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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 Docket
Case Nos. 00-14763-I,
00-15068-D

**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.'S
AND COX COMMUNICATIONS GULF COAST, L.L.C.'S
OPPOSITION TO GULF POWER COMPANY'S
MOTION FOR EXTRAORDINARY RELIEF**

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Florida Cable Telecomm. Ass'n, Inc.

Cox Communications Gulf Coast, L.L.C.

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

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

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

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

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

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

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003 and 00-004 before the Federal Communications Commission)

Barry Breithaupt, Representative of Torrence Cablevision USA, Inc.

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

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Cole, Raywid & Braverman (counsel for parties to Docket Nos. PA 00-003 and 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)

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Federal Communications Commission (Respondent)

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

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

L. Keith Gregory, Representative for 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)

Gulf Power Company (Petitioner)

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

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Deborah Lathen, Chief, Cable Services Bureau, Federal Communications Commission

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Mississippi Power Company (affiliate of Petitioner)

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

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

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

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

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

Ralph A. Peterson (counsel for Petitioner)

Phenix 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)

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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)

Southern Company Capital Trust I (affiliate of Petitioner)

Southern Company Capital Trust If (affiliate of Petitioner)

Southern Electric Generating Company (affiliate of petitioner)

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

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

The Southern Company (parent of Petitioner)

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

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

CORPORATE DISCLOSURE STATEMENT

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

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

The Alabama Cable Telecommunications Association ("ACTA") is the principal trade association of the cable television industry in Alabama. ACTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1

Comcast Cablevision of Dothan, Inc., an Alabama corporation that provides cable television services, is 100% owned by Comcast Cablevision Corporation of the South-East, a Florida corporation, which is 100% owned by Comcast Holdings, Inc., a Delaware corporation, which is 100% owned by Comcast Cable Communications, Inc., a Delaware corporation, which is 100% owned by Comcast Corporation, a publicly held Pennsylvania corporation.

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Pursuant to Fed. R. App. 27 and Eleventh Circuit Rule 27-1, Intervenor, the Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. ("FCTA/Cox"), respectfully submit this Opposition to Petitioner Gulf Power Company's ("Gulf Power") Motion for Extraordinary Relief ("Motion"). As more fully discussed below, Gulf Power's Motion is based entirely upon its theory that the Federal Communications Commission ("FCC" or "Commission") has improperly failed to adhere to this Court's decision in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"). This position is completely unfounded, because (1) this Court has stayed the issuance of the mandate in *Gulf Power II* pending Supreme Court review; and (2) Gulf Power's appeal in this proceeding is from a matter pending before the FCC's Cable Services Bureau ("Bureau") that *has yet to be decided*, and is thus incurably premature. Moreover, the extraordinary relief sought by Gulf Power here would

effectively dissolve the stay entered by the Court in *Gulf Power II*. Accordingly, Gulf Power's Motion for Extraordinary Relief should be denied.

BACKGROUND

This appeal involves the decision by two subsidiaries of The Southern Company, an electric utility, to suddenly terminate its utility pole attachment contracts with Alabama and Florida cable television operators, and the utilities' attempts to unilaterally impose new contracts with attachment rates more than 500 percent higher than existing pole attachment rates. On July 10, 2000, FCTA/Cox filed a pole attachment Complaint with the Bureau in which it pointed out that the exorbitant new pole rates violate 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*, and that there is no merit to Gulf Power's argument that the "just compensation" required by the Constitution entitles Gulf Power to a higher pole attachment rate than that calculated in accordance with Section 224 and FCC regulations. The Bureau has not even ruled on FCTA/Cox's pole Complaint, yet Gulf Power filed a Petition for Review in this Court.

