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Federal Communications Commission
Office of Secretary

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

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATIONS GULF COAST, LLC, et al.,	)	
Complainants,	)	E.B. Docket No. 04-381
v.	)	
GULF POWER COMPANY,	)	
Respondent.	)	

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

GULF POWER COMPANY'S MOTION TO STRIKE COMPLAINANTS' PETITION FOR CLARIFICATION

Respondent Gulf Power Company ("Gulf Power") moves to strike Complainants' October 20, 2004 Petition for Clarification. In support of this motion, Gulf Power says the following:

I. INTRODUCTION

Complainants are trying to make this proceeding more complex and more protracted than it needs to be. The message in the September 27, 2004 Hearing Designation Order is clear: allow Gulf Power an opportunity to develop and present the evidence outlined in its January 9, 2004 Description of Evidence. Under the guise of seeking "clarification" of the scope of the evidentiary hearing, Complainants actually have recycled many of the same arguments presented to the Enforcement Bureau in their Response to Gulf Power's Description of Evidence. The

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Petition for Clarification -- which suffers from both substantive and procedural problems -- is premature at best and, at worst, an early attempt to "poison the well." Because Complainants' petition is either premature, redundant, or both, Gulf Power respectfully requests that the Petition for Clarification be stricken, and that this hearing proceed as set forth in the Hearing Designation Order and the subsequent orders from the Chief Administrative Law Judge.

II. BACKGROUND

The 1996 Amendments to the Pole Attachment Act stripped Gulf Power of its ability to deny access to cable and telecom providers for reasons other than safety, reliability, engineering, or capacity. Prior to that time, Gulf Power was under no obligation to allow others into its pole space. If it made more financial sense to allow others onto its poles at the regulated rate, Gulf Power would do so; if not, Gulf Power had the prerogative to deny access. The change from voluntary access to mandatory access was not, as Complainants suggest, a mere technicality. (See Petition for Clarification, pp. 3-4). The shift from voluntary to mandatory access was a substantial alteration of the rights, obligations and economics concerning pole attachments. But the rate did not change with it, with one exception: the 1996 Amendments provided a higher pole attachment rate for telecom providers than cable providers, notwithstanding the fact that the property taken is identical.[1]

When the Enforcement Bureau retroactively applied the Eleventh Circuit's novel test to Gulf Power's three-year-old evidence, Gulf Power sought an opportunity to meet the new test. Complainants vigorously opposed this request at every step. The Enforcement Bureau, in its December 9, 2003 letter ruling, essentially said to Gulf Power: before we rule on your request, tell us what kind of evidence you seek to present. Gulf Power obliged with its January 9, 2004

[1] The Telecom Rate, unlike the Cable Rate, properly includes an allocation for unusable pole space, which benefits all attachers equally.

Description of Evidence. Complainants submitted a twenty-page opposition, arguing that the evidence set forth in the Description of Evidence was irrelevant to the Eleventh Circuit test. After considering the parties' positions, the Enforcement Bureau granted Gulf Power's request for an evidentiary hearing by Order dated September 27, 2004. The Hearing Designation Order defines the issue as: whether Gulf Power "is entitled to receive compensation above marginal cost for any attachments to its poles belonging to the Complainants." (Hearing Designation Order, ¶ 1).

III. SUBSTANTIVE PROBLEMS WITH COMPLAINANTS' PETITION

The very purpose of Complainants' Petition for Clarification -- to redefine the scope of the proceeding -- is at odds with the Hearing Designation Order's directive. But more specifically, the petition seeks preliminary determinations on key issues in the case, without the benefit of evidentiary development and presentation. For example:

- In part IV (pp. 13-17), Complainants ask in essence that evidence regarding "capacity" be limited to the specific types of evidence Complainants believe is relevant to this issue. This is just another way of making the same arguments Complainants made in their response to Gulf Power's Description of Evidence. (See generally, Complainants' Response to Description of Evidence, pp. 7-15). Moreover, if the Petition for Clarification is a motion *in limine* of sorts, it is premature and unnecessary in a proceeding such as this. Upon hearing the evidence, the Presiding Judge can make an independent determination of whether and to what extent the evidence satisfies the test.

- In part III.B. (pp. 12-13), Complainants argue that even if Gulf Power can meet the Eleventh Circuit test, Gulf Power is entitled to no more compensation than it

already receives through the Cable Rate. This is an indirect way of arguing that the entire proceeding is moot. There are two problems with this argument (aside from being just plain wrong). First, Gulf Power's entitlement to just compensation is the ultimate issue, which should be decided after development and presentation of the evidence. Second, it is hard to believe the Enforcement Bureau would have granted Gulf Power's request for evidentiary hearing if Gulf Power was not entitled to recover more than the Cable Rate under any circumstances.

- In part III.A. (pp. 9-11), Complainants advocate a "two-part" evidentiary hearing. Gulf Power agrees with Complainants insofar as they suggest that Gulf Power must first meet the Eleventh Circuit test before receiving an amount in excess of marginal costs.[2] However, Gulf Power disagrees with the linear, step-by-step approach urged by Complainants. The alternative cost methodology informs the threshold "crowding" issue, and vice versa. These two considerations should not be reviewed in a vacuum.

These, of course, are not the only substantive problems with Complainants' petition, but they are indicative of the true purpose of the petition -- to pretermit the need for an evidentiary hearing at all.

IV. PROCEDURAL PROBLEMS WITH COMPLAINANTS' PETITION

The Petition is procedurally flawed on several grounds. First, a "Petition for Clarification" does not appear to be contemplated by the Commission's regulations, and is not

[2] Gulf Power, of course, has always disagreed and continues to disagree with the Eleventh Circuit's test, and the Eleventh Circuit's creation of an entirely new classification of tangible property in the just compensation context -- nonrivalrous property.

contemplated in the Hearing Designation Order or the Prehearing Order. The Petition instead appears to be an amalgamation of several types of pleadings allowed under the Commission's regulations, but fails to satisfy the corresponding regulatory requirements that apply for such pleadings. For example:

- If the Petition for Clarification is a motion to enlarge, change or delete issues pursuant to § 1.229, then it must contain "specific allegations of fact sufficient to support the action requested . . . supported by affidavits of a person or persons having personal knowledge thereof." 47 C.F.R. § 1.229(d). Complainants' Petition for Clarification does not -- and could not -- meet this criteria..

- If the Petition for Clarification is a request for summary decision pursuant to § 1.251, then "the party filing the motion may not rest upon mere allegations or denial but must show, by affidavit or by other materials . . . that there is no genuine issue of material fact. . . ." 47 C.F.R. § 1.251(a). Complainants' Petition for Clarification does not meet this criteria.

If the Presiding Judge determines that a clarification of certain issues is needed at an early stage of the proceedings, then the Presiding Judge should explore such a possibility at the Prehearing Conference to be held among the parties. See 47 C.F.R. § 1.248(c)(1).

V. CONCLUSION

For all of the reasons set forth above, Gulf Power respectfully requests the Complainants' Petition for Clarification be stricken, and that this hearing proceed as outlined in the September 27, 2004 Hearing Designation Order, and the subsequent orders entered by the Chief Administrative Law Judge.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion To Strike Complainants' Petition For Clarification has been served upon the following by United States mail, on this the 4th day of November, 2004:

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