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October 30, 2015

File Number: 36EX-178808

**VIA Email and Electronic Filing**

Michael Engel  
Lisa Griffin  
Federal Communications Commission  
Enforcement Bureau  
Market Disputes Resolution Division  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Charter Communications, LLC v. Georgia Power Co., EB Docket No. 14-210,  
File No. EB-12-MD-02**

Dear Mr. Engel and Ms. Griffin:

On behalf of Charter Communications, LLC ("Charter"), the purpose of this letter is to apprise the Enforcement Bureau of recent filings in the U.S. District Court for the Northern District of Georgia. In light of these filings, summarized below and attached to this letter, Charter requests either a ruling on Charter's pending Second Amended Complaint, a statement from the Bureau regarding its intent to rule on this matter, or a confidential Staff-supervised mediation session between Charter and Georgia Power. If the Commission is not yet ready to issue a ruling, reviving the parties' prior good-faith efforts to settle the matters raised in this proceeding through mediation may be appropriate.

Apparently, Georgia Power's counsel in the federal court case (different from its counsel here) has grown impatient with the Commission's timetable for resolving this matter. On September 29, 2015, its federal court counsel filed a petition requesting that court to lift its stay of that case despite the fact that the Commission has not yet resolved the matters the court referred to it. Georgia Power asserts in that filing that the FCC has allowed this proceeding to fall "dormant," obscuring and putting at risk the extensive factual and legal record Staff and the parties worked diligently to develop, and jumbling the issues that have been appropriately segregated between the Commission and the court. Georgia Power's petition is attached as Exhibit A. Charter filed its response to Georgia Power's petition, attached as Exhibit B, on

Michael Engel  
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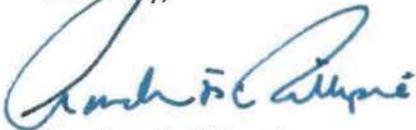
October 16, 2015. And Georgia Power filed its reply, attached as Exhibit C, on October 29, 2015.

Georgia Power's motion is now ripe for decision. If the court were to lift its stay, the parties could be thrust back into lengthy and expensive litigation of these matters in that forum, wasting their extensive efforts in this one. And the Commission would risk losing control of the important ratemaking and policy issues that fall clearly within its exclusive and primary jurisdiction.

While Charter would prefer a prompt decision by the Commission on the briefs as filed, the additional proceedings since the parties' last mediation have clarified the disputed matters and the parties' positions. All stakeholders – including the parties and Staff – now have the benefit of a complete factual and legal record on which to explore a resolution. A renewed effort to settle this matter before the Commission – to the extent the Commission is not yet ready to rule – also could avoid possible interference by the federal district court with the important ratemaking and policy matters that court referred to the FCC and that Charter incorporated into its Second Amended Complaint.

For these reasons, Charter requests either a ruling on its pending complaint, a statement from the Bureau regarding its intent to rule on the complaint, or that Staff schedule a confidential Staff-supervised mediation session at a mutually agreed-upon time. Thank you for your continued efforts in this matter.

Sincerely,



Gardner F. Gillespie  
Partner  
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

GFG/gs

cc: Eric Langley

SMRH:224312451

# **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

GEORGIA POWER COMPANY,

Plaintiff,

v.

CHARTER COMMUNICATIONS,  
LLC, et al.,

Defendants.

Civil Action No.

1:11-cv-04461-MHS

**GEORGIA POWER COMPANY’S MOTION TO  
LIFT THE STAY WITH MEMORANDUM OF LAW IN SUPPORT**

Plaintiff Georgia Power Company (“Georgia Power”) moves this Court to revisit its previous orders and lift the stay imposed on this case. This stay has been in place for nearly three years, and has provided more than sufficient time for the Federal Communications Commission (“FCC”) to provide guidance insofar as its limited jurisdiction affects this case. It has become clear that the interests of administering justice and the costs of further delay outweigh any possible value of staying the case.

**I. INTRODUCTION**

Georgia Power filed this action on December 22, 2011, alleging that Charter unlawfully withheld information from Georgia Power resulting in Charter’s underpayment of fees for attachments to Georgia Power’s utility poles. Georgia

Power has pled that these actions constitute breach of contract (or, in the alternative, unjust enrichment) and fraud, which are claims that only this Court has the power to decide. Charter responded by filing a complaint with the FCC which Charter then used as justification for seeking a stay of this litigation from this Court.

In an order dated October 22, 2012, the Court first entered a stay of Georgia Power's contract claims to give the FCC an opportunity to rule on the issues raised in Charter's pole attachment complaint. Order, Oct. 22, 2012, at 23-24, 27 (ECF Doc. 43).<sup>1</sup> The Court emphasized that the stay was only a discretionary accommodation to give the FCC a chance to guide the Court on issues common to the two proceedings. *Id.* at 24-25. Furthermore, the Court's order displays an expectation that the FCC would resolve Charter's complaint without prejudice to Georgia Power's contract claims. *Id.* at 25-26 (noting that the parties should return to the Court upon completion of the FCC proceeding, and refusing to dismiss the contract claims with prejudice to allow Georgia Power to preserve its claims in front of the Court). This case has been on hold ever since the Court's October 22, 2012 order.

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<sup>1</sup> This stay was initially based only upon certain contracts Charter submitted as possibly relevant to this dispute. The Court also ordered Georgia Power and Charter to file any additional contracts that could form the basis of Georgia Power's claims. *Id.* at 29.

Georgia Power submitted a motion to certify the October 22, 2012 order for interlocutory appeal or for final judgment, or in the alternative for reconsideration, on November 14, 2012 (ECF Doc. 45). On May 28, 2013, the Court entered an order (ECF Doc. 55) on this motion. First, the Court converted the previous dismissal of Georgia Power's fraud claims into a dismissal without prejudice with leave "to file an amended Complaint properly alleging its fraud claim and related claim for punitive damages." Order, May 28, 2013 at 20 (ECF Doc. 55). Then, the Court denied Georgia Power's motion as it pertained to the contract claims, continuing to stay these claims under primary jurisdiction. *Id.* at 40. The Court reasoned that the stay would maximize the efficiency of the Court's resources, *id.* at 37-38, and affirmed that the ultimate issue of enforcing the applicable contracts remained in the Court's jurisdiction, *id.* at 44.