In an Order dated September 8, 2000 ("*APCo Order*"), the Bureau granted a similar pole complaint filed by the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. ("*ACTA/Comcast*") against Alabama Power Company ("*APCo*"). The Bureau ruled that the Supreme Court has previously upheld the constitutional sufficiency of the FCC's pole formula in calculating attachment rates, that "a utility is compensated in full for any [pole] make-ready or change-out costs associated with [an] attachment," and that the FCC's annual cable pole rental formula "allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital." Motion, Ex. 1, at ¶¶ 5-6. 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 this Court¹ and a motion for a stay,² in an effort to avoid the FCC's development of a full record.³ In its Motion, Gulf Power is again trying to improperly circumvent the agency by seeking a writ of mandamus against the Bureau.

ARGUMENT

I. Gulf Power's Claim For Extraordinary Relief Is Unwarranted Because This Court Has Stayed The Mandate In Gulf Power II

Gulf Power's contention that this Court should "order the FCC to dismiss the FCTA Complaint (and the ACTA Complaint as well) based upon the FCC's having already proclaimed its defiance of *Gulf Power II*," Motion at 8, has no merit. Gulf Power's argument relies on two premises: its theory that this Court's decision in *Gulf Power II* is a judgment binding upon the FCC, and its claim that Gulf Power has made a sufficient factual showing that "Internet" services will be provided over every Florida attachment to every customer. The first premise is wrong, and the second has not been proved.

First, in an Order dated October 12, 2000, this Court stayed the issuance of the mandate in *Gulf Power II*. The stay means that final judgment has not been entered and that Gulf Power may not use that case as a mechanism for avoiding the Bureau's and the Commission's review in

¹ 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. Those motions are pending.

² 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).

³ Intervenors ACTA/Comcast filed their Opposition to APCo's Motion for Stay on November 6, 2000 ("ACTA Opposition").

this case. In both *Gulf Power Co. v. FCC*, 187 F.3d 1324 (11th Cir. 1999) (“*Gulf Power I*”), and *Gulf Power II*, separate panels of this Circuit held that 47 U.S.C. § 224 is 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. In *Gulf Power II*, the panel was divided on the question of Section 224’s application to attachments carrying Internet services commingled with cable or telecommunications services. By Order dated October 12, 2000, the court stayed the issuance of the mandate in *Gulf Power II* pending the filing of and final action on a petition for writ of certiorari in the U.S. Supreme Court on the disputed question. *See* Attachment A. The stay of the mandate makes clear that, despite Gulf Power’s general reliance upon this Court’s Internal Operating Procedures, *Gulf Power II*’s holding concerning Section 224’s coverage of pole attachments that include Internet services is not binding on the FCC.⁴ Because the stay of *Gulf Power II* remains in effect until the Supreme Court concludes its consideration of the

⁴ Gulf Power inaccurately cites *Generali v. D’Amico*, 766 F.2d 485, 489 (11th Cir. 1985), for the proposition that, because *Gulf Power II* is binding in the Eleventh Circuit, the FCC is therefore also bound by the case. *Generali* does not establish this rule. The case makes no mention of a circuit’s binding effect of authority upon a federal agency. As cited by Gulf Power, *Generali* simply states that precedent from one circuit of the United States Court of Appeals is not binding upon a different circuit and that the Eleventh circuit is bound by precedent arising out of its own circuit (and the former Fifth Circuit). Similarly, in *Martin v. Singletary*, 965 F.2d 944 (11th Cir. 1992), this Court emphasized that the stay of a mandate means that the lower tribunal is not yet bound to carry out this Court’s judgment. When a mandate is stayed, the circuit court decision has no effect on the lower tribunal’s proceedings or decisions. *See Flagship Marine Services, Inc. v. Belcher Towing Company*, 23 F.3d 341 (11th Cir. 1994). Here, because the mandate in *Gulf Power II* is stayed, the FCC is not “bound” to follow it in resolving other pole attachment complaints.

pending Petitions for Certiorari, it would be entirely inappropriate for this Court to effectively dissolve the mandate and force the FCC do anything with respect to *Gulf Power II*.⁵

Second, Gulf Power has not demonstrated as a matter of fact that all Florida cable operators provide Internet services over every Gulf Power pole. Gulf Power asserts in this Court that the cable operators in the FCTA/Cox Complaint are “undeniably Internet service providers,” Motion at 5, when the agency whose role it is to find such facts has made no such determination. It would be inappropriate for the Court to substitute itself as the fact-finder in this dispute and accept Gulf Power’s unsupported claim.

