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

FLORIDA CABLE TELECOMMUNICATIONS
ASSOCIATION, INC.; COX COMMUNICATIONS
GULF COAST, L.L.C., *et al.*

Complainants,

P.A. No. 00-004

vs.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

GULF POWER COMPANY'S ANSWER TO
PETITION FOR TEMPORARY STAY

Dated: July 20, 2000

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SUMMARY

In 1996, cable companies scored a legislative victory when Congress amended 47 U.S.C. § 224 (“The Act”) to mandate that utilities provide cable and telecommunications companies access to the utilities’ networks of poles, conduits, ducts and rights-of-way. Utilities immediately objected before Courts and this Commission that the forced occupation effected a taking of their private property triggering constitutionally adequate just compensation. Utilities argued that the rates set forth in the Act did not rise to the constitutionally required level, but were instead the continuation of a more than two decade long “favorable” or “beneficial” (read “*subsidized*”) rate for cable companies.

Cable companies, and this Commission, told the Eleventh Circuit Court of Appeals, in writing, that if a utility believed it was entitled to a constitutional price higher than that set forth in the Act, it should charge it. Cable companies and this Commission explained that the cable company would then either have to pay the price or forego access. As for requests for stay, the Commission indicated that it *would not* interfere with a utilities’ price until the conclusion of the complaint proceeding and any subsequent judicial review.

Notwithstanding their earlier statements, and those of the Commission with which they did not disagree, Petitioners now ask the Commission to rule Gulf Power’s actions in seeking an appropriate price “unreasonable.” Petitioners’ express “shock” that Gulf Power would follow the very rules cable companies explained to the Eleventh Circuit were in place to insure that Gulf Power and other utilities would be appropriately compensated.

Petitioners set forth a parade of horrors that will be triggered if they have to pay Gulf Power’s price. Each of the alleged harms stem from the notion that Gulf Power is going to immediately remove their facilities. Petitioners are crying wolf. Gulf Power has terminated, by the terms of the contracts themselves and as a matter of law, what Petitioners

themselves describe as “voluntary” pole attachment agreements. The effective date of any potential termination, none of which has been noticed or threatened by Gulf Power, is months away. With plenty of time for Petitioners to exercise their right of mandatory access, and the requested relief of a refund order (if appropriate), there is no harm, much less the requisite *immediate and irreparable harm*. In fact, Petitioner Mediacom has already exercised its right to mandatory access prior to the filing of this complaint. Clearly, neither Mediacom (which has already insured its access to Gulf Power’s poles) nor any other cable company can show the “likely cessation of cable television service” required by the Commission rules regarding requests for stay. *See* 47 U.S.C. § 1.1404.

What the cable companies fear is finally having to pay their fair share for the valuable networks to which they seek access. Make no mistake, the harm about which they complain is harm to their profits. As Mediacom has expressly admitted and demonstrated in its correspondence to Gulf Power, this dispute is about money and nothing more. Disputes about money are not about irreparable harm and therefore not appropriate for the extraordinary relief of a stay.

Finally, the Commission’s rules require petitions for stay to be filed within fifteen (15) days from notice that there will be a termination. 47 C.F.R. §§ 1.1403(c) and (d). Here, Petitioners received notice of Gulf Power’s termination as early as April and May, months preceding the filing of the Petition. The Petition is, therefore, untimely.

Petitioners’ motion must be denied. Their redress, if any be required, will come in due course before this Commission and/or appropriate courts of law.

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GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

**GULF POWER COMPANY'S ANSWER TO
PETITION FOR TEMPORARY STAY**

Respondent, Gulf Power Company ("Gulf Power"), respectfully answers the Petition for Temporary Stay (the "Petition") filed by the Florida Cable Telecommunications Association, Inc. (the "Association"); Cox Communications Gulf Coast, L.L.C. ("CCGC"); Mediacom Southeast LLC ("Mediacom"); and Comcast Cablevision of Panama City, Inc. ("Comcast"), hereinafter collectively referred to as "Petitioners," on July 10, 2000. For the reasons set forth below, the Petition must be denied.¹

¹As set forth in the contemporaneously filed motion of Gulf Power to dismiss the complaint and petition filed by Petitioners, the Commission lacks jurisdiction over this matter under the holding of *Gulf Power Company v. Federal Communications Commission*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"). By filing this Answer, Gulf Power in no
(continued...)