Subsequently, Georgia Power filed its Second Amended Complaint, (ECF Doc. 56), and filed 124 contracts with the Court, (ECF Doc. 61). Charter filed a motion to dismiss this Second Amended Complaint, alleging (1) that Georgia Power failed to sufficiently plead its fraud claims; and (2) if the Court would not dismiss the amended fraud claims, that Georgia Power's fraud claims were identical to the contract claims and therefore should be subject to the same stay pending a ruling from the FCC. (ECF Doc. 60).

In an October 11, 2013 order, the Court denied Charter's motion to dismiss and extended the October 22, 2012 stay to cover both Georgia Power's fraud claims and Georgia Power's contract claims. Order, Oct. 11, 2013 at 15-16 (ECF Doc. 66). The Court again emphasized that it assumed the FCC proceeding would be resolved swiftly and that the stay would not result in undue prejudice to Georgia Power. *Id.* at 12.

Nearly three years have passed since this Court entered the stay. Over three and a half years have passed since Charter filed its FCC complaint. The supplemental (and final) briefing in the FCC proceeding concluded more than a year ago, but the FCC still has not ruled. Meanwhile, Georgia Power is no closer to resolving its claims in this lawsuit, and the costs of delaying Georgia Power's access to justice continue to grow with time. It is time to lift the stay and move forward.

## **II. LAW & ANALYSIS**

### **A. The Law Limits the Time for Staying a Case Based on Primary Jurisdiction, and That Limit Has Expired**

The doctrine of primary jurisdiction, which was the sole basis for staying this case, now dictates that this case be allowed to proceed. The premise of primary jurisdiction is that parties should be permitted a reasonable opportunity to seek administrative review when necessary. *Reiter v. Cooper*, 507 U.S. 258, 268

(1993). But that opportunity is not unlimited. Courts must always balance the usefulness of seeking (or awaiting) administrative review with “the need to resolve disputes fairly yet as expeditiously as possible.” *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976).

Case law instructs that a judicial stay must be temporary; if an agency does not rule, a court must exercise its jurisdiction after a reasonable amount of time has passed. *See Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 206 (5th Cir. 1988) (directing the trial court to stay proceedings no more than 180 days to allow an agency to rule on certain issues); *Pickens v. Am. Credit Acceptance, LLC*, No. 2:14-00201-KD-N, 2014 U.S. Dist. LEXIS 131587, at \*8 (S.D. Ala. Sept. 19, 2014) (stay of no more than six months); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60-61 (2nd Cir. 1994) (staying the action but permitting the plaintiff to apply to dissolve the stay if the agency failed to rule within eighteen months).

Here, it is patently unreasonable to continue this stay any longer. The parties have exhausted the FCC’s complaint and mediation processes, leaving no realistic hope of settlement or other conciliation. *See Order*, Oct. 11, 2013 at 12 (ECF Doc. 66) (listing possible settlement through mediation as a reason supporting a stay). The FCC proceeding has been dormant for more than twelve

months and there is no further briefing, hearings, meetings, or other activity scheduled in the proceeding. The FCC has had ample time in which to rule if it wished to do so. *See* 47 U.S.C § 208(b) (1) (allowing FCC a maximum of 5 months to rule on even complex formal complaints); *see also* 47 CFR § 1.1414(e)(2) (FCC rule allows states a maximum of 360 days to rule on pole attachment complaints). Any reasonable time for an FCC ruling has long since passed. It is time to move forward.

It is essential to remember that this Court issued a stay only to give the FCC an *opportunity* to rule if it chose, not because the Court lacked jurisdiction over Georgia Power's claims. Order, Oct. 22, 2012 at 25-26 (ECF Doc. 43); Order, Oct. 11, 2013 at 10 (ECF Doc. 66). Courts commonly determine issues that happen to fall within a regulatory agency's purview so long as the agency has previously developed guidance sufficient for courts to interpret the facts in front of them. *See College Park Holdings v. Racetrac Petroleum*, 239 F. Supp. 2d 1322, 1328 (N.D. Ga. 2002) ("ample documentation of the agency's institutional attitudes and remediation expectations" allowed the court to fashion relief without the regulatory agency's immediate input); *see also Holcombe v. Credit Prot. Ass'n, LP*, No. 3:14-cv-14, 2014 U.S. Dist. LEXIS 122054, at \*10 (M.D. Ga. Aug. 28, 2014) (a lack of any issues of first impression weighs against entering a stay for primary

jurisdiction). When a case primarily concerns legal issues entrusted to the courts, the balance tips even further toward proceeding in court. *See Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 990 (D. Haw. 2014) (competence of an agency to pass on a question is insufficient to require a stay where the agency's statutory scheme entrusts courts to rule on relevant issues).

This is a pole rent collections case with an accompanying fraud claim. Both the courts and the FCC have long recognized that these claims belong in the judiciary. *See, e.g., Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675, 679 (D.C. Cir. 2003) (citing *Appalachian Power Co.*, 49 Rad. Reg. 2d (P&F) 574, 578 (1981)); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd 11599, 11601 (1999) (the Commission "will not assert its jurisdiction merely to enforce the terms of a pole attachment agreement"). Although Charter has repeatedly claimed that this case is somehow infected with broad, sweeping regulatory concerns that only the FCC can address, Charter's actual filings in the FCC proceedings have confirmed what Georgia Power has said all along: this is a state law matter that does not implicate the policy functions of the FCC. Indeed, the only aspect of this case that even in theory is committed to the FCC's jurisdiction is Charter's defense that Georgia Power somehow miscalculated the past-due pole rental rates it is trying to collect. That issue pertains at most only to

the level of damages, not to whether Charter is liable. Because Georgia Power's pole rental rates are presumptively correct until the FCC finds otherwise, and because those rates in any event cannot be challenged retroactively<sup>2</sup>, that issue in no way prevents this case from moving forward. If the FCC thought the rates were miscalculated it could certainly have so ruled by now, and if it chooses to make such a ruling in the future this Court can certainly take that ruling into account. But awaiting indefinitely a rate ruling that may never come is neither necessary nor just.

Nor does this case contain any other issue implicating the FCC's exclusive jurisdiction. Both parties have represented to the FCC that this matter poses no "case of first impression" regulatory issues such as reclassification of services.<sup>3</sup> Charter has further implicitly admitted to the FCC that the issue of whether Charter is obligated to pay the telecom rate for telecommunications services is an issue of

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<sup>2</sup> The FCC can review only rates in effect *after* the date that Charter filed its FCC complaint, which was filed *after* this action. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 FCC 2d 1585, 1600 (1978) (relief granted prospectively in order to avoid abuse of FCC rate review by cable operators). And even this limited possibility of rate review poses no meaningful conflict with this Court's jurisdiction; case law clearly allows a court to exercise its jurisdiction in this scenario. *See Georgia Power's Sept. 16, 2013 Resp. in Opp. to Charter's Mt. to Dismiss* (ECF Doc. 63) at 17-19 (collecting and discussing other cases where courts have proceeded even with possibility of prospective rate review by the FCC).