Finally, other federal courts have reached different conclusions about the proper regulatory treatment of Internet services than those reached by the panel majority in *Gulf Power II*. In *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. June 22, 2000), the Ninth Circuit ruled that the FCC has jurisdiction over cable broadband Internet services because to the extent that a cable operator 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.*, 216 F.3d at 879. Conversely, a federal district court in the Fourth Circuit ruled that the FCC has jurisdiction over cable broadband Internet services because these Internet services fall under the statutory definition of a cable service. *See MediaOne Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712 (E.D. Va. May 10, 2000), appeal pending. The Commission’s jurisdiction over FCTA/Cox’s and ACTA/Comcast’s pole Complaints is also appropriate in light of the FCC’s recent launch of its own *Notice of Inquiry* to determine whether rules are

⁵ The Government and the National Cable Television Association filed Petitions for Certiorari on November 21 and 22, 2000, respectively Case Nos. 00-843 (docketed Nov. 27, 2000) and 00-832 (docketed Nov. 22, 2000). Pursuant to Fed. R. App. P. 41(d)(2)(B) the stay of the mandate remains in effect until the Supreme Court’s final disposition.

appropriate in light of the conflicting court decisions.⁶ The FCC has national responsibilities, and the nation is clearly in a national dialogue on how to regulate (or deregulate) the Internet. In sum, given this Court's stay of the mandate in *Gulf Power II*, Gulf Power's unsupported factual assertions, the different holdings in the circuits, and the FCC's own consideration of this issue, the Bureau has acted properly in considering FCTA/Cox's pole Complaint against Gulf Power. The Bureau (and the FCC) are simply not bound by *Gulf Power II* while the mandate is stayed and petitions for *certiorari* are pending. The order sought by Gulf Power here would improperly collaterally dissolve that stay in violation of the federal rules.

II. Gulf Power Fails To Meet This Court's Standards For A Writ Of Mandamus Under The All Writs Act

Gulf Power's request for extraordinary relief also does not meet the required showing for a writ of mandamus from this Court. At the outset, it is important to point out that Intervenors have already described the flaws in Gulf Power's arguments in ACTA/Comcast's November 3, 2000 Opposition to APCo's Motion for Stay and in ACTA/Comcast's and FCTA/Cox's November 9, 2000 Replies to Gulf Power's and APCo's Response to the FCC's Motions to Dismiss these appeals. Gulf Power's request for mandamus will not remedy the flaws in its earlier filings. As the United States Supreme Court has observed, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."⁷ Similarly, this Circuit has held that "The writ of mandamus is an extraordinary remedy justified only when exceptional

⁶ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, DA 00-355 (released Sep. 28, 2000).

⁷ *Kerr v. United States Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 402 (1976).

circumstances amounting to a judicial usurpation of power are present.”⁸ In particular, the issuance of a writ of mandamus requires a showing of three elements: (1) the right to such relief is clear and indisputable, and (2) no other adequate means are available to remedy a (3) clear usurpation of power or abuse of discretion.⁹ Gulf Power fails to meet all three of these requirements.

A. Gulf Power Has Not Demonstrated A “Clear And Indisputable” Right to The Extraordinary Relief Sought

This Court has held that motions requesting extraordinary relief are “granted sparingly.”¹⁰ Courts will grant writs of mandamus only for truly extraordinary cases, and the petitioner carries the burden of proving that its “right to issuance of the writ is ‘clear and indisputable.’”¹¹ “They are not to be used as a substitute for appeal, or to control the decision of the trial court in

⁸ *In re National v. Ciba-Geigy*, 803 F.2d 616, 620 (11th Cir. 1986) (internal quotations omitted) (citing *Will v. United States*, 389 U.S. 90, 95 (1967), quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

