

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	CC DOCKET NO. 95-95
)	
American Cablesystems of Florida, Ltd.,)	
d/b/a Continental Cablevision)	
of Broward County and Continental)	
Cablevision of Jacksonville, Inc.,)	
)	
Complainants)	PA 91-0012
)	
v.)	
)	
Florida Power and Light Company)	
)	
Respondent)	
)	

OPPOSITION TO RESPONDENT'S REQUEST FOR STAY

FP&L's Motion for Abeyance and related Motion for Clarification and Reconsideration expresses confusion over the issues to be resolved by the Hearing Designation Order. Complainant submits that the HDO is quite clear, although some background may be helpful.

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Congress directed the FCC to establish "a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. 95-580, 95th Cong. 1st Sess. 21 (1977). In keeping with that mandate, the Bureau has historically resolved the substantive issues itself (if the parties cannot settle) and left it to the parties to compute the amount of refunds. If the parties are unable to agree on the dollar amount, then the Bureau would issue a subsequent order giving still more specificity. Under the current procedures, the Bureau has again resolved the substantive issue in this case—ruling, as it has before, that maintenance charges are to be calculated per the FCC formula adopted in rulemaking—but has left the ALJ in charge of supervising the settlement of further specification of the amounts in question. As complainants see it, by July 17 the parties are to produce the data from which the appropriate refund may be computed. FP&L must recompute rates for each year during the pendency of the complaint, making the change prescribed by the Bureau. Complainant must submit a schedule of amounts paid, so that the difference may then be computed and refunded with interest. We do not believe that this requires clarification. If FP&L requires additional time in which to mechanically compute the appropriate rates, we are certain that reasonable accommodations may be made. But the case should not be brought to a complete halt.

FP&L has also sought a stay pending reconsideration. Complainants will file an opposition to the Reconsideration Petition when due. However, the filing of such a Petition does not warrant a stay under settled pole doctrine. The test for a stay as set forth in

decisions of the D.C. Circuit¹ requires four factors to be evaluated when a party seeks a stay: (1) the likelihood of the requesting party's success on the merits; (2) the likelihood that irreparable harm to the requesting party will result in the absence of a stay; (3) the absence of harm done to other interested parties in the event the stay is granted; and (4) the extent to which the stay serves the public interest.² Respondent's petition fails to demonstrate either a high likelihood of success on the merits or a high probability of harm. The Commission has already ruled even before this case that maintenance charges are not to be calculated through subaccounts of Account 369 as Respondent claims.³ Relatively modest monetary refunds represent the only penalties facing Respondent; and such monetary damages never constitute irreparable harm.⁴ Granting a stay to Respondent will force Complainant and other interested parties to continue paying pole attachment rental rates which the Commission has deemed unjustifiable. There will be significant and needless harm to other interested parties should the ALJ grant a stay. Finally, there is no evidence that a stay will serve the public interest. A stay would only serve to benefit the Respondent, allowing Respondent to continue charging unjustified rental rates to parties seeking to attach to its poles. Respondent can point to no evidence supporting any of the four elements of the stay test.

¹ See, e.g. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) ("Holiday Tours"); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958) ("Virginia Petroleum").

² Virginia Petroleum, 259 F.2d at 925.

³ Warner Amex Cable v. Arkansas Power & Light Co., PA-82-0019 (October 11, 1983).

⁴ Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C. Cir. 1985).

Several cases illustrate that almost identical claims by electric utility companies and telephone companies fail to satisfy the standard for a stay of a pole attachment decision by the Bureau. Teleprompter Corp. v. Maine Public Service Co., File No. PA-81-0015, Mimeo 001889 (July 6, 1981), Georgia Power Co. v. Columbus Cablevision, Inc., File No. PA-80-0022, Mimeo 30626 (Dec. 28, 1981), Warner Amex Cable Communications, Inc. v. Southwestern Elec. Power Co., File No. PA-82-0017, Mimeo 3410 (April 14, 1982), General Television of Delaware, Inc. v. Diamond State Tel. and Tel. Co., File No. PA-84-0015, Mimeo 2141 (Jan. 28, 1985).

In any event, particularly in pole cases, where appeals from an ALJ's decision moves directly to the Commission, rather than to the Review Board, it is especially appropriate to wait until a final order has issued in this case resolving all of the issues—including the amount of refund—before reconsideration is entertained. Section 1.106 of the Commission's rules states explicitly that petitions for reconsideration of interlocutory actions will not be entertained. 47 C.F.R. § 1.106(a)(1) (1994). See CBS, Inc., 51 F.C.C.2d 651 (1975). In the absence of such a rule, a party might submit a petition for reconsideration simply to reiterate its earlier contentions concerning the issues in question, or as might be the case here, to merely delay the settlement of the case. The Commission's rejection of Respondent's rates constitutes such an interlocutory action and should be denied.

For the following reasons, the Respondent's Request for Stay should be denied.

Respectfully submitted,

**American Cablesystem of Florida, Ltd., d/b/a
Continental Cablevision of Broward County
Continental Cablevision of Jacksonville, Inc.**

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July 13, 1995

CERTIFICATE OF SERVICE

I, Nichele Y. Rice, hereby certify that I have this 13th day of July, 1995, caused a copy of the foregoing to be delivered by first class mail, postage pre-paid tot he following:

Hon. Edward Luton
Administrative Law Judge
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