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

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

TO: Cable Services Bureau

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

The Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. (hereinafter "FCTA/Cox"), pursuant to Section 1.45(b) of the Commission's rules, hereby oppose the "Motion to Strike Complainants' Supplement or, In the Alternative, Motion to Dismiss" ("Motion") filed by Gulf Power Company ("Gulf Power") in the above-captioned proceeding. As detailed more fully below, Gulf Power's Motion is unwarranted and unsupported. Time Warner's Supplement is a purely ministerial filing, and the Commission has routinely accepted such in pole attachment complaint proceedings. The Motion erroneously claims that the Commission has already adjudicated this case and that this proceeding is currently under the exclusive jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit.

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As shown below, the Bureau has *not* adjudicated *this* case and thus there is no jurisdiction – exclusive or other – in the Eleventh Circuit.

Gulf Power also makes no attempt to distinguish its actions toward Time Warner and the legal issues concerning its rate increase from the other cable operators involved in this proceeding. That is because Time Warner is faced with the same situation as the original cable operator Complainants in the complaint filed by FCTA/Cox.[1] Instead, Gulf Power incorrectly argues that Time Warner suffered no injury as of the filing date of the Complaint, although Gulf Power seeks to impose the same rate for the same reasons on Time Warner as it did for the original complainants.

As demonstrated below, Gulf Power's pleading is an inappropriate and unpersuasive attempt to exclude Time Warner from a pole attachment complaint addressing the same facts and legal issues. Accordingly, the Bureau should deny Gulf Power's Motion.

I. Background

This proceeding involves a complaint filed by FCTA/Cox against Gulf Power for its attempts to unilaterally impose new contracts with attachment rates more than 500 percent higher than existing pole attachment rates on Florida cable television operators. On July 10, 2000, FCTA/Cox filed a pole attachment Complaint ("*FCTA Complaint*") with the Bureau in which it noted that the exorbitant new pole rates violate 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*, and that there was no merit to Gulf Power's argument that the "just compensation" required by the Constitution entitled Gulf Power to a higher pole attachment rate than that calculated in

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[1] *See Florida Cable Telecommunications Ass'n, Inc. v. Gulf Power Co.*, Complaint, P.A. No. 00-004 (filed July 10, 2000) ("*FCTA Complaint*").

accordance with Section 224 and FCC regulations. On August 9, 2000, Gulf Power filed its Opposition and FCTA/Cox filed their Reply on August 29, 2000. During and after this pleading cycle, Gulf Power filed no less than five separate pleadings outside of the procedures prescribed by the Commission's rules.[2] The Bureau has not ruled on the *FCTA Complaint* or these motions.

On October 26, 2000, Gulf Power notified Time Warner that it was increasing the cable operator's rental fee to $38.06 – the same rate Gulf Power charged other Florida cable operators involved in the *FCTA Complaint*. Thus, Time Warner found itself in the same position as the other cable operators who had previously joined in the *FCTA Complaint*.

In an Order dated September 8, 2000, the Bureau granted a separate pole complaint filed by the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. ("ACTA/Comcast") against Alabama Power Company ("APCo").[3] The Bureau ruled in favor of ACTA/Comcast. Three days after the Bureau's *APCo Order*, APCo filed an Application for Review of that order with the FCC. However, without giving the Commission a chance to consider the utilities' arguments (as required by the Communications Act), both Gulf Power and APCo filed premature appeals of the Bureau's *APCo Order* with the United States Court of Appeals for the Eleventh Circuit.[4] Importantly, Gulf Power's Petition for Review

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[2] *See* Gulf Power's Motion to Dismiss Complaint for Lack of Jurisdiction (filed July 20, 2000); Gulf Power's Motion to Strike (filed Aug. 7, 2000); Gulf Power's Motion for Confidential Treatment of Commercial and Financial Information (filed Aug. 9, 2000); Gulf Power's Motion to Strike (filed Sept. 6, 2000); Gulf Power's Notice of Filing Supplemental Authority (filed Sept. 11, 2000).

[3] *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Order, 15 FCC Rcd. 17346 (rel. Sept. 8, 2000) ("*APCo Order*").

[4] *See* Petition for Review of Gulf Power Company, Docket No. 00-15068-D (filed Sept. 27, 2000) and Petition for Review of Alabama Power Company, Docket No. 00-14763-I (filed Sept. 27, 2000). Respondent FCC filed Motions to Dismiss both proceedings on October 18, 2000. The Motions to Dismiss have been carried with the case.

pertains to the *APCo Order* and not any order or ruling in *this* case. APCo also filed a motion for a stay,[5] in an effort to avoid the FCC's development of a full record in the *APCo* proceedings.[6]

II. Gulf Power Misrepresents the Status of the Pending FCTA Complaint

Gulf Power's claim that the Commission has already adjudicated the pending *FCTA Complaint* proceeding is absurd. Motion at 3. Further, Gulf Power misrepresents the facts concerning the assumption of jurisdiction over this proceeding by the Eleventh Circuit. *See id.* In an effort to completely circumvent the Commission, Gulf Power attempts to equate the Bureau's September 8, 2000 *APCo Order* with an order in the instant FCTA proceeding. There has been no decision at any level on the *FCTA Complaint*. It bears emphasizing that this case is not the same case as *ACTA v. APCo.*

