Conversely, a federal district court in the Fourth Circuit ruled that the FCC has jurisdiction over cable broadband Internet services offered by RoadRunner Corporation because these Internet services fall under the statutory definition of a cable service. *See MediaOne*

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[12] The authorities cited by Gulf Power in an attempt to turn this self-evident proposition on its head are inapposite. The first case involved a federal district court's finding that, as a subordinate court, it was obliged to follow an appellate panel's decision in a separate case. *Vo Van Chau v. United States Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (holding that the State Department's screening of immigrants, which was declared illegal in a prior ruling, was "exactly the practice" at issue involving the district court plaintiffs). The general language quoted by Gulf Power in the second case – that an appellate court is "bound to follow prior panel decisions, except where they have been overruled either by an en banc decision of this Court or a decision of the Supreme Court" – is also irrelevant to this case. *See White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999). In *White*, the Eleventh Circuit merely held that it had to acknowledge that an earlier decision was no longer good law in light of a subsequent Supreme Court decision. *Id.* at 1259. Finally, the doctrine of "stare decisis" is inapplicable here since it governs

*Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712 (E.D. Va. May 10, 2000), appeal pending. Finally, the Commission's jurisdiction over the current Complaint is appropriate in light of Chairman Kennard's recent announcement to launch a formal proceeding addressing Internet service provided over cable networks. *See FCC Chairman to Launch Proceeding on "Cable Access,"* FCC News, June 30, 2000.

The FCC has national responsibilities, and the nation is clearly in a national dialogue on how to regulate (or deregulate) the Internet. It cannot simply abandon that responsibility because one panel in one circuit has reached a non-final conclusion with which other courts differ. Given the ongoing split in the circuits on the question of exactly how Internet services are to be regulated and because of the Commission's own independent consideration of this issue, the Commission should deny Gulf Power's *Motion to Dismiss for Lack of* Jurisdiction.

## IV. Gulf Power Fails to Controvert Petitioners' Showing of Irreparable Harm

Gulf Power utterly fails to address the numerous types of irreparable harm that Petitioners have demonstrated they will suffer from Gulf Power's termination and rate increase. Gulf Power argues that Petitioners' showing of harm is "speculative," Answer at 14, but has not presented facts that contradict Petitioners' evidence that the utility's actions would directly result in lost customers, competitive disadvantage in rolling out new services and products, and damage to business reputation and goodwill. Complaint, Ex. 7, ¶¶ 15-18; Ex. 8, ¶¶ 5-11, 13-14.[13] Instead, Gulf Power resorts to rhetoric, claiming the rate increase is merely a reduction in

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only settled precedents involving an "accepted and established legal principle." *See* BLACK'S LAW DICTIONARY (5th ed. 1979).

[13] Gulf Power ignores Petitioners' specific examples demonstrating irreparable harm, in favor of asserting the convenient claim that Petitioners are only alleging monetary harm. Answer to Petition for Stay at 16. Gulf Power

Petitioners profit margins,[14] ignoring the direct harm to the extension of discretionary lines, provisions of other services benefiting the public and loss of customers to competitors such as DBS. Complaint, Ex. 7, ¶¶ 15-18; Ex. 8, ¶¶ 5-11, 13-14. Because Gulf Power did not controvert these facts with evidence of its own, the Commission should deem them admitted. *Cf.* 47 C.F.R. §1.1407(d).

Gulf Power attempts to demonstrate that because Petitioner Mediacom invoked its right of mandatory access by signing the new pole attachment agreement, irreparable harm will not occur. The actual facts are at odds with Gulf Power's embellished version of them. Contrary to Gulf Power's characterization, Mediacom never "requested" nor voluntarily elected mandatory access from Gulf Power. Answer to Petition for Stay at 10. As evidenced in the June 28, 2000 letter from Bruce Gluckman, Mediacom's Vice President of Legal and Regulatory Affairs, Mediacom objected to Gulf Power's attempt to force it to conclude an agreement at such an "astronomical" pole rental rate and specifically reserved without waiver its right to challenge the rate. Complaint, Ex. 13 (stating that "Mediacom will not accept such a steep increase"). Mediacom would never have sought mandatory access at the $38.06 rental rate if it planned to protest and reserve without waiver its right to seek appropriate agency and judicial relief. *See id.* Mediacom was simply unwilling to operate its cable business without some kind of a written

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then states that it "has estimated 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" M.R. Dunn Affidavit, ¶ 11, and such an increase is "a cost that could be absorbed by the cable companies." Answer to Petition for Stay at 18. Mr. Dunn provides no methodology for this estimate, nor could Gulf Power have accurate subscriber figures with which to make such a calculation.