<sup>3</sup> *See Statement of Undisputed Facts* filed with the FCC at ¶¶ 17, 18, attached as Exhibit 1.

contract construction that falls within this Court's jurisdiction.<sup>4</sup> And to the extent Charter disputes whether the services provided over its attachments have already been classified as telecommunications services, that determination requires no more than reference to existing FCC and judicial rulings. With an abundance of such guidance by which to steer its way, the Court is well-equipped to proceed on this matter. *See College Park Holdings*, 239 F. Supp. 2d at 1328.

This situation is nearly identical to *Tampa Elec. Co. v. Bright House Networks, LLC*, Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 06-00819. In that case the plaintiff utility brought breach of contract and unjust enrichment claims against the defendant cable provider for failing to pay the telecom rate for telecommunications use of attachments. As in this case, the defendant sought to derail the litigation by filing an FCC complaint and asking the court to stay the case on grounds of primary jurisdiction. The court granted the stay. After eighteen months without an FCC ruling, the court lifted the stay. *See Order Granting Tampa Electric's Mt. to Revisit Partial Stay of Discovery*, May 22, 2008, attached as Exhibit 3. The case then proceeded to trial. Significantly, the FCC never did rule on the merits of that FCC

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<sup>4</sup> *See* Charter's FCC Post-Discovery Brief at 4, attached as Exhibit 2 ("Assuming a contractual obligation to pay a rate as high as the Telecom Rate (an issue that is pending in Georgia Power's federal court lawsuit against Charter) . . .").

complaint.

**B. Lifting the Stay is Required to Avoid Further Undue Prejudice to Georgia Power**

As long as this stay remains in place, Georgia Power continues to suffer harm of exactly the type that has been recognized as relevant and important, including the following:

*i. Expense and delay.*

As a general principle, courts should be reluctant to invoke primary jurisdiction because it “often results in additional expense and delay.” *Holcombe*, 2014 U.S. Dist. LEXIS 122054, at \*3. Charter’s tactics have forced Georgia Power into an unnecessary and protracted FCC proceeding. *See infra.* at 5-6. As Georgia Power has already shown, the FCC’s lack of jurisdiction over the claims in this action means the FCC cannot give Georgia Power the relief it seeks. *See* Georgia Power’s May 17, 2012 Resp. to Charter’s Mt. to Dismiss (ECF Doc. 36) at 7-11. Charter got the stay it requested and has had every chance to convince the FCC to rule in its favor. Nothing has come of it. Enough is enough.

*ii. Prejudice to Georgia Power’s claims.*

Georgia Power needs discovery on key factual issues, including facts necessary to determine which of over 100 contracts are applicable to this case, facts surrounding the related issue of Charter’s complicated history of corporate

restructuring, and facts relating to how Charter's attachments have been used by itself and others. These are facts directly relevant to Georgia Power's breach of contract and fraud claims. The evidence sought is increasingly in danger of escaping this Court's rightful jurisdiction as time goes on, records are lost, and memories fade. *See Jordan v. Nationstar Mortg. LLC*, No. 14-cv-00787, 2014 U.S. Dist. LEXIS 148844, at \*11 (N.D. Cal. Oct. 20, 2014) (considering the plaintiff's charge that "discovery is growing stale, [and] that witness[']s memories are fading").

*iii. Further potential wrongdoing by the Defendant.*

Charter admits to having used its attachments for telecommunications services during the relevant years of this dispute without ever informing Georgia Power. *See* Second Am. Compl. at ¶¶ 25 n.1, 27-30 (ECF Doc. 56); Charter's Second Am. FCC Compl. at ¶¶ 81-85, 92-102, 154, attached as Exhibit 4. Georgia Power has proffered to this Court extensive evidence of far more telecommunications usage than Charter will admit. Only full discovery and adjudication under this Court's jurisdiction will provide the justice appropriate for this wrongdoing. *See Hawai'i Wildlife Fund*, 24 F. Supp. 3d at 992 (administrative ruling has to come within a reasonable amount of time, otherwise "a defendant would be able to buy itself potentially years" of further wrongdoing).

### III. CONCLUSION

For the foregoing reasons, Georgia Power respectfully requests that the Court lift the stay imposed by the October 22, 2012 and October 11, 2013 orders and allow this case to proceed.

Respectfully submitted this 29th day of September, 2015.

TROUTMAN SANDERS LLP

*/s/ Robert P. Williams II*

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*Attorneys for Plaintiff Georgia Power  
Company*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(D) of the Local Rules for the United States District Court for the Northern District of Georgia, I hereby certify that the foregoing has been prepared in Times New Roman, 14 point font, as permitted by Local Rule 5.1(B) and (C).

*/s/ Robert P. Williams II* \_\_\_\_\_

Robert P. Williams II

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

GEORGIA POWER COMPANY,  
Plaintiff,  
v.  
CHARTER COMMUNICATIONS,  
LLC, et al.,  
Defendants.

Civil Action No.  
1:11-cv-4461-MHS

**CERTIFICATE OF SERVICE**

I certify that on September 29, 2015, a copy of the foregoing *Georgia Power's Motion to Lift the Stay* was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all counsel of record.