The Eleventh Circuit has ruled that pole attachment complaints be determined based on "actual rates" and "concrete facts."[7] Such a determination necessarily involves consideration of a utility's actual costs. Here, it is indisputable that APCo and Gulf Power are separate utilities facing different actual costs as reflected in distinct FERC Form 1 filings of underlying cost data at the Federal Energy Regulatory Commission. Thus, Gulf Power is simply wrong in asserting that the Bureau in the *APCo Order* has already adjudicated the claims in this proceeding. *See* Motion at 2.

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[5] *See* Alabama Power Company Motion for Stay Pending Review of the Federal Communications Commission's Order, Docket No. 00-14763-I (filed Oct. 23, 2000).

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

[7] *Gulf Power Co. v. FCC*, 187 F.3d 1324, 1338 (11th Cir. 1999).

Gulf Power prematurely filed a petition for review of the non-final agency decision in *ACTA v. APCo* with the Eleventh Circuit.[8] However, ***that proceeding seeks review of the*** **ACTA v. APCo** ***Bureau decision only***. The Eleventh Circuit is not reviewing any of the pending pleadings here because the Bureau ***has not even rendered a decision in this case!*** Gulf Power is attempting to preempt the administrative process and has already prejudged its result. Thus, Gulf Power impatiently seeks to "end run" the Bureau's decisionmaking authority. The Eleventh Circuit has no jurisdiction, and cannot, over this proceeding until after an appealable order is issued in *this* proceeding and a party files a timely petition for review thereof. The Bureau should reject Gulf Power's transparent and self-serving jurisdictional "sleight-of-hand" claiming no FCC jurisdiction in this case because of a pending review of the *APCo Order*.

III. Time Warner's Supplement Is Entirely Appropriate, As The Commission's Regulations Specifically Contemplate Representation of Cable Operators By State Associations

The Supplement adding Time Warner as a party comports with the underlying interests of administrative efficiency supporting the important role of state associations in developing policy and settling conflicts. The Commission's pole attachment regulations expressly provide that state associations may bring complaints on behalf of their cable operator members. *See* 47 C.F.R. § 1.1404(a). In *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,*[9] the Commission recognized that:

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[8] *See* Petition for Review of Gulf Power Company, Docket No. 00-15068-D (filed Sept. 27, 2000). The parties are currently briefing their arguments before the Eleventh Circuit and no ruling on the merits has been issued.

[9] Report and Order, 2 FCC Rcd. 4387 (1987).

> Allowing cable associations to file complaints will further facilitate settlement in those situations by providing a more centralized group with which the utilities can negotiate. Indeed, we note that even under our old Rules, cable associations were instrumental in developing state- or region-wide settlements in pending proceedings.[10]

The Commission further recognized the importance of allowing state associations to bring complaints on behalf of ***similarly situated*** cable providers. *See id.* at ¶ 80 (stating that amending rules allowing state associations to bring claims "will go far to resolving the problems raised by the utilities, while also permitting a more efficient proceeding involving similarly situated cable operators."). In addition, a long line of Commission precedent exists involving pole proceedings brought by state associations on behalf of similarly situated cable operators.[11]

Gulf Power presents its Motion as if these rules and Commission precedent did not exist. It argues that Time Warner's lack of notice of the same rate increase imposed on other similarly situated cable operators bars them from protection under Section 224 and the Commission's rules. *See* Motion at 4-6. Under Gulf Power's reasoning, a utility could provide delayed, staggered notice of exorbitant pole rental increases to individual cable operators, thereby forcing them to bring numerous, separate complaints for precisely the same action. Such a result would constitute a waste of administrative resources, subject cable operators to the unnecessary burden

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[10] *Id.* at ¶ 78.

[11] *See, e.g., Cable Telecommunications Association of Maryland, Delaware and District of Columbia v. Baltimore Gas & Electric Company and Bell Atlantic-Maryland*, Order, P.A. No 00-001, DA-01-647 (rel. Mar. 13, 2001); *Tennessee Cable Telecommunications Association, et al. and The Cable Television Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Order, 14 FCC Rcd. 7902 (1999); *Texas Cable & Telecommunications Ass'n v. Entergy Services*, Order, 14 FCC Rcd. 9138 (1999); *Texas Cable and Telecommunications Ass'n v. GTE Southwest, Inc.*, Order, 14 FCC Rcd. 2975 (1999).

of filing individual pole complaints, and eviscerate the Commission's rules providing for state association representation to encourage more efficient and speedier resolution of disputes.