I. Background

The Petitioners' cries of "ambush" and "shock" at Gulf Power's so-called "sudden" assertion of its contractual and constitutional rights is, in a word, ludicrous. This dispute is long-standing and Gulf Power, along with numerous other utilities, have made their respective positions clear.

Since the inception of the FCC's jurisdiction over pole attachment rates, utilities have objected to the artificially low rates set by the Commission. In the mid-1980's, Florida Power Corporation ("FPC") voiced its objections by challenging those favorable rates as effecting an unconstitutional taking of its private property pursuant to the Fifth Amendment. The Eleventh Circuit agreed with that position, holding that the 1978 Act committed a taking and failed to provide just compensation. *See generally Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985). Upon review, the Supreme Court reversed that decision, holding that no taking had occurred because the utilities had *voluntarily* allowed the attachments. *FPC*, 480 U.S. 245, 250-54 (1987). The *FPC* court cautioned, however, that should Congress in the future *mandate* access, a taking may occur, invoking the more stringent standards of the Fifth Amendment. 480 U.S. at 251, n.6.

In 1996, Congress went too far in accommodating the requests of cable television companies. The 1996 Amendments for the first time *forced* pole owners to provide space to every cable company that desires to use any pole, duct, conduit or right-of-way owned by a utility. 47 U.S.C. § 224(f)(1). In addition, the same right of forced access was also

¹(...continued)

way acquiesces to the Commission's jurisdiction or waives the arguments set forth in its motion to dismiss. This Answer is filed only as a precaution should the Commission improperly refuse to recognize the binding ruling of *Gulf Power II* and deny Gulf Power's motion to dismiss.

provided to attachments of telecommunications carriers. Gulf Power and other utilities, stripped of their right to exclude others from their private property, sought judicial relief. See *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd* 187 F.3d 1324 (11th Cir. 1999) (“*Gulf Power I*”); *Gulf Power v. Federal Communication Comm’n*, 208 F.3d 1263 (11th Cir. 2000) (“*Gulf Power II*”). The *Gulf Power* courts found that the mandatory access provisions of the 1996 Act effected a taking of private property entitling the utilities to just compensation. Although the issue of compensation was found not ripe for judicial review, the utilities, in each of the *Gulf Power* cases, made clear the continued reality that cable companies were being subsidized.

Simultaneously, before the Commission in CS Docket Nos. 97-98 and 97-151 (and even in FCC proceedings implementing the 1978 Pole Attachment Act), numerous utilities (including Gulf Power) made clear their assertion that the cable rate methodology adopted by the Commission was artificially low and unfair. The utilities submitted voluminous and compelling evidence supporting their contentions.

Cable companies, through their various associations and some individually, participated in the proceedings discussed above. The cable companies are, therefore, well aware that utilities have objected to the artificially low, regulated rates they have received. The cable companies are also very aware that the *Gulf Power* decisions make clear the utilities’ right to constitutionally adequate just compensation for the taking effectuated by the 1996 Act. The Petitioners cannot claim surprise that Gulf Power (the named plaintiff in both the *Gulf Power* cases) would insist that the just compensation it is entitled to is higher than the undeniably “favorable” rates set by the FCC.² The cable companies cannot argue

² See S. Rep. No. 95-580, 95th Cong., 1st Sess. 18 (1977) (“The formula, developed
(continued...)”)

with a straight face “shock” that Gulf Power, or any other utility, would take action to end the ongoing subsidy. Following the *Gulf Power* decisions, the cable companies knew their over twenty-year “favorable,” subsidized ride is over.