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*/s/ Robert P. Williams II*  
\_\_\_\_\_  
Robert P. Williams II

# **Exhibit B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

_____	)	
GEORGIA POWER COMPANY,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	1:11-CV-4461-MHS
CHARTER COMMUNICATIONS, LLC,	)	
et al.,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’<sup>1</sup> MEMORANDUM IN OPPOSITION  
TO GEORGIA POWER’S MOTION TO LIFT THE STAY**

**I. INTRODUCTION**

This Court has correctly ruled on three separate occasions that the claims of Plaintiff Georgia Power Company (“Georgia Power”) should be stayed pending the Federal Communications Commission’s (“FCC”) determination of the meaning

<sup>1</sup> Charter Communications, LLC, Charter Communications Properties, LLC, Cable Equities Colorado, LLC, Falcon Cable Media, Falcon Cablevision, Falcon Community Ventures I, HPI Acquisition Co. LLC, Marcus Cable Associates, L.L.C., Peachtree Cable TV, L.P., Robin Media Group, Inc. and Vista Broadband Communications, LLC (collectively “Charter”).

and reasonableness of “attachment rate” as that term is used in the parties’ pole attachment agreements. *See* Oct. 22, 2012, Order [DN 43]; May 28, 2013, Order [DN 55]; Oct. 10, 2013, Order [DN 66]. Georgia Power now asks the Court to reverse its conclusions and lift the stay imposed under the primary jurisdiction doctrine. *See, generally*, Mot. to Lift Stay [DN 84]. Georgia Power does not invoke any fundamental change in the facts or circumstances of this lawsuit. Instead, it simply complains that the FCC is taking too long to rule on Charter’s pending complaint. *See id.* Georgia Power’s impatience is not a legitimate basis for lifting the stay—especially when all of the reasons that this Court originally decided to defer to the FCC still apply.

The Court has already found that the specialized knowledge of the FCC regarding the reasonableness of pole attachment rates is necessary to define “attachment rate” as that term is used in the parties’ pole attachment agreements. Charter’s FCC complaint is fully briefed and awaiting a ruling. The Court has also already rejected Georgia Power’s arguments that its claims do not invoke the jurisdiction of the FCC or can be resolved without an FCC determination. Finally, the Court has already recognized that Georgia Power is not prejudiced by waiting to proceed with discovery until after the FCC rules. Georgia Power’s Motion is just a rehash of the arguments it made when it opposed the stay initially, and a

rehash of the arguments it raised when it moved the Court to lift stay in opposition to Charter's Motion to Dismiss the Second Amended Complaint. The Court rejected those arguments twice before and it should do so again.

Nor can Georgia Power demonstrate any actual prejudice arising from the current stay. There is no concern about missing evidence. Charter has complied with its obligations to retain and preserve evidence relevant to Georgia Power's claims. Moreover, if Georgia Power were to prevail in this litigation it could be made whole through compensatory damages. According to the various iterations of its Complaint, Georgia Power has been operating under the current status quo since at least 2001. It will not suffer any irreparable harm while the stay remains in place. The public's interests of regulatory consistency far outweigh Georgia Power's narrow interest in avoiding a potential delay in damages that may or may not ever be awarded.

For these reasons, the Court should deny Georgia Power's Motion.

## **II. BACKGROUND**

Georgia Power filed this lawsuit on December 22, 2011. *See* Complaint [DN 1]. Georgia Power's claims that Charter must pay Plaintiff the "Telecom Rate" under 47 U.S.C. § 224(e) (as calculated by Plaintiff) instead of the "Cable Rate" under 47 U.S.C. § 224(d) for the privilege of attaching wires to Georgia

Power's utility poles because it uses those wires to provide "telecommunications services" under 47 U.S.C. § 224 are governed by the FCC's exclusive ratemaking authority under the Pole Attachment Act (47 U.S.C. § 224(b)(1)).

The FCC has exclusive jurisdiction to determine the rates that apply to Charter's pole attachments. The technical regulatory classification of Charter's services under the Communications Act and the ratemaking issues raised by those classifications carry nationwide implications for development of competition in the provision of communications services, including advanced IP-Enabled voice and other broadband services. For those reasons, Charter filed a regulatory complaint with the FCC asking it to determine, among other things, (1) whether the Cable Rate is the just and reasonable rate for Charter's attachments and (2) whether Georgia Power's attempt to charge Charter the Telecom Rate would impose an unjust, unreasonable, and unlawful rate under the Pole Attachment Act.

On October 22, 2012, this Court entered an order staying this case because "the parties' dispute over the applicable rate and whether it is reasonable is within the primary jurisdiction of the FCC." Oct. 22, 2012 Order [DN 43] at 21.<sup>2</sup> The

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<sup>2</sup> The Court also dismissed Georgia Power's unjust enrichment claim without prejudice (*see* Oct. 22, 2012, Order [DN 43] at 38), Georgia Power's fraud claim with prejudice (*See id.* at 41-42), and Georgia Power's punitive damages claim with prejudice. *See id.* at 42.

Court further concluded that “the specialized knowledge of the FCC regarding the reasonableness of pole attachment rates is needed to define ‘attachment rate’ and a deferral to the FCC is necessary for a uniform interpretation of the regulations.” *Id.* at 24. According to the Court, the FCC “will not be concerned with whether Charter failed to pay Georgia Power, but with what the applicable rate is and whether it is reasonable.” *Id.* at 25-26.

The Court did not place a time limit on its stay order. Rather, it unequivocally instructed that the parties should return to this Court *only* after the FCC resolves the rate issue and defines what is reasonably meant by “attachment rate” in this case. *See id.* at 25 (“Therefore, after the FCC resolves the rate issue and defines what is reasonably meant by ‘attachment rate’ in this case, the parties may return to this Court to determine whether Charter did in fact breach the contract by not paying the FCC-defined ‘attachment rate.’”). Even then, the Court instructed that the parties would only need to return to this Court “if the FCC determines that the rate to be paid is not the rate Charter has already tendered.” *Id.* at 26.

In response, Georgia Power filed a Motion for Interlocutory Appeal or Alternatively Motion for Reconsideration. *See, generally,* Motion for Reconsideration [DN 45]. On May 28, 2013, the Court entered an order

converting its dismissal of Georgia Power's fraud and punitive damages claims to a dismissal without prejudice, and directing Georgia Power to file an amended complaint regarding its fraud and punitive damages claims. *See* May 28, 2013, Order [DN 55] at 47. The Court also directed the parties to file any other contracts upon which Georgia Power's claims are based. *See id.* With respect to the stay, the Court specifically rejected Georgia Power's attempt to separate the issue of contract construction from the issue of ratemaking (the same argument it makes in this Motion). *See id.* at 44 ("The Court finds Georgia Power's argument separating the issue of contract construction, and qualifying that issue as a final judgment, from the remainder of the breach of contract claims, to be unavailing.")

Georgia Power filed its Second Amended Complaint on June 11, 2013 (*see, generally*, Second Am. Compl. [DN56]), and filed 124 additional contracts that may, or may not, apply to Georgia Power's claims on September 3, 2013. *See* Notice of Filing Additional Contract Documents [DN 61]. Charter moved to dismiss Counts VI and VII of the Second Amended Complaint. *See* Charter MTD [DN 60]. In its response to Charter's motion, Georgia Power asked the Court to vacate the stay and revisit its decision to defer to the FCC for determination of "attachment rate" because the FCC had not ruled in the 18 months since Charter filed its FCC complaint. *See* GP Resp. to MTD [DN 63].