IV. The Supplement Is Purely Ministerial and Time Warner's Claim Involves the Same Facts, Legal Positions and Rate Methodology At Issue In the FCTA Complaint

There is nothing surreptitious about the filing of Time Warner's Supplement. The Supplement is purely ministerial – not, as Gulf Power asserts, a ploy "to significantly expand the scope of these proceedings by adding Time Warner as a new party." Motion at 4. Gulf Power characterizes a simple administrative filing[12] that has been routinely allowed over the entire course of pole attachment regulation as entirely transforming this proceeding. Yet the Commission has often accepted supplements adding parties in other pole attachment complaint proceedings without protest.[13]

Time Warner's participation in the *FCTA Complaint* does not alter the scope of this proceeding. Time Warner is in the same position as every other cable operator involved in the complaint. For whatever reason, Time Warner did not receive notice of the new rate until October 26, 2000 – much later than the other parties. But the facts are the same. The legal positions are the same. The rate methodology is the same. And the injury is the same. Time Warner's claim is essentially identical to its fellow members of the FCTA and they should be

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[12] Because the Supplement constitutes a ministerial, non-substantive update to the Complaint, FCTA/Cox did not believe a Motion for Leave to file was necessary.

[13] *See, e.g., Cable Television Ass'n of Georgia v. Georgia Power Co.*, Supplement, P.A. No 01-002 (filed Feb. 6, 2001); *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Supplement, P.A. No. 00-003 (filed Sept. 6, 2000 and Aug. 18, 2000); *Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, et. al. v. Baltimore Gas & Electric Co. and Bell Atlantic - Maryland, Inc.*, Supplement, P.A. No. 2000-00-001 (filed Feb. 15, 2000 and Feb. 25, 2000); *Cable Television Ass'n of Georgia v. Bellsouth Telecommunications, Inc.*, Supplement, P.A. No. 98-004 (filed May 21, 1998, Oct. 22, 1998, Mar. 4, 1999 and Apr. 21, 1999); *Texas Cable & Telecommunications Ass'n, Mississippi Cable*

decided together, as the Commission has done throughout the history of pole attachment regulation. Because the underlying issues facing Time Warner are the same as those in the *FCTA Complaint* and the Bureau has taken no action, granting the Supplement to add Time Warner as a party in this proceeding will not prejudice Gulf Power. Indeed, it is astonishing that Gulf Power claims any kind of prejudice; what did it expect when it served the same rate increase notice on Time Warner that it had served on the other Florida cable operators?

Gulf Power's claim that Time Warner suffered no injury in fact, and therefore lacks standing, is also without merit. Gulf Power cannot credibly argue that Time Warner's claim is outside the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Motion at 5 (quoting *Ass'n of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). To make a proper showing of standing, "a complainant must allege (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) redressable by the relief requested."[14] Here, Time Warner's injury in fact consists of Gulf Power's imposition of an unjust and unreasonable pole attachment rental rate. This action is ***directly traceable*** to Gulf Power's conduct and is redressable by the relief requested in the *FCTA Complaint* Time Warner seeks to join, *i.e.*, the Bureau can order reinstatement of the existing rate during negotiations of a new rate under the Cable Formula. Moreover, Section 224(b) expressly provides for the Commission's regulation of just and reasonable rates, terms and conditions, as well as its ability to adjudicate disputes regarding the same. *See*

Telecommunications Ass'n, and Arkansas Cable Television Ass'n v. Entergy Services, Inc., Addendum, P.A. No. 97-005 (Aug. 25, 1997).

[14] *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998) (internal quotations omitted) (citations omitted). *See also Allen v. Wright,* 468 U.S. 737, 751 (1984).

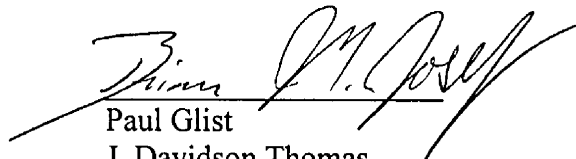
47 U.S.C. § 224(b). As such, Time Warner's claim clearly falls within the "zone of interests" protected by Section 224.

Finally, Time Warner is not attempting to obtain unlawful refund protection, as suggested by Gulf Power. *See* Motion at 6-7. As demonstrated above, Time Warner simply seeks to join the pending *FCTA Complaint* because it involves the same facts and legal issues. As a result, a decision by the Bureau that binds Time Warner will be efficient and preserve administrative resources. The Bureau may fashion a remedy or refund under Section 1.1411(c) of the Commission's rules[15] as it deems appropriate under the circumstances.

CONCLUSION

For the foregoing reasons, the Bureau should dismiss Gulf Power's "Motion to Strike Complainants' Supplement or, In the Alternative, Motion to Dismiss" and permit the Supplement adding Time Warner as a party to the *FCTA Complaint.*

Respectfully submitted,



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April 23, 2001

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[15] 47 C.F.R. § 1.1411(c).

CERTIFICATE OF SERVICE

I, Elinor McCormick, hereby certify that on this 23rd day of April 2001, I caused a copy of the foregoing "Opposition" to be sent via hand delivery(**), FedEx (*) or regular mail to the following:

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