⁹ *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 209 (1989); *In re Temple*, 851 F.2d 1269, 1271 (11th Cir. 1988) (citing *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986) and *U.S. v. Fernandez-Toledo*, 737 F.2d 912, 919 (11th Cir. 1978)). The Court in *In re Temple* noted that the litigants were given no notice of a proposed mandatory class certification, had no opportunity to present evidence in an adversarial proceeding, and had no right to an immediate appeal. Moreover, the Court observed that the district court’s order would delay resolution of claims that were close to being completed. Perhaps most important, the district court raised new and important legal issues. This was the type of “drastic situation” envisioned by the court’s “extraordinary relief” standard. In contrast, Gulf Power clearly does not meet this standard. Gulf Power was given notice of FCTA/Cox’s pole attachment complaint and had more than sufficient opportunity to present its case to the Bureau.

¹⁰ *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quoting *In re Estelle*, 516 F.2d 480 (5th Cir. 1975)).

¹¹ See *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 209 (1989) (quoting *Bankers Life & Casualty Co., v. Holland*, 346 U.S. 379, 384 (1953)) (internal quotations omitted).

discretionary matters.”¹² This Circuit has established an exacting standard: “[u]nless an appellant can demonstrate ... that there is a great likelihood, *approaching near certainty*, that he will prevail when his case finally comes to be heard on the merits, he does not meet the standard” for granting such extraordinary relief.¹³

Gulf Power’s Motion does not come close to meeting these high standards. Instead of establishing a “clear and indisputable” likelihood of prevailing on the merits, it effectively asks the Court to substitute its judgment for that of the administrative agency in issuing an initial decision.¹⁴ But this Circuit and its predecessor have rejected attempts to appeal non-final federal agency actions such as the FCTA/Cox pole Complaint pending before the Bureau. In *Kabeller v. Busey*, 999 F.2d 1417 (11th Cir. 1993), this Court affirmed the dismissal of a suit filed in federal district court that challenged a federal agency’s alleged failure to address a claim. Significantly, the Court affirmed the district court’s decision

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

¹² *Jackson* at 1004; see also *Bankers Life & Casualty Co., v. Holland*, 346 U.S. 379, 383 (1953).

¹³ *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963) (emphasis added). Under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), decisions of the Fifth Circuit issued prior to September 30, 1981 are binding authority in the Eleventh Circuit.

¹⁴ Throughout its Motion, Gulf Power inappropriately blurs the distinction between action by the FCC’s delegated authority, the Cable Services Bureau, and the full Commission which maintains the authority to review decisions of the Bureau, in an attempt to mislead the Court. FCTA/Comcast note that, under the agency’s procedures, the Bureau receives all pleadings from the parties and issues an initial, non-final decision on the merits. See 47 C.F.R. §§ 1.1404 and 1.1407. Either party may then seek review of the non-final decision before the full Commission. See 47 C.F.R. § 1.115. Gulf Power’s Motion consistently references action and statements by the “FCC,” when in fact, such actions and statements were made in the APCo Complaint proceeding by the Bureau, the FCC’s delegated authority.

Id. at 1419 (emphasis added).¹⁵ With respect to the lack of finality, this Court observed, “Given that appellant’s complaint is still under review, transfer is not ‘in the interest of justice.’” *Id.* at 1423. *Accord, Curtis McNair Arnold v. Commodity Futures Trading Commission*, 987 F. Supp. 1463 (S.D. Fla. 1997)(following *Kabeller* and finding that “With ongoing proceedings before the CFTC, this Court is also unwilling to disrupt that CFTC enforcement proceeding any more than has occurred to date”). Finally, extraordinary relief of the type sought by Gulf Power here would undo the effect of the stay in violation of the order of the *Gulf Power II* court and the federal rules.