In addition, Gulf Power has demonstrated no connection between the reasonableness of a 514 percent increase in its pole rental rates and the four-year stock performance of Cox as compared to The Southern Company. M.R. Dunn Affidavit, ¶ 11. Such a vast number of variables affect corporations' general stock performance and Gulf Power's general observation does nothing to support its claim that its electricity customers have subsidized the entire cable industry. *See id.*

[14] *See* Answer to Petition for Stay at 18.

pole attachment "agreement" in place. Gulf Power's suggestion that Petitioners can simply place themselves in Mediacom's undesirable position is unpersuasive. Answer to Petition for Stay at 10.

Neither Petitioners, nor the FCC, nor the Department of Justice disclaimed in the *Gulf Power* litigation the right to seek relief from irreparable harm. Rule 1.1403(d) has been a part of the rules since 1979. Undersigned counsel specifically made reference to the process for interim relief in the submission to the Eleventh Circuit attached to Gulf Power's Motion. Affidavit of M.R. Dunn, Attachment U, Ex. 3. Gulf Power's notion that the FCC has surrendered its equity powers is frivolous.

## V. This Request Complies With Commission Procedure

Section 1.1403(d) of the Commission's rules provides the Commission with a vehicle for granting the requested relief. The regulation states that a "cable television system operator . . . may file a Petition for Temporary Stay of [a rate increase] notice . . . within 15 days of receipt of that notice." While Petitioners were aware that Gulf Power was interested in raising its rates some weeks ago, they immediately sought to negotiate -- consistent with long-standing Commission precedent[15] -- both the increase and the demand for the new agreement. On July 6, 2000, exactly 4 days from the July 10th filing of the Complaint and Petition for Stay, and after several failed attempts to negotiate with Gulf Power, Gulf Power sent pole invoices for the period covering July 1, 2000 through December 31, 2000, assessing the new $38.06 rate on a

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[15] *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Opinion and Order on Reconsideration*, 4 FCC Rcd. 468 (1989) at ¶ 39; *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order*, 2 FCC Rcd. 4387 at n. 51 (1987) (explaining good faith requirement to attempt to resolve disputes and noting that Commission may impose sanctions for failure to negotiate in good faith).

semi-annual basis. Complaint, Ex. 5, ¶ 23. At that time, it was clear that all bets were off, that Gulf Power would not be modifying its position and that Petitioners knew for a certainty that Gulf Power intended the rate to go into effect. That was Petitioners' notice. Four days later, Complainants filed their Complaint and requested the Stay.[16] Petitioners have thus met the applicable deadline both for requesting a stay and for challenging the unlawful $38.06 rate.

In the event the Commission determines that for some reason the July 6th date should not be used for the purposes of granting the requested stay, it should grant the requested stay under Rule 1.1415. This rule states that the Commission "may issue such orders and so conduct its proceedings as will best conduce to the proper dispatch of business and *the ends of justice*." *See* 47 C.F.R. § 1.1415 (emphasis added). Petitioners maintain that the special circumstances of this case merit a grant of the requested stay under Rule 1.1415 to serve the "ends of justice" in this matter. As discussed in Section IV, *supra*, Petitioners will be irreparably harmed by Gulf Power's threatened termination and its demand for exorbitant pole rental charges. Any delay by Petitioners in filing this suit resulted from their adherence to FCC policy by attempting to engage Gulf Power in good faith negotiations concerning the new pole agreements and rate increases. This case is of great importance not only to Petitioners, but to their customers located in Gulf Power service territories. This fact supports a finding by the Commission that the grant of the stay will conduce to the ends of justice in this matter.

In addition, the position taken by Gulf Power here is functionally identical to that taken by its Southern Company affiliate Alabama Power Company in another proceeding pending before this Commission. *See Alabama Cable Telecommunications Ass'n, et al. v.*

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[16] For Petitioners to have initiated this proceeding during their good faith attempts to negotiate the new pole agreements would have would have abruptly ended any chance of coming to an amicable arrangement with Gulf Power.