On October 10, 2013, the Court entered an order denying Charter's Motion to Dismiss, and ruling that the stay would remain in effect "pending conclusion of the FCC proceedings." *See* Oct. 10, 2013, Order [DN 66] at 17. The Court held that "the crux of the issues in Charter's FCC complaint and the stayed claims from this case pending before the FCC are the same." *Id.* at 12. The Court again confirmed that the stay would last until the FCC determined a reasonable rate (*id.* at 15), and that it would be a waste of resources to allow Georgia Power to proceed on fraud and punitive damages claims that may become moot depending on the FCC's determination. *Id.* at 16. "In sum, the Court stays all of the claims in this case *until the parties resolve the rate issues before the FCC.*" *Id.* (emphasis added).

Charter filed its FCC Complaint on February 24, 2012. On December 5, 2012, the FCC stayed the proceedings with the agreement of *both Georgia Power and Charter* until this Court resolved Georgia Power's Motion for Interlocutory Appeal. The parties' jointly agreed stay lasted until October 10, 2013 when this Court entered an order on Charter's Motion to Dismiss the Second Amended Complaint. After that order the parties engaged in multiple rounds of briefing and limited discovery in the FCC proceeding. The parties also participated in an,

ultimately unsuccessful, FCC-mediated settlement conference. As of September 8, 2014, Charter's FCC Complaint is fully briefed and ripe for resolution.

### III. ARGUMENT

**A. Nothing has occurred that would require the Court to lift the stay before the FCC determines the meaning and reasonableness of "attachment rate" as that term is used in the parties' Parties' Pole Attachment Agreements.**

The Court stayed this case under the doctrine of primary jurisdiction. The primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties," and is particularly appropriate where the agency possesses "expert and specialized knowledge" in a particular area. *See United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* at 64. "If the case involves questions that are beyond the Court's competence or that should be resolved by an agency in order to promote uniformity, the Court should stay the proceedings and refer the case to the appropriate agency." *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1220 (S.D. Ga. 1997) (referring issues to the FCC's primary jurisdiction).

The Court already ruled that Georgia Power's claims in this case require resolution of issues within the FCC's primary jurisdiction. *See* Oct. 22, 2012, order [DN 43] at 20. Once courts invoke the primary jurisdiction doctrine and stay a matter pending agency action, they rarely lift the stay unless the reasons for which the Court deferred to the agency and issue the stay in the first place no longer apply. *See, e.g., Sw. Bell Tele., L.P. v. Vartec Telecom, Inc.*, 2008 WL 4948475, at \*2 (E.D. Mo. Nov. 10, 2008) (denying motion to lift stay where "all of the reasons for deferring to the primary jurisdiction of the FCC remain in place at this time"); *Union Elec. Co. v. Cable One, Inc.*, 2013 WL 2286055, at \*2 (E.D. Mo. May 23, 2013) (denying motion to lift stay based on primary jurisdiction referral to FCC; noting, in spite of "further delay . . . the Court finds that this detriment is outweighed by the FCC's expertise."); *Brian Glauser v. Twilio, Inc.*, No. C. 11-2584 P PJH, DN 88 (N.D. Cal. Dec. 4, 2013) (unpublished) (denying motion to lift stay based on lack of action by FCC)<sup>3</sup>; *see generally Owner Operated Indpt. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 785-86 (8th Cir. 1999) (nothing "[w]hen the agency declines to provide guidance or to commence a proceeding that might obviate the need for judicial action, '[t]he court

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<sup>3</sup> A copy of the Court's order is attached hereto as Exhibit 1.

[can] then proceed according to its own light”); *Atchison, Topeka & Santa Fe Railway Co. v. Aircoach Transp. Ass’n.*, 253 F.2d 877, 886 (D.C. Cir. 1958) (holding that Court can “proceed according to its own light to interpret” certain issues after an agency “might disclaim jurisdiction, or for some other reason might refrain from deciding these questions”).

Nothing has changed in this case since the Court entered the stay. The law with respect to primary jurisdiction has not been altered, and the cases the Court relied on when it twice rejected Georgia Power’s efforts to avoid a stay are still good law. This Court previously held that “[w]ithout a clear definition of ‘attachment rate’ from the contract, the parties are left with a dispute about what the rate should be.” Oct. 22, 2012, Order [DN 43] at 21. The Court further held that “the FCC has primary jurisdiction to determine the meaning and reasonableness of ‘attachment rate’ in this case,” and that “the specialized knowledge of the FCC regarding the reasonableness of pole attachment rates is needed to define ‘attachment rate’” as that term is used in the parties’ contracts. *Id.* at 24. Tellingly, Georgia Power identifies no authority for the proposition that this Court can invade the FCC’s current proceeding midstream and usurp its power to determine the meaning and reasonableness of “attachment rate” as that

term is used in the parties' contracts. Nor does Georgia Power articulate any new analysis for its contention that the Court's prior rulings are incorrect.

Instead, Georgia Power recycles the arguments it unsuccessfully advanced in numerous earlier motions and briefs. This Court has long since considered, and properly rejected, those arguments—including Georgia Power's continued attempt to draw a distinction between contract interpretation and the rate making issue before the FCC as a basis for lifting the stay. *See* Mot. to Lift Stay [DN84] at pp. 7-9. The Court rejected this very argument because it identified the central issue in this case as what is meant by "attachment rate" as that term is used in the parties' pole attachment agreements. *See* May 28, 2013, Order [DN 55] at 44. The Court found that the FCC should determine the meaning and reasonableness of the contractual "attachment rate." *See* Oct. 22, 2012, Order [DN 43] at 24 ("The Court concludes that the specialized knowledge of the FCC regarding the reasonableness of pole attachment rates is needed to define 'attachment rate' and a deferral to the FCC is necessary for uniform interpretation of the regulations.")). Until the FCC properly resolved that that issue, the Court concluded it could not interpret the parties' pole attachment agreements. *See id.* at 24-25.