Gulf Power’s requests for dismissal of the FCTA/Cox Complaint at the Bureau or forced imposition of its exorbitant pole rate increases must be denied. The Commission cannot be said to have predetermined the issue before it. The full Commission has not had an opportunity to review the “issue” of whether, as Gulf Power alleges, the provision in the Telecommunications Act of 1996 (“1996 Act”)¹⁶ of nondiscriminatory access in Section 224(f) changes the amount of compensation required by the Constitution for the use of the very same utility pole space that has been used for decades. Both of the decisions cited by Gulf Power -- the *APCo Order* and the order in *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 F.C.C.R. 9563 (2000) -- are Bureau decisions. Moreover, as the Supreme Court has stated, courts do not have discretion to label further administrative review “futile” where exhaustion of remedies is

¹⁵ In rejecting the appellant’s request for mandamus or the application of the All Writs Act, the Court also found that only “truly extraordinary” circumstances would “justify our interference with nonfinal agency action” since the “court’s supervisory province as to agencies is not as direct as our supervisory authority over trial courts.” *Id.* at 1422. The Court also pointed out that delays of several months, and even a few years, were “not so unreasonable as to warrant mandamus.” *Id.* In this appeal, Gulf Power’s allegation of “unreasonable delay” is baseless because the matter has been pending before the Bureau for only four months.

¹⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996)(“1996 Act”).

statutorily required, as it is in this case. *See* 47 U.S.C. §§ 155(c)(7) and 402(a); 28 U.S.C. § 2342(a). “Where Congress specifically mandates, exhaustion is required.” *McCarthy*, 503 U.S. at 144. *See also Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)(holding that where exhaustion is a statutorily specified jurisdictional prerequisite, “the requirement . . . may not be dispensed with merely by a judicial conclusion of futility”).

Even if Gulf Power were not to prevail before the Bureau on FCTA/Cox’s pole Complaint, the instant situation does not constitute the “truly extraordinary circumstances” necessary to justify this Court’s supplanting the administrative agency charged with determining pole attachment disputes. *See Bankers Life & Casualty Co., v. Holland*, 346 U.S. 379, 383 (1953) (noting that “the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delays and perhaps unnecessary trial . . . Congress must have contemplated those conditions in providing that only final judgments are reviewable”) (citations omitted). Gulf Power must await an initial determination from the Bureau, and, if it does not prevail, it may file an Application for Review before the full Commission. Only after issuance of a final decision by the full Commission may Gulf Power seek this Court’s appellate review. In its Motion, Gulf Power has not come close to showing that it has a “clear and indisputable” right to mandamus or that it has the right to demand a dissolution of the stay of the mandate ordered by the Court in *Gulf Power II*.

B. Gulf Power Has Other Adequate Means To Attain The Relief It Seeks

In addition, Gulf Power has not met its showing under the second element of the test for extraordinary relief – a showing that there exists no other adequate means to attain relief. Gulf Power contends that the 1996 Act, provides no “reasonable, certain and adequate” process for recovering just compensation if a court concluded that the FCC’s pole rate was insufficient.

Motion at 11-14. But as this Court held in *Gulf Power I*,” the 1996 Act gives the Court the authority to issue an order that will ensure the provision of adequate compensation:

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

Id. at 1335. Thus, Section 224 clearly does provide a “reasonable, certain and adequate” process for receiving just compensation. With the 1996 Act’s provisions for judicial review of Commission decisions under 47 U.S.C. § 402(a), it becomes apparent that Gulf Power’s unsubstantiated claim of no judicial process for compensation rings hollow.

In addition, Gulf Power’s reliance upon conclusory allegations of irreparable harm does not constitute the showing of “really extraordinary circumstances”¹⁷ required to Gulf Power’s Motion. The Bureau’s *APCo Order* relied upon by Gulf Power is only about money – it declared void APCo’s new, exorbitant \$38.81 pole rate and required a return to the current \$7.47 rate while the parties commence negotiations over a new contract. Motion, Ex. 1 at ¶ 7. If the Bureau were to reach a similar ruling in Gulf Power’s case, there would be no conceivable harm to Gulf Power that could not be rectified by a later monetary payment. As this Court explained in *Gulf Power I*, the utilities are protected by judicial review after the development of a full record before the Commission and, if appropriate, the imposition of a new rate order that “ensure[s] a utility receives just compensation both prospectively and in the period prior to the

¹⁷ *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quoting *In re Estelle*, 516 F.2d 480 (5th Cir. 1975)).

court's determination of the just compensation rate." *Gulf Power I*, 187 F.3d at 1335.¹⁸ Because Gulf Power is assured adequate alternative means for relief in the event that it prevails, it is not entitled to a writ of mandamus.

C. The FCC Has Not Usurped Power or Abused Its Discretion In The Underlying Proceeding

In addition to failing the first two prongs of the test for granting a writ of mandamus, Gulf Power also has not met its burden of proving the third prong: clear usurpation of power or abuse of discretion.¹⁹ As described in Section I above, there is no merit to Gulf Power's argument that the Bureau's consideration of FCTA/Cox's pole Complaint is inconsistent with *Gulf Power II*, because the mandate in that case has been stayed, Gulf Power has not established that FCTA/Cox in fact carries Internet services over every pole, and the proper regulatory status of Internet over cable remains to be determined.

Moreover, the Bureau's consideration of FCTA/Cox's pole Complaint during the last four months does not constitute "unreasonable delay" or an "abuse of discretion." The Administrative Procedures Act's ("APA") authorizes courts "to compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). However, the less than four months that have elapsed since the filing of the last pleadings before the Bureau do not constitute "unreasonable delay" under the APA.²⁰ Absent exigent circumstances such as matters

¹⁸ Gulf Power's citation to *McCarthy v. Madigan*, 503 U.S. 140 (1992) is inapposite. In *McCarthy*, which involved a prisoner's compliance with the Bureau of Prison's internal grievance procedures, the court held that Congress had not clearly required exhaustion.

¹⁹ *In re Temple*, 851 F.2d at 1271.

²⁰ See, e.g., *Kabeller v. Busey*, 999 F.2d 1417, 1423 (11th Cir. 1993) (finding delay of fourteen months reasonable and affirming district court's denial of request for writ of mandamus); *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (holding agency delay of less than three years reasonable and rejecting request for writ of mandamus); *Telecommunications Research*

endangering the public health and safety,²¹ courts are not inclined to find administrative delay to be an abuse of discretion. See *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (stating that “relief delayed is not always relief denied.... and a court is in general ill-suited to review the order in which an agency conducts its business.”) (citing *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 272 (1949)). Where, as here, an agency faces no specific statutory timetable or other factors influencing expedited decisionmaking, an agency’s control concerning the timing of its decisions is entitled to “considerable deference.” *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (holding agency delay of less than three years reasonable and rejecting request for writ of mandamus). In light of the considerable deference given to the timetables of administrative agencies, the Bureau’s delay of only four months cannot be labeled “unreasonable delay” sufficient to constitute an abuse of discretion.²²

CONCLUSION

Gulf Power has failed to carry its burden of proving that it is clearly and indisputably entitled to the drastic remedy of mandamus. The mandate in *Gulf Power II* has been stayed, and even if had not been stayed, Gulf Power has failed to establish the factual predicate for that decision’s application in this case. Furthermore, Gulf Power cannot show that it has no other

and Action Center v. Federal Communications Commission, 750 F.2d 70, 81 (D.C. Cir. 1984) (delays of two and five years not warrant mandamus).

²¹ The D.C. Circuit noted in *TRAC* that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *TRAC*, 750 F.2d 70, 80 (D.C. Cir 1984).

²² Gulf Power’s premature appeal to this Court itself may lead the Bureau to defer a ruling on FCTA/Cox’s pole Complaint. As noted in ACTA/Comcast’s November 3, 2000 Opposition to Petitioner’s Motion for Stay and in ACTA/Comcast’s and FCTA/Cox’s November 9, 2000 Replies to the Gulf Power’s and APCo’s Responses to the FCC’s Motions to Dismiss, the Court should dismiss these appeals and permit the Bureau and the Commission (in FCTA/Cox’s case)

adequate means of relief, or that the Bureau has usurped its authority or abused its discretion.

This Court should dismiss Gulf Power's Motion.

Respectfully submitted,



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Florida Cable Telecomm. Ass'n, Inc.

Cox Communications Gulf Coast, L.L.C.

Dated: December 22, 2000

and the Commission (in ACTA/Comcast's case) to decide the issues and develop a complete record.

RAYWID & BRAVERMAN Seiver
1919 Pennsylvania Ave., NW
Washington DC 20006

October 12, 2000

RE: 98-6222 -CC Gulf Power Company v. FCC
AGCY NO.: 97-151 CS

CC: Matthew J. Calvert
CC: Daniel L. Brenner
CC: Neal Morse Goldberg
CC: Michael S. Schooler
CC: Walter Steimel Jr.
CC: Marjorie K. Conner
CC: Shirley Sachie Fujimoto
CC: Jean Howard
CC: Kenneth Feree
CC: Jonathan L. Wiener
CC: Andrew W. Tunnell
CC: Jennifer M. Buettner
CC: John Russell Campbell
CC: Ralph Alan Peterson
CC: Janet Reno
CC: Robert B. Nicholson
CC: Robert J. Wiggers

CC: Gregory M. Christopher
CC: Hon. Will L. Garwood
CC: Administrative File
CC: David W. Carpenter
CC: John Francis Raposa
CC: Robert B. McKenna
CC: James T. Hannon
CC: William Single
CC: Anthony C. Epstein
CC: RAYWID & BRAVERMAN Seiver
CC: Paul Glist
CC: Geoffrey Charles Cook
CC: John D. Thomas
CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

October 12, 2000

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-6222 -CC Gulf Power Company v. FCC
AGCY NO.: 97-151 CS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Jenifer Alexander (404) 335-6172

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6222

FCC Agency No. 97-151

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 12 2000

THOMAS K. KAHN
CLERK

GULF POWER COMPANY,
ALABAMA POWER COMPANY, et al.,

Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-2589

FCC Agency No. 97-151

TAMPA ELECTRIC COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-4675

FCC Agency No. 98-20-FCC

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6414

FCC Agency No. 98-20

COMMONWEALTH EDISON COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6430

FCC Agency No. 97-151-CS

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6431

FCC Agency No. 97-151-CS

TEXAS UTILITIES ELECTRIC COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6442

FCC Agency No. 97-151-CS

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6458

FCC Agency No. 97-151-CS

AMERICAN ELECTRIC POWER SERVICES CORPORATION,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6476

FCC Agency No. 97-151

DUKE ENERGY CORPORATION,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6477

FCC Agency 97-151

VIRGINIA ELECTRIC and POWER COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6478

FCC Agency No. 97-151

CAROLINA POWER & LIGHT COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 98-6485

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

- () The motion of Respondents, Federal Communications Commission and United States (FCC) for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is *Granted*
- () The motion of Respondents, FCC, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.
- () The motion of Respondents, FCC, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.
- () IT IS ORDERED that the motion of Respondents, FCC, for a further stay of the issuance of the mandate is DENIED.


UNITED STATES CIRCUIT JUDGE

ORD-45

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

- () The motion of Intervenor, National Cable Television Association, Inc. (NCTA) for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is *granted*.
- () The motion of Intervenor, NCTA, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.
- () The motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.
- () IT IS ORDERED that the motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is DENIED.



UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, Debra Sloan, hereby certify that on this 22nd day of December, 2000, I caused a copy of the foregoing *Florida Cable Telecommunications Association, Inc.'s and Cox Communications Gulf Coast, L.L.C.'s Opposition to Gulf Power Company's Motion For Extraordinary Relief* to be sent via U.S. Mail to the following:

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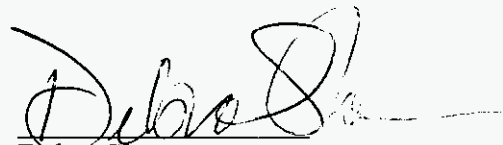
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