*Alabama Power Co.*, Complaint, P.A. No. 00-003 (filed June 23, 2000).[17] Moreover, Petitioners believe that there is a strong likelihood that other Southern Company affiliates will be making similar claims in other states. Therefore, Petitioners believe that the potential exists for millions of subscribers and numerous cable operators across a four-state area to be harmed if the Commission does not issue a stay here (and in the other cases), and that, as a result, and for the reasons set forth above this is a matter of great importance justifying the stay.

Petitioners have filed the Petition for Temporary Stay within 15 days of receipt of the invoice reflecting the higher pole rental rates charged by Gulf Power. Petitioners have also demonstrated that, in the event the Commission does not believe this Petition for Stay has been timely filed, the grant of a the Petition for Temporary Stay in this case is justified as conducing to "the ends of justice" under 47 C.F.R. § 1.1415.

## VI. Conclusion and Relief

The Commission should deny Gulf Power's Motion to Dismiss because Petitioners' Complaint raises substantial issues concerning the merits of Gulf Power's unilateral termination and exorbitant pole rate increase that provide a fair ground for litigation and deliberative investigation. Moreover, the Commission should grant a temporary stay of Gulf Power's termination and 514 percent rate increase because a stay will fairly preserve the status quo while the Commission adjudicates Petitioners' Complaint.

Gulf Power's attempt to nullify all of Petitioners' existing pole attachments and demand payment of unsubstantiated and extortionate pole rents is unjust and premature. Aside from its reliance upon previously rejected arguments that the Commission may not address

[17] Indeed, the Commission would frustrate the "ends of justice" and deliver an inconsistent result if it issued a decision prohibiting the same unreasonable rates, terms and conditions by Alabama Power but refused to do the same in the case of Gulf Power.

"contractual" issues, Gulf Power premises its attack upon the Commission's jurisdiction entirely upon the Eleventh Circuit's rulings in *Gulf Power II*. But that decision is not final. Moreover, even if the Eleventh Circuit were not to grant rehearing, the Ninth Circuit's recent *AT&T* ruling labeling cable-delivered Internet as a "telecommunication service" and the pending appeal of the *Henrico County* case before the Fourth Circuit make it far from clear that the panel's decision in *Gulf Power II* is a conclusive determination of the FCC's authority to regulate pole attachments carrying commingled video and Internet services. In addition, Gulf Power has not even shown that all the Petitioners actually provide cable-delivered Internet services on every node to every subscriber in Florida. Fundamentally, Gulf Power has acted too fast: it cannot establish either legal or factual support for its precipitous attempt to extort monopoly pole rents.

The Commission clearly has authority to grant a temporary stay in this matter. The Commission has on two previous occasions granted temporary stays against unjust and unreasonable pole practices by electric utilities. *See Telecommunications, Inc. and TCI Cablevision, Inc. v. South Carolina Electric & Gas*, PA-83-0027, Mimeo No. 5957 (Common Carrier Bureau Aug. 16, 1983); *see also Whitney Cablevision of Indiana, Limited v. Southern Indiana Gas and Electric Company*, Mimeo No. 841 (rel. Nov. 16, 1984). In this case, the Commission is clearly within its authority to enter a stay, particularly because the attachments at issue were the product of voluntarily negotiated contractual arrangements.

During the pendency of a temporary stay, the Commission may also enter an order requiring Gulf Power to negotiate in good faith the terms of any new pole attachment agreement with Petitioners. The Petition for Temporary Stay currently before the Commission seeks to preserve the status quo under the same rates, terms and conditions of their existing, voluntarily-contracted pole attachment agreements while the Commission adjudicates

Petitioners' Complaint. Petitioners are willing, and have previously expressed this willingness to Gulf Power, to engage in good faith negotiations regarding execution of new pole attachment agreements. In contrast, Gulf Power is attempting to receive an endorsement of its premature self-help action.