Finally, the Commission must recognize that Gulf Power is doing nothing more than what the Commission itself has instructed utilities to do. During the proceedings in *Gulf Power I*, the Commission, through the Department of Justice, represented to the Eleventh Circuit Court of Appeals on two separate occasions – in writing (by letters dated 2/26/99 and 3/29/99, respectively) – that a utility should charge attaching entities the amount it deems appropriate. *See* Exhibit 2 (“a cable company seeking pole access must pay the rate that the utility demands”) (3/29/99 letter at 2). The Commission went on to explain that “the cable company would either have to forgo its right of attachment or else pay the rate that the utility demanded (unless and until the FCC issued a new rate order . . .).” *Id.* at 2. In short, the Commission made clear that “the utilities are free to charge any rates they can command.” *Id.* Furthermore, the Commission indicated in the March 29th letter not only that a Petition for Temporary Stay such as that filed by Petitioners would not be granted,³ but that the FCC would stay the effect of any of its orders that would lower a utility’s charge, so that the utility would first have an opportunity for a judicial determination of just compensation.

The cable companies, through the National Cable Television Association, participated in *Gulf Power I* as *Amicus Curiae*. The NCTA agreed with the Commission’s recommended procedures and themselves told the Eleventh Circuit – in writing – that “the FCC does not

²(...continued)

in 1978, gives cable companies a more *favorable rate* for attachment than other telecommunications service providers. The *beneficial rate* to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.”)

³*See* Exhibit 2 (3/29/99 letter at 7, n. 2).

limit a utility's rates for access to poles prior to [an FCC] complaint [proceeding]." Exhibit 3 at 8. Yet, the cable companies now seek to stay the very thing they told the Eleventh Circuit is not limited.⁴

Accordingly, there is no surprise. There is no unfair prejudice or irreparable harm. Gulf Power is doing exactly what this Commission and cable companies have stated is the proper procedure. Gulf Power is merely exercising its contractual and constitutional rights to ensure that cable companies pay their fair share. If Gulf Power's price exceeds just compensation, the cable companies have asked for and will receive a refund. Other than finally paying a more fair price for their attachments, Congress has insured that nothing else will change. There is no basis for a stay.

This is the backdrop against which the Petitioners' request must be decided.

II. Facts

1. In the past, Gulf Power voluntarily entered into pole attachment agreements with cable television companies. The contracts gave the companies a license to attach their cables to Gulf Power's poles. While the agreements were voluntary, Gulf Power believed the regulated rates it received were artificially low and provided an unfair subsidy to cable companies. Exhibit 1 (M.R. Dunn affidavit, ¶¶ 7, 8 and 11).

2. Like any license, the agreements were subject to termination and contained express termination clauses. *Id.* ¶¶ 2 and 3. The most recent agreements expire after a five-year term and further allow termination for certain specified causes. *See* Ex. 1, ¶¶ 2 and 3. Gulf Power has on many occasions exercised its termination rights established in the pole

⁴In part predicated upon these representations by the FCC and the cable companies, the court in *Gulf Power I* held that the Pole Attachment Act provides an adequate process for determining just compensation because "the utility is not required to provide access to its property at a rate that does not provide just compensation." 187 F.3d at 1338.

attachment agreements. *Id.* at ¶ 3. For example, in the following instances Gulf threatened to exercise or in fact exercised its contractual right to terminate a pole attachment agreement: (1) Panama City Beach Cablevision, Inc., in the late 1970's, for improperly reporting attachments and failure to pay for making the attachments; (2) Comcast Cablevision Corporation, U.S. Cable, and the City of Springfield, in 1991, for improperly reporting attachments and failure to pay for making the attachments; and (3) Gulf Long Distance, Inc., in 2000, due to no attachments being made. The Gulf Long Distance agreement was terminated, but, they signed a new pole attachment agreement under the name of Madison River Communications based on mandatory access provisions and just compensation. *Id.*

3. There is no “course of dealings” between Gulf Power and any of the Petitioners altering Gulf Power’s right to terminate the license agreements. *Id.* at ¶ 2. Gulf Power has entered into new agreements with the cable industry on various occasions over the last twenty years. *Id.* On each of those occasions, Gulf Power notified the cable company that its pole attachment agreement was to expire on its own terms on a date certain and that a new agreement must be reached and signed for the cable company to continue attaching to Gulf Power’s poles. *Id.* The circumstances surrounding those previous contract changes were markedly different than those precipitating Gulf Power’s recent notice of termination.

4. On June 28, 2000, Mediacom, one of the Petitioners in this proceeding, exercised its right to mandatory access and executed a pole attachment contract committing it to pay an annual per pole price of \$38.06 for the taking. *Id.* at ¶ 5. The price is derived from a cost-based methodology Gulf Power believes begins to move toward constitutionally

adequate just compensation. *Id.*⁵

5. Gulf Power properly notified Petitioners Comcast and Mediacom that their pole attachment agreements with Gulf Power were to expire by operation of the terms of the agreements and that access to Gulf Power's poles would be through mandatory access with just compensation for the taking. *Id.* at ¶¶ 4 and 5. Comcast was reminded that its pole attachment agreement was to expire on February 29, 2000, by Gulf's letter of January 25, 2000. *Id.* at ¶ 4. On April 3, 2000, representatives from Gulf and Comcast met to discuss the new operational changes set forth in the new pole attachment agreement. At that meeting, Comcast representatives declined to discuss the new just compensation annual fee because, as they stated, to do so would be "wasting his time and mine to try to explain the fee." *Id.* Comcast requested and was provided data pursuant to Section 1.1404 (g) of the FCC's Regulations. Certain portions of the requested data was not provided pending Comcast signing an adequate confidentiality agreement. *Id.* Mediacom's pole attachment agreement was by its terms set to expire on June 30, 2000, and Gulf sent notice of this by a letter dated March 20, 2000. *Id.* at ¶ 5. On April 27, 2000, representatives of Gulf Power and Mediacom met to discuss the new pole attachment agreement which had been mailed by letter dated April 26, 2000. *Id.* During this meeting, Gulf Power representatives explained the changing operational items as well as the new just compensation fee. *Id.* On May 2, 2000, a copy of the computation sheet showing the just compensation derivation was sent

⁵Gulf Power also directs the Commission's attention to the Petition for Reconsideration filed on Gulf Power's behalf on June 16, 2000, in CS Docket No.: 97-98.

by letter to Mediacom. *Id.* The new pole attachment agreement was fully executed by Mediacom on July 5, 2000. *Id.*

6. By letter dated May 17, 2000, CCGC was notified that the pole attachment agreements Gulf Power had entered into with Cox Communications Pensacola, Inc., and TWC Cable Partners dba Emerald Coast Cable Television were "null and void" by operation of law since both companies were no longer active business entities with authority to conduct business in Florida. At that time, CCGC was informed by Gulf that it was not voluntarily granting access to its poles and a pole attachment agreement with a rate based on just compensation resulting from the taking under mandatory access was attached to the May 17, 2000 letter for CCGC's signature. *Id.* at ¶ 6. Despite attempts by Gulf Power to meet with Cox and explain the just compensation rate, no meetings have taken place. *Id.* Comcast requested and was provided data pursuant to Section 1.1404 (g) of the FCC's Regulations. Certain portions of the requested data were not provided pending Cox signing an adequate confidentiality agreement. *Id.*

7. Gulf Power has offered to provide Petitioners any additional information subject to the requesting entity executing an appropriate confidentiality agreement. *Id.* at ¶¶ 9 and 10. Such a confidentiality agreement is necessary because Gulf Power has sought confidential treatment of much of the underlying cost data in its most recent FERC Form 1 filing made with the Federal Energy Regulatory Commission. *Id.* at ¶ 10. Only Petitioner CCGC responded to the offer and requested a copy of the confidentiality agreement. Then on July 7, 2000, Petitioner CCGC refused to sign the confidentiality agreement, premised

on the erroneous statement (a misstatement that it repeated in Mr. Gregory's affidavit herein) that the confidentiality agreement was unreasonably designed to preclude any disclosure to the Commission. The confidentiality agreement, contrary to CCGC's remarks, specifically provides for a procedure under which all confidential information can be disclosed to the Petitioners *and the Commission* in any proceeding by issuance of a stipulated order directing confidential treatment through filing the information under seal and with restricted disclosure to those persons in actual need of the information.

8. Gulf Power heard nothing further from Petitioner CCGC or the other Petitioners until it was served with the filings in this proceeding.

9. Gulf Power does not desire to "disrupt" any cable company's business or "service to [its] customers." *Id.* at ¶ 8. Gulf Power has simply chosen to get out of the business of voluntary access to its poles, conduits, ducts, and rights-of-way. *Id.* Any future access by a cable television company must be pursuant to the mandatory access provision those companies lobbied for and received from Congress. *Id.* With that access, the cable companies must pay just compensation for the taking.

10. There is no need for any cable company to suffer disruption of its business or cessation of cable service to its customers. In 1996, cable companies asked for and received the right of mandatory access. All the Petitioners have to do is exercise their right of mandatory access and pay the constitutionally required price. With the exception of the price for the taking, the day-to-day operations of the cable companies should not be affected. *Id.* at ¶ 7 and 8. Mediacom's actions in signing a new agreement to assure access proves the

point.

11. There is no immediate threat that Gulf Power will remove cable facilities from its poles. Gulf Power has neither exercised any of its rights to removal nor ever made any representation (or “threat” as the Petitioners like to characterize it) to any of the Petitioners, by notice or otherwise, that cable facilities would be removed from the poles. Petitioners have had ample time and continue to have ample time within which to exercise their rights to mandatory access to insure that they do not suffer any interruption in service. *See* 47 C.F.R. § 1.404(c). Again, that Mediacom requested and received mandatory access in a mere 62 days following the April 27, 2000 notice of Gulf Power’s action proves that there is neither a need for or likelihood that there will ever be any cessation of cable service. Petitioners have every right to do just what Mediacom has.

12. Publically filed information attached as Exhibit 4 hereto shows that pole attachment rentals comprise approximately 2.7 % and 3% respectively of Comcast’s and Mediacom’s total operating expenses.

13. Gulf Power has joint use agreements with two major telephone companies. BellSouth’s joint use price for space on Gulf Power poles in 1999 was \$57.07 for poles beyond a 45/55% ownership ratio. Sprint-Florida telephone company price for joint use poles for 1999 was \$ 23.27 for poles beyond a 50/50% ownership ration along with Sprint agreeing to pay 46% of all pole liability claims on poles to which they attach regardless of ownership. *Id.* at ¶ 14.

in public filings as being terminable on short notice and terminable after an initial period by either party upon notice. See Petition for Temporary Stay at 3, 8; Complaint at ¶¶ 13, 14, Exs. 3-5 at §§ 1, 23, Ex. 7 at ¶ 15.

The agreements at issue in this case were entered into voluntarily. They were the subject of negotiation between Gulf Power and the Petitioners. One of the negotiated terms in each of the agreements is an express termination provision stating that the agreements are for a five year term at the end of which they terminate and, in addition, provides for termination for certain specified causes. Exhibit 1 (M.R. Dunn affidavit), at ¶¶ 2 and 3 Gulf Power has relied upon and exercised its termination rights in the past. *Id.* As such, the termination provision has full meaning and effect.

Following the 1996 Amendments and the decisions in *Gulf Power I* and *Gulf Power II*, Gulf Power has decided to exercise its contractual rights to “terminate” all voluntary agreements, with the termination of the agreements involving the Petitioners having ensued (1) by operation of the expiration of the agreement’s terms in the cases of Petitioners Mediacom and Comcast and (2) by operation of law upon the former attachers’ relinquishing their agreements and rights, thereby requiring Petitioner CCGC to enter a new agreement to

⁶(...continued)

have failed to act in good faith. As discussed in the affidavit of M.R. Dunn, Gulf Power acted in good faith by providing the Petitioners advance notice of its intentions, giving Petitioners more than adequate time to seek information and to enter into discussions about the new agreements (indeed, Comcast’s agreement expired on February 29, 2000, so it had more than four months to reach a new agreement), offering to answer Petitioners’ questions, and submitting additional information to those Petitioners who so requested. In contrast to Gulf Power’s efforts to amicably resolve matters, Petitioners, as evidenced by the many misstatements in their Complaint and Petition, displayed little interest in understanding the terms of the new arrangement or even the cost-support for Gulf Power’s price, but instead rushed to litigation before the Commission. Petitioners’ actions cannot be deemed to be in good faith.

maintain its facilities on Gulf Power's poles. As stated above, the decision cannot be a surprise to the Petitioners. The Supreme Court in *FPC* noted that "[t]he language of the [1978] Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization." 480 U.S. at 251, n.6. The 1978 Act was equally silent on any right of the FCC to require utilities to "refrain from terminating pole attachments agreements." *Id.* Gulf Power clearly has the right to terminate, and the FCC has no statutory authority to hold otherwise.⁷

Petitioners' efforts to cloud Gulf Power's clear contractual rights with a so-called "course of dealings" argument fails for several reasons.⁸ First, there is no course of dealing sufficient to contradict the express wording of the mutually agreed upon contracts. Ex. 1 (M.R. Dunn affidavit), at ¶ 2. The pole attachment agreements are not meaningless form documents. In fact, Gulf Power has made many substantive changes to its pole attachment agreement in the last twenty or so years, though none recently, some of which resulted from negotiations with the cable companies and others from changes in law or business practice. These changes were the subject of discussions with the cable companies at the time that the

⁷The Eleventh Circuit Court of Appeals also recognized utilities' rights to terminate voluntary agreements in *Gulf Power II*. The Court stated unequivocally that "[s]ince the 1978 Act did not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions . . . by canceling the existing arrangements, and having the attachments removed." *Gulf Power II*, 208 F.3d at 1263, n.6.

⁸As discussed in Gulf Power's Motion to Dismiss that is being filed contemporaneously with this Answer, the FCC lacks jurisdiction over this breach of contract claim because the Petitioners are not claiming that any of the contractual rates, terms, or conditions are unjust or unreasonable. *See, e.g., In the Matter of Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 12 F.C.C.R. 10362 ¶ 10 (1997).

changes were made by Gulf. The termination provision in the contracts is one such term that has changed over the years. *Id.* at ¶ 2. It belies common sense that the parties would make substantive changes to a contractual provision that is or was unenforceable. *See, e.g., Turner v. Johnson & Johnson*, 809 F.2d 90, 96 (1st Cir. 1986) (the “give-and-take of negotiations” which results in legally enforceable contractual provisions cannot be ignored); *Id.* at 97 (“[A] knowledgeable [party] should not sign a contract that conflicts with his or her understanding of the agreement.”). Furthermore, assuming *arguendo* that there is some course of dealings governing termination issues, the course of dealings included the express contractual right to terminate, and Gulf Power has acted consistently therewith on numerous occasions by providing notices of termination to the affected cable company. Ex. 1, at ¶ 3.

B. There is No Irreparable Harm

Although the Commission applies a four-prong test when evaluating a petition for stay, the primary “basis for injunctive relief [including a stay] . . . has always been irreparable harm and inadequacy of legal remedies.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The alleged injury “must be both certain and great; it must be actual and not theoretical.” *Id.* A stay should *not* be granted “against something that is merely feared as liable to occur at some indefinite time.” *Id.* (citations omitted). Additionally, 47 U.S.C. § 1.1403 requires the Petitioners to show “likely cessation of cable television service.”

Petitioners are unable to show either irreparable harm or the inadequacy of their legal remedies.

1. Petitioners’ Right to Mandatory Access Cures Any Concerns About The Alleged Harm

Petitioners go to great lengths arguing highly speculative potentially irreparable harm.

The parade of horrors includes alleged potential loss of customers, competitive disadvantage in rolling out new services and products, loss of good will, and (most dramatically) conclusory assertions concerning the closing of some businesses. Whether Petitioners' list of highly speculative and conjectural ills individually constitutes irreparable harm need not be debated. At its core, *all* of the Petitioners' alleged potential harms stem from one concern – that they must immediately remove their facilities from Gulf Power's poles.

Immediate removal of facilities, disruption of service, and uncertainty over other terms and conditions are wolf cries of the highest magnitude. The cable companies lobbied Congress and were victorious in obtaining the right to mandatory access. Petitioners know that they can simply demand and receive access to Gulf Power's facilities. The Petitioners also have adequate time within which to protect themselves to avoid any disruption of service. The agreements at issue herein were terminated either by operation of the expiration of the agreement's terms in the cases of Petitioners Mediacom and Comcast or by operation of law upon the former attachers' relinquishing their agreements and rights, thereby requiring Petitioner CCGC to enter an agreement to maintain its facilities on Gulf Power's poles. Exhibit 1, ¶¶ 4, 5 and 6). Gulf Power gave Petitioners Comcast and Mediacom at least 30-days notice that their pole attachment agreements would terminate by operation of the expiration of the agreement's terms and that new pole attachment agreements were required and would be entered into by Gulf only pursuant to mandatory access and not voluntary agreement. *Id.* Since the termination of the Comcast and Mediacom agreements was as a result of the operation of a specific contractual term setting a date certain for the agreements to terminate, these parties can hardly claim that they were unaware of the time at which they should seek new pole attachment agreements with Gulf. CCGC was also given at least 30-

days notice that it must enter into a new pole attachment agreement with Gulf. *Id.* Each of these parties has been afforded ample time in which to seek access to Gulf's poles via mandatory access. The Act insures that there will be no disruption of service. As Petitioner Mediacom has demonstrated, with mandatory access serving as their "ace-in-the-hole", cable companies need not fear removal of facilities. All Petitioners' need do is mandate access and sign the agreement. If they dispute the rate, the rate will be settled through these FCC proceedings and other court actions. There is not one scintilla of evidence presented in this proceeding where Gulf Power has threatened or even intimated that it was seeking to have the Petitioners' facilities removed. Petitioners' allegations to the contrary are spurious, and specious at best.

Petitioners' alleged irreparable harm arising from removal of their facilities can simply be avoided, is theoretical only, and cannot support a request for stay. *Wisconsin Gas Co.*, 758 F.2d at 674; *see also* 47 U.S.C. § 1.1404(d). Mediacom's action are conclusive proof that Petitioners' real complaint is money.

2. Alleged Monetary Harm Does Not Constitute Irreparable Harm

The Petitioners' alleged fears concerning removal of their facilities is a legal smokescreen; they have mandatory access. What the cable companies fear is finally having to pay their way. Make no mistake – the harm they allege is monetary. This dispute is about money and nothing more, as even Mediacom admits in its June 28, 2000 letter to Gulf Power Company. Complaint at Exhibit 13.

Petitioners assert that the \$38.06 charge will irreparably harm them, their customers, and the public. Petitioners speculate that their ability to provide additional services, rebuilds

and upgrades will be limited.⁹ Additionally, they claim that the increase in pole rents will result in increased cable rate and loss of customers to competitors.¹⁰

“Although the concept of irreparable harm does not readily lend itself to definition, the courts have developed several well known and undisputable principles to guide them.” *Wisconsin Gas Co.*, 758 F.2d at 674. It is well settled that “*economic loss* does not, in and of itself, constitute irreparable harm.” *Id.* “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.” *Id.*¹¹

Here, the Petitioners have requested a refund order should the Commission decide that Gulf Power’s price is too high. Of course, the Commission has the power to enter a refund order under 47 U.S.C. § 1.1410(c). The FCC’s ruling is subject to appeal. As such, any

⁹In essence, the Petitioners claim that their ability to increase their revenue base and make even more money *might* be slowed. Aside from being grossly speculative, this is *not* irreparable harm.

¹⁰It should be emphasized that it is Gulf Power and its customers that are being harmed by having to subsidize the cable industry, and this harm will continue until those cable companies pay their fair share for their attachments. Gulf Power, as a regulated *public* utility, is unquestionably providing a critically important service (the provision of electric services) and having to subsidize another industry obviously takes from Gulf Power’s ability to provide that public utility service. Gulf Power’s customers should not be forced to assist cable companies in their expansion of services, upgrade of their facilities, or competitive success against satellite television companies.

¹¹Courts have recognized *severe* economic hardship as irreparable harm only where it threatens the very existence of the movant’s business. *Wisconsin Gas Co.*, 758 F.2d at 664. However, the burden of proof is high. Courts require much more than “unsubstantiated and speculative” allegations of demise. *Id.*; *see also Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) (where plaintiff alleged potential destruction of business, loss of jobs, business reputation, and good will, court found the damages “capable of ascertainment” and the “loss of income” insufficient as irreparable harm). Petitioners’ claims of potential ruin are conclusory, unsubstantiated, speculative, and woefully insufficient to fall within the limited exception.

monetary harm Petitioners may suffer relates to the difference in disputed rates (approximately \$7.00 per pole versus \$38.06 per pole). That alleged harm, if any, can be calculated with certainty and compensated.¹²

The Petitioners' own statements and publically filed financial information doom their arguments concerning financial harm. The 10-K filings of Petitioners Comcast and Mediacom show that pole attachment rental fees comprise approximately 2.7 % and 3% respectively of their total operating expenses. Ex. 4. Indeed, for Comcast, the percentage is even lower because their "rental expense" category includes all lease expenses, not just pole rentals. Ex. 4. (at 61). Obviously, the impact will not be as disastrous as Petitioners assert.¹³ The increase from the FCC rate calculation to just compensation amounts in an approximately \$1.10 increase to monthly cable service rates, a cost that could be absorbed by cable companies. Ex. 1, at ¶ 11.

The cable companies are finally on the verge of being forced to pay a full price for something they have historically been given "favorable" or "beneficial" rates. Unwilling to sacrifice their profit margins, the cable companies do not want to pay a full price, and they

¹²Should the Commission decide to grant the stay (which it should not), Petitioners should be required to either post a bond, or pay into an interest bearing account, an amount equivalent to the difference between the payment due at \$38.06 per pole and the amount currently being paid under the expired agreements of Petitioners Mediacom and Comcast and the relinquished and terminated agreements of the former attachers to poles to which Petitioner CCGC is seeking access, beginning July 1, 2000 until such time as the Commission resolves the Complaint. *See, e.g., In the Matter of TCI Arlington, Inc.*, 14 FCC Rcd. 3969 (1999); *In the Matter of Heritage Cablevision, Inc.*, 13 FCC Rcd. 22, 820 (1998).

¹³Gulf Power's history with joint use agreements shows that the telephone companies are more than willing, and certainly able, to pay more accurate and fair rates. For example, BellSouth's joint use price for space on Gulf Power poles in 1999 was \$57.07 and Sprint-Florida's price for joint use poles for 1999 was \$ 23.27. Neither of these two companies have gone out of business due to higher pole attachment rentals.

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DATED: July 20, 2000

CERTIFICATE OF SERVICE

I, Regina Hogan, a secretary in the law firm of Keller and Heckman LLP, certify that copies of the foregoing "Gulf Power Company's Answer to Petition for Temporary Stay" were delivered by hand or sent by overnight delivery to the following on this, the 20th day of July, 2000:

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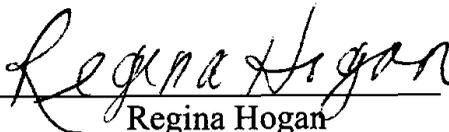
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