Georgia Power's only new argument is essentially that this Court is required to abandon its previous orders and lift the stay because the FCC is taking too long

to rule. *See* Mot. to Lift Stay [DN 84] at 5. That argument is wholly untenable where, like here, the reason for issuing the stay still exists. *See Sw. Bell Tele., L.P.*, 2008 WL 4948475 at \*2; *Union Elec. Co.*, 2013 WL 2286055 at \*2; *Brian Glauser*, No. C. 11-2584 P PJH, DN 88 (N.D. Cal. Dec. 4, 2013). Nor has the passage of time fundamentally changed the central issue in this case. The Court still requires a definition of “reasonable rate” before it can interpret the parties’ pole attachment agreements.

The cases cited by Georgia Power (*see* Mot. to Lift Stay [DN 84] at 5) are inapposite. In *Wagner* and *Weicker*, the courts issued stays for set periods of time under the primary jurisdiction doctrine, but allowed the stays to be extended upon a showing of good cause. *See Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 206 (5th Cir. 1988) (granting a stay of 180 days with the option to extend it further for good cause shown); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 29 F.3d 51, 60-61 (2nd Cir. 1994) (granting a stay of 18 months with the opportunity to show why the stay should not be dissolved after expiration of the initial period). The *Picken’s* court granted a six month stay without comment as to extension or dissolution of the stay after expiration of the initial six month period. *See Pickens v. Am. Credit Acceptance, LLC*, No. 2:14-00201-KD-N at p. 6-7 (S.D. Ala. Sept. 19, 2014). None of these cases mandated that the stay be lifted if the

agency did not rule in the time allotted by the Court. And none state an inviolate rule that a stay can only remain in effect for a set time period.

The only case Georgia Power can identify where a court actually lifted a stay granted under the primary jurisdiction doctrine is an unreported order from a state court in Hillsborough County, Florida. *See* Mot. to Stay [DN 84] at 9 (citing *Tampa Elec. Co. v. Bright House Networks, LLC*, Hillsborough County, Florida, Case No. 06-00819). The Hillsborough County Circuit Court's order is neither binding nor persuasive. Moreover, the decision to grant or lift a stay under the primary jurisdiction doctrine is not a one size fits all test, but is dependent on the particular facts and circumstances of each case. *See Access Telecomm. v. Sw. Bell Tele. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) ("There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. Rather, in each case we consider whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created.") (internal citations omitted). Contrary to Georgia Power's self-serving summary, the order attached as Exhibit 3 to Georgia Power's Motion to Stay does not provide any legal analysis or explanation for why the Hillsborough County Circuit Court decided to lift the stay in that particular case. *See* Mot. to Stay at Exhibit 3 [DN 84-3].

Georgia Power's attempt to classify this case as a run of the mill "pole rent collections case with an accompanying fraud claim" is disingenuous at best. The Court has already found that this case involves more than allegations of simple non-compliance with a contract, and that "the specialized knowledge of the FCC regarding the reasonableness of pole attachment rates is needed to define 'attachment rate' and a deferral to the FCC is necessary for a uniform interpretation of the regulations." Oct. 22, 2012, Order [DN 43] at 24. Georgia Power specifically invoked the FCC's exclusive jurisdiction under the Pole Attachment Act by alleging that Charter is providing "telecommunications services," that the Telecom Rate applies to attachments used to provide those services, and that Charter owes "the appropriate Telecom Rate payments for each attachment used for telecommunications services minus the Cable Rate already received." Second Am. Compl. ¶¶ 38, 17, 21-22. The fraud and punitive damages claims are derivative of Georgia Power's breach of contract claims. *See* Oct. 10, 2013, Order [DN 66] at 15.

There has been no development that would render proceeding with this litigation prior to an FCC ruling any less of a waste of resources than this Court found it would be in October 2012, or October 2013. At this point—when the FCC proceeding is fully briefed and awaiting a decision—it would make even less sense

for the Court to attempt to address the meaning and reasonableness of “attachment rate” before the FCC than it did when the Court entered the stay in the first place. The most efficient use of resources is to keep the stay in place and wait for a decision from the FCC which is best equipped to handle the technical complexity of determination of what is a “reasonable rate” under the parties’ contracts.<sup>4</sup>

**B. Georgia Power is not suffering any prejudice because of this Court’s decision to stay.**

Georgia Power argues that the Court should lift the stay because it will suffer undue prejudice in the form of expense and delay, inability to perform discovery, and further alleged wrongdoing by Charter. *See* Mot. to Stay [DN 84] at pp. 10-11. Georgia Power’s arguments are without merit.

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<sup>4</sup> Furthermore, if the Court lifts the stay and allows these proceedings to continue on a parallel track with the FCC’s consideration of the same issues, its resolution may be inconsistent with the FCC’s well-established jurisprudence in this field and may conflict with subsequent FCC classifications. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 979-86 (2005) (reversing the Ninth Circuit where its decision to classify a service as a “telecommunications service” conflicted with the FCC’s later rulemaking on the same issue); *See also Clark*, 523 F.3d at 1114 (expressing concern that a judicial decision on the regulatory classification “could jeopardize the uniform administration of the FCC’s regulatory scheme”); *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144 (W.D.N.Y. 2005) (staying lawsuit and referring issue of VoIP’s status to FCC); *Public Serv. Comm’n of Colo. v. Mile-Hi Cable Partners, L.P.*, 995 P.2d 310 (Colo. Ct. App. 1999) (deferring to the FCC on reasonableness of penalty for a cable operators’ unauthorized attachments).

*First*, Charter did not force Georgia Power into an “unnecessary and protracted FCC proceeding.” It was the Court that ruled it cannot resolve this dispute with a “clear definition of ‘attachment rate,’” that the “parties’ dispute over the applicable rate and whether it is reasonable is within the primary jurisdiction of the FCC” (*see* Oct. 22, 2012, Order [DN 43] at 21), and that “the FCC has primary jurisdiction to determine the meaning and reasonableness of ‘attachment rate’ in this case.” *Id.* at 24. Other courts have reached the same conclusion. *See Union Elec. Co. v. Cable One, Inc.*, 2011 WL 4478923 at \*4 (E.D. Mo. Sept. 27, 2011) (staying nearly identical pole attachment case under primary jurisdiction doctrine because the classification of cable based information or telecommunication services involves a technical inquiry that is outside of the traditional expertise of the court, and has far-reaching consequences that concern the promotion of uniformity and consistency in the regulatory scheme promulgated by the FCC).

