

- b. declaring that EAI's attempts to charge Complainants for an excessive number