Contrary to Gulf Power's argument,[18] it would not be appropriate to require a bond during the pendency of a temporary stay. Gulf Power has adduced no evidence that the $38.06 rate they seek to impose bears any relationship to a just and reasonable rate. Indeed, they have failed to provide the cost support required by the Commission's rules. In addition, the cases cited by Gulf Power involve stays of municipal or other governmental rate determinations with at least a patina of legitimacy, not private parties' own demands for payment which are offered in defiance of FCC rules. *See, e.g., TCI of Arlington, Inc.; Petition for Stay of Local Rate Order of City of Arlington, Texas*, 14 FCC Rcd. 3969 at ¶5, DA 99-504, File No. CSB-A-0612 (1999). Because Gulf Power has not established that it will be harmed irreparably by a temporary stay, no bond is necessary. *See Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975 (2nd Cir. 1996)(court did not abuse discretion in dispensing with preliminary injunction bond where defendants failed to show a likelihood of harm in the absence of a bond).

[18] *See* Answer to Petition for Temporary Stay at n. 12.

In sum, the Commission should deny Gulf Power's motion to dismiss and grant a temporary stay.

Respectfully submitted,

By: Michael A. Gross by BMJ

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**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION**

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

July 31, 2000

**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.*<br><br>*Complainants,*<br><br>v.<br><br>GULF POWER COMPANY,<br><br>*Respondent,* | P.A. No. 00-004 |

To: Cable Services Bureau

**SECOND DECLARATION OF L. KEITH GREGORY**

I, L. Keith Gregory, do hereby state:

1. I am Vice President and General Manager of Cox Communications Gulf Coast, L.L.C. ("Cox Gulf Coast"), successor in interest to TWC Cable Partners d/b/a Emerald Coast Cable Television and Cox Communications Pensacola, Inc. in the cable television systems serving Ft. Walton Beach and Pensacola, Florida. I have served in this position for the past 15 months. Previously, I was Director of Business Operations for Cox Communications' corporate offices in Atlanta, Georgia for five years. I have worked in the cable television industry for Cox Communications for more than 25 years.

2. In my capacity as Vice President and General Manager of Cox Gulf Coast, I am directly responsible for overseeing all of Cox Gulf Coast's cable television operations in

northwest Florida, including relationships with utility pole owners, network construction and maintenance, sales, customer service, public relations, marketing, billing operations and after-market services.

3. Contrary 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.

4. Gulf Power's purported termination of Cox's pole arrangements as a result of the pro forma affiliate restructuring is unreasonable. The consolidation of Cox's Pensacola system and TWC Cable Partners' d/b/a Emerald Coast Cable Television ("Emerald") system in Fort Walton Beach into the wholly owned Cox affiliate, Cox Communications Gulf Coast, L.L.C, does not change Cox's role in the management or control of these cable systems and in fact increases its ownership interest in the Fort Walton Beach system. Cox is operating the same business and has retained substantially the same personnel and utility contacts since the restructuring. In fact, Cox has been managing and controlling the Pensacola system since before 1980 and the Ft. Walton Beach system since the beginning of the TWC Cable Partners' Partnership in 1991.

5. I have reviewed the attached Opposition to Gulf Power's Motion to Dismiss and am familiar with the matters described therein. The information set forth in the Opposition is true and correct to the best of my knowledge, information and belief. I declare under the penalties of perjury of the law of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge, information and belief.

L. Keith Gregory

Date: July 31, 2000

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

| | |
|---|---|
| FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.*<br><br>*Complainants,*<br><br>v.<br><br>GULF POWER COMPANY,<br><br>*Respondent,* | P.A. No. 00-004 |

To: Cable Services Bureau

**SECOND DECLARATION OF CHARLES F. DUDLEY**

I, Charles F. Dudley, do hereby state:

1. I am General Counsel of the Florida Cable Telecommunications Association ("Association" or "FCTA"). I have served in this position since 1997. I have worked in the cable television industry for the last nine years.

2. As General Counsel for the FCTA I am directly responsible for maintaining high level relationships with government officials at the local, state and federal levels on behalf of Association members. I advise members concerning the applicability of the FCC's formulation regarding investor-owned utility poles.

3. I have reviewed the attached Opposition to Gulf Power's Motion to Dismiss and am familiar with the matters described therein. The information set forth in the

Opposition is true and correct to the best of my knowledge, information and belief. I declare under the penalties of perjury of the law of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge, information and belief.

Charles F. Dudley

Charles F. Dudley

Date: July 28, 2000

## CERTIFICATE OF SERVICE

I, Elinor McCormick, hereby certify that on this 31st day of July, 2000, I caused a copy of the foregoing Opposition to Motion to Dismiss, to be sent via FedEx(*), hand delivery(**),or regular mail to the following:

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