*Second*, Georgia Power’s argument that “evidence” it needs in order to prosecute its claims is “in danger of escaping this Court’s rightful jurisdiction” is absurd. Mot. to Stay [DN 84] at 11. Georgia Power offers no facts to support that statement. Charter is required by law to preserve documents, data, and other information relevant to Georgia Power’s alleged claims in this lawsuit or face potentially stiff penalties. *See In re Delta/AirTran Baggage Fee Antitrust Litig.*,

770 F. Sup. 2d 1299, 1307 (N.D. Ga. 2011). Moreover, this Court already held that “[i]f Georgia Power still needs discovery to determine which of the 124 contracts govern, it would be appropriate to begin discovery after the FCC determines the reasonable rate rather than allow limited discovery on the 124 contracts at this time.” Oct. 10, 2013, Order [DN 66] at 15. Nothing has changed since the Court’s order that would make Georgia Power’s alleged need for discovery any more compelling. Georgia Power’s unsupported allegation that Charter is destroying evidence is nothing more than transparent gamesmanship.

*Third*, Charter’s continued use of its pole attachments is not a legitimate reason for lifting the stay because it is not causing any irreparable harm to Georgia Power. In fact, Georgia Power has never made such a claim. It also puts the cart before the horse. This case is about Georgia Power trying to collect additional monies it believes it is owed based on Charter’s use of certain pole attachments. If Georgia Power prevails on its claims (which Charter denies would be appropriate), it will be entitled to money damages in an amount sufficient to make it whole for any alleged improper use of pole attachments by Charter. If Charter prevails, the status quo remains the same and Georgia Power is not entitled to any additional money. This is the same whether the case is decided today, next month, or next year; the only difference being the amount of damages Georgia Power is entitled to

recover *if* it is successful. Georgia Power has operated under the current status quo since as early as 2001. *See* Second Am. Compl. [DN 56] at ¶ 27. Georgia Power cannot seriously contend that waiting a little while longer for the FCC to rule on issues central to this case will cause Georgia Power such undue prejudice as to require this Court to lift the stay.

#### **IV. CONCLUSION**

For these reasons, Charter respectfully requests the Court deny Plaintiff's Motion to Lift the Stay and grant such other and further relief as the Court deems necessary and proper.

This 16th day of October, 2015.

Respectfully Submitted,

THOMPSON COBURN LLP

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**LR 7.1D CERTIFICATION OF COUNSEL**

I hereby certify that the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO LIFT STAY has been prepared in 14 point Times New Roman font.

/s/ Steven M Sherman  
Steven M. Sherman, *pro hac vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of October, 2015, the undersigned filed the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO LIFT STAY** with the Clerk of the Court using the CM/ECF system which sent notification of such filing upon all attorneys of record including:

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/s/ Steven M Sherman  
Steven M. Sherman, *pro hac vice*

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BRIAN GLAUSER, individually and on  
behalf of all other similarly situated,

Plaintiff,

No. C 11-2584 PJH

v.

**ORDER DENYING MOTION TO  
LIFT STAY**

TWILIO, INC., et al.,

Defendants.

\_\_\_\_\_ /

Plaintiff’s motion to lift stay came on for hearing before this court on December 4, 2013. Plaintiff Brian Glauser (“plaintiff”) appeared through his counsel, Benjamin Richman. Defendant GroupMe, Inc. appeared through its counsel, Bryan Merryman. Defendant Twilio, Inc. appeared through its counsel, Patrick Thompson. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES without prejudice plaintiff’s motion to lift the stay for the reasons stated at the hearing and as follows.

The court finds that there is a likelihood that the FCC will issue an agenda for the coming year sometime in January 2014. Accordingly, the court hereby vacates the January 27, 2014 deadline to file a joint status statement, and instead orders the parties to appear for a case management conference on **March 27, 2014** at 2:00pm. The parties are also directed to file a joint case management conference statement by **March 20, 2014**. At the time of the case management conference, the court will revisit plaintiff’s request to lift the stay in this action.

**EXHIBIT 1**

**IT IS SO ORDERED.**

Dated: December 4, 2013



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PHYLLIS J. HAMILTON  
United States District Judge

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# **Exhibit C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

GEORGIA POWER COMPANY,

Plaintiff,

v.

CHARTER COMMUNICATIONS,  
LLC, et al.,

Defendants.

Civil Action No.

1:11-cv-04461-MHS

**GEORGIA POWER COMPANY’S REPLY IN SUPPORT OF ITS MOTION  
TO LIFT THE STAY WITH MEMORANDUM OF LAW IN SUPPORT**

Georgia Power Company (“Georgia Power”) respectfully replies to Charter Communications, LLC’s (“Charter”) Memorandum in Opposition to Georgia Power’s Motion to Lift the Stay (the “Response”). (ECF Doc. 85).

In its Response, Charter concedes the essential points needed to grant Georgia Power’s Motion:

- The FCC has had years to consider the Court’s primary jurisdiction referral.
- All briefing ended long ago, but the FCC has not chosen to rule.
- Charter has no idea when, or if, the FCC will ever rule.

The rest of the Response amounts to nothing more than “So what if the FCC hasn’t ruled?” Charter implies that a perpetual stay would be just fine, and perhaps to Charter it would. But Charter’s desire to avoid the merits indefinitely has

nothing to do with justice. Georgia Power is entitled to see justice done, and justice requires that this case be allowed to proceed.

**A. Charter Fails to Provide Any Reason This Case Should Not Move Forward Now.**

Charter's Response does nothing to refute that this controversy is at heart a pole rent collections case and that the FCC proceeding implicates at most a finite and non-essential portion of the controversy. Charter's only asserted basis for not lifting the stay is the novel and illogical notion that the FCC's very failure to rule means "nothing has changed" since the Court entered its stay, and therefore nothing needs to be done. (ECF Doc. 85 at 2). But the doctrine of primary jurisdiction is not, as Charter seems to suggest, merely a device to pause a case indefinitely. As Georgia Power showed in its Motion and as Charter does not deny, the doctrine of primary jurisdiction requires courts to balance the usefulness of awaiting administrative review with the need for courts to resolve disputes and avoid harm caused by delay. *See, e.g., Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976).

Charter appears to concede that the FCC has far exceeded the time allowed by case law and statute for ruling on primary jurisdiction referrals of this type. The few cases Charter cites in which courts decided to maintain a stay are based upon the peculiar facts of the given case and are easily distinguishable here. In

*Southwestern Bell Telephone, L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, 2008 U.S. Dist. LEXIS 91057 (E.D. Mo. Nov. 10, 2008), the plaintiff telecommunications companies asked the district court to rule that the defendants owed the plaintiffs access charges based on an ongoing FCC proceeding to determine the nature and regulatory obligations of “IP-in-the-middle” technology used by the defendants. *Id.* at \*2-4. The court held that continuing the stay was appropriate because the FCC was still accepting comments on the ongoing regulatory issue and “indicated that it intends to address comprehensive reform in the near future.” *Id.* at \*5-6. Here, in contrast, Georgia Power has shown time and time again that this case poses no novel regulatory questions, and Charter has offered no evidence whatsoever that the FCC will soon rule on Charter’s pole attachment complaint.

Elsewhere, Charter cites a number of cases involving classification, or reclassification, of services within the FCC’s jurisdiction. For example, in *Union Electric Co. v. Cable One, Inc.*, No. 4:11-CV-299, 2013 U.S. Dist. LEXIS 73092 (E.D. Mo. May 23, 2013), the district court refused to lift a stay on a pole rent collections case because the controversy depended on the unresolved regulatory classification of Voice over Internet Protocol (“VoIP”) services. *Id.* at \*4-5. See also *Frontier Tele. of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144

(W.D.N.Y 2005) (concerning the proper classification of VoIP); *Clark v. Time Warner Cable*, 523 F.3d 1110 (9th Cir. 2008) (same). Similarly, in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the Ninth Circuit Court of Appeals impermissibly attempted to *overturn* the FCC's regulatory classification of high-speed broadband as a non-telecommunications service. 545 U.S. at 982-83. This case raises no such question. Georgia Power is not seeking a new regulatory classification. Indeed, Georgia Power recognizes and relies on the classifications already established by the FCC.

Charter incorrectly cites *Owner-Operated Independent Drivers Association, Inc. v. New Prime, Inc.*, 192 F.3d 778 (8th Cir. 1999), and *Atchison, Topeka & Santa Fe Railway Co. v. Aircoach Transportation Association, Inc.*, 253 F.2d 877 (D.C. Cir. 1958), to suggest that a stay based on primary jurisdiction cannot be lifted until the regulatory body expressly refuses to issue a ruling. These cases state no such holding and Georgia Power is unaware of any case that does. A court should certainly proceed when an agency expressly refuses to rule on a regulatory matter, but we have found no decision stating that a court cannot proceed when an agency simply fails to rule. Indeed, the court in *Aircoach Transportation Association* states the *exact same rule* cited by Georgia Power in support of lifting

the stay: a stay on the grounds of primary jurisdiction should only last as long as necessary to give the relevant administrative body an *opportunity* to rule. 253 F.2d at 886 (“In short, the court, while retaining jurisdiction, should in its discretion withhold decision . . . until the Commission has had an opportunity to decide initially . . .”). Similarly, the court in *Public Service Co. v. Mile Hi Cable Partners L.P.*, 995 P.2d 310 (Colo. Ct. App. 1999) (cited in Charter’s Response at 15 n4) merely upheld the trial court’s *initial* ruling to stay a case to give the FCC an opportunity to rule. 995 P.2d at 312. The court did not address a *failure* by the FCC to rule. As Georgia Power has discussed in its Motion, the case law is clear that once the agency has had a reasonable opportunity to rule if it chooses, its failure to rule mandates that the stay be lifted. *See* cases collected in Georgia Power’s Motion (ECF Doc. 84 at 4-6).

Significantly, Charter offers no reason to expect that the FCC will rule at all in this case, whether soon or otherwise. This fact favors lifting the stay. *See Jordan v. Nationstar Mortg. LLC*, No. 14-cv-00787, 2014 U.S. Dist. LEXIS 148844, at \*11 (N.D. Cal. Oct. 20, 2014) (stay on primary jurisdiction was unwarranted in part because the evidence failed to show the FCC would rule on the underlying regulatory issue in a timely fashion). And although Charter continues to hide behind the fiction that a ruling from the FCC might somehow moot this

case entirely (ECF Doc. 85 at 7), Charter's admission to the FCC that only this Court has the power to decide whether Charter has a contractual obligation to pay the higher telecom rate to Georgia Power is fatal to this argument. *See* Charter's FCC Post-Discovery Brief at 4, attached to Georgia Power's Motion to Lift the Stay (ECF Doc. 84, Ex. 2).

**B. Charter's Self-Serving Denial That Delay Causes Harm Has No Legal Significance.**

Charter's final line of defense is to claim that delaying this case indefinitely causes no harm to Georgia Power. (ECF Doc. 85 at 15). This is not true. While Charter suggests that later is as good as now when it comes to Georgia Power's right to receive what it is owed, Charter does not and cannot deny that Georgia Power's ratepayers will continue to foot the bill for Charter's underpayments until this case is resolved. For Charter, a perpetual stay would be highly desirable. But the old adage "justice delayed is justice denied" has obvious application here. Courts must assert jurisdiction and resolve disputes "fairly yet as expeditiously as possible." *Miss. Power & Light Co.*, 532 F.2d at 419. The doctrine of primary jurisdiction is no exception to that rule. And while Charter can promise to preserve evidence while the case is stayed, there is nothing it can do to preserve human memory or to guarantee that physical evidence will not be destroyed by accident, error, or circumstances beyond its control. Such risks of harm are among the many

reasons there exists a timeliness component to justice.

Charter's effort to impose an "irreparable harm" standard is without support in the law. (ECF Doc. 85 at 3, 17). Georgia Power is not asking for injunctive relief in its Motion, and Georgia Power is unaware of any authority that would require a showing of irreparable harm to lift a primary jurisdiction stay.

Georgia Power's access to justice has been delayed far longer than is reasonable. Nothing has come of the stay, and Charter cannot give this Court any reason to believe anything will come of it. It is time to allow the wheels of justice to begin to turn again.

Respectfully submitted this October 29, 2015.

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*Attorneys for Plaintiff Georgia Power  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(D) of the Local Rules for the United States District Court for the Northern District of Georgia, I hereby certify that the foregoing has been prepared in Times New Roman, 14 point font, as permitted by Local Rule 5.1(B) and (C).

*/s/ Alan G. Poole* \_\_\_\_\_  
Alan G. Poole

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

GEORGIA POWER COMPANY,  
Plaintiff,  
v.  
CHARTER COMMUNICATIONS,  
LLC, et al.,  
Defendants.

Civil Action No.  
1:11-cv-4461-MHS

**CERTIFICATE OF SERVICE**

I certify that on October 29, 2015, a copy of the foregoing *Georgia Power's Reply in Support of its Motion to Lift the Stay* was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all counsel of record.

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