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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
TeleCable of Piedmont, Inc.,)
Complainant,)
v.)
Duke Power Company,)
Respondent.)

File No. PA90-003

CC 95-93

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To: The Common Carrier Bureau

ANSWER OF DUKE POWER COMPANY TO COMPLAINT AMENDMENT

On May 30, 1991, Counsel for TeleCable of Piedmont, Inc. (Complainant) submitted for filing an amendment to its Complaint (Amendment) in the above-captioned proceeding. In accordance with Section 1.724 of the Commission's Rules, 47 C.F.R. § 1.724, Duke Power Company (Duke) hereby submits its Answer to the Amendment.

BACKGROUND

On November 15, 1990, Complainant filed its Complaint with the Commission, requesting the Commission to: 1) determine that Duke's then current cable television (CATV) pole attachment rate of \$4.87 exceeded the maximum rate Duke lawfully may charge; 2) adopt, as just and reasonable, the per pole attachment rate computed by Complainant in the amount of \$4.19; 3) substitute Duke's rate with Complainant's rate; and 4) order Duke to refund,

with interest, the amounts Complainant has paid in excess thereof since July 1, 1990.

On January 18, 1991, Duke submitted to the Commission its answer to the Complaint (Answer). In its Answer, Duke explained that: 1) Duke's pole attachment rate of \$4.87 for calendar year 1990 is just and reasonable; 2) Duke's rate is calculated in accordance with Commission methodology and precedent; 3) in the event the Commission determines that reduction of Duke's rate is warranted, no refunds can be ordered for the period prior to the date the Complaint was filed and then only if the record establishes that a "substantial" overcharge was assessed by Duke.

Complainant's Reply was filed on February 22, 1991. Now, more than three months after it filed its Reply, Complainant has filed the Amendment. In it, Complainant claims Duke has "further adjusted [its CATV pole attachment] rate retroactive to January 1, 1990 ... [and] amend[s] ¶¶ 8 and 21d of the Complaint accordingly." Amendment at 1.

ARGUMENT

I. NO BASIS EXISTS FOR ALLOWING THE AMENDMENT.

Complainant, by its Amendment, appears to request the Commission to impose on Duke a refund obligation for the period beginning January 1, 1990, in the event a refund ultimately is ordered. As will be shown below, no basis has been presented by

which the Commission can accept the Amendment for filing or permit Complainant to amend its Complaint in the manner requested.

A. The July 12, 1990 Invoice Is Not Relevant To The Instant Proceeding.

In its Amendment, Complainant alleges that Duke has increased its CATV pole attachment rates retroactively to July 1, 1990. Complainant also claims that "[b]y the attached invoice, [Duke] has further adjusted the [CATV pole attachment] rate retroactive to January 1, 1990." The first allegation is incorrect and the second is irrelevant to this proceeding. Moreover, both are intended to enlarge the period for which Duke could be held liable for refunds (from that permitted by the Commission's Rules) should the Commission order refunds.

1. Duke has not increased its rates retroactive to July 1, 1990.

The Commission's methodology for calculating CATV pole attachment rates for electric utilities is based largely on data contained in an electric utility's FERC Form 1.^{1/} In order for Duke's CATV pole attachment rate to more closely reflect the costs Duke incurs in providing this service, Duke calculates its rate

^{1/} 47 C.F.R. § 1.1404(g). The FERC Form 1 is compiled by each electric utility and filed with the FERC on or before April 30 of each year. The cost data contained in the FERC Form 1 is based on actual utility costs for the previous calendar year.

once a year, on June 1, based upon its most recent FERC Form 1.^{2/} In accordance with Section 4 of the Agreements, this redetermination of Duke's CATV pole attachment rate is then "retroactively adjusted to January 1...."

Thus, when Duke prepared its FERC Form 1 in April, 1990 for calendar year 1989, it calculated its 1990 CATV pole attachment rate based on that data. On June 1, 1990, Duke issued its bill to Complainant, containing the newly effective CATV pole attachment rate, for the period July 1, 1990 through December 31, 1990. This was a prospective increase, not a retroactive adjustment.

2. The invoice relates to a period not at issue in the instant proceeding.

In accordance with the terms of the Agreement, the above-stated prospective rate also became effective retroactive to January 1, 1990. Thus, on July 12, 1990, Duke prepared the invoice which is the subject of the Amendment.^{3/} This invoice includes additional amounts owed for the period January 1, 1990 through June 30, 1990 (over and above that amount already paid).^{4/}

^{2/} See Agreements at 4, §§ 4.1, 4.2.

^{3/} Although the July 12, 1990 invoice reflecting the retroactive rate adjustment was not formally issued until April 1991, Complainant was on formal notice of the amount of the 1990 rate by receipt of the June 1, 1990 prospective rate statement. In any event, receipt of bills in no way affects the extent of Duke's liability in this case.

^{4/} The additional amounts were owed because Duke's CATV pole attachment rate for 1990 was higher than its rate for 1989.

Thus, the invoice applies only to the period January 1 through June 30, 1990.

In contrast, the Complaint was filed with the Commission on November 15, 1990. In accordance with the Commission's Rules, the Commission may "[o]rder a refund, or payment, if appropriate ... from the date that the Complaint, as acceptable, was filed, plus interest." 47 C.F.R. § 1.1410(c). The Commission consistently has applied this rule, limiting the effectiveness of any rate change to the date the complaint was filed. Trenton Cable TV, Inc. v. Missouri Public Service Co., 50 R.R.2d 1395, at 1399 (1982); Riverside Cable TV, Inc. et al. v. Arkansas Power & Light Company, PA85-0001, mimeo 4813 (released May 30, 1985).

As Duke explained in its Answer, Complainant is limited to seeking relief on the rate in effect from the date the Complaint was filed, November 15, 1990.^{2/} Moreover, no claim can be made that the rate in effect on November 15, 1990 was subject to retroactive adjustment. Therefore, the invoice has no relevance to the instant Complaint.

If the newly determined rate had been lower than the interim rate, the licensees would have received a credit for the difference.

^{2/} See Answer of Duke Power Company To The Complaint Filed By TeleCable of Piedmont, Inc., PA90-003, at 23-24 (filed January 18, 1991).

B. Complainant's Window Of Opportunity For Amending Its Complaint Closed Long Ago.

Notwithstanding the above, Complainant should be denied the opportunity to amend its Complaint because it was aware of the retroactive rate adjustment aspect of the Agreement at the time it filed its Complaint.

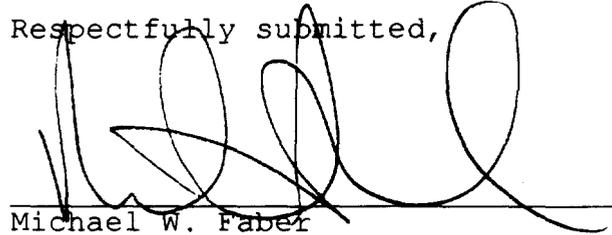
The federal courts long have held that a movant would be denied the opportunity to amend a complaint when movant knew of the facts underlying the amendment at the time the Complaint was filed. See, e.g., Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097 (5th Cir. 1979) cert. denied, 446 U.S. 939 (1980); First National Bank of Louisville v. Master Auto Service Corp., 693 F.2d 308 (4th Cir. 1982); Johnson v. Rogers, 551 F.Supp. 281 (D.C. Cal. 1982).

Duke and Complainant entered into the Agreement on May 1, 1990. Section 4 of the Agreement states that the "Annual Pole Attachment Fee... shall be retroactively adjusted to January 1 and shall be based upon data from [Duke's] FERC Form 1 for the prior year." Thus, Complainant has had actual notice of this provision since that time.^{5/} Since Complainant was aware of this provision six months before it filed the Complaint, and has presented no good cause for amending the Complaint at this late date, the Commission should reject the Amendment.

^{5/} Also, as stated supra at 4, n.3, Complainant has had actual notice of the amount of the increase since June 1990.

WHEREFORE, for the foregoing reasons, Duke Power Company respectfully requests the Commission to reject the Amendment filed by TeleCable of Piedmont, Inc. on May 30, 1991.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael W. Faber", written over a horizontal line.

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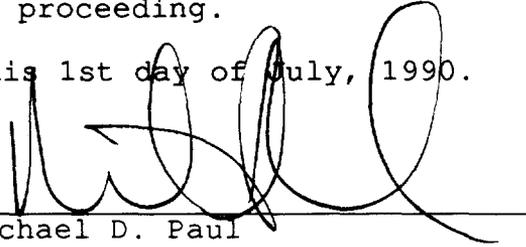
Attorneys for Duke Power Company

July 1, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 1st day of July, 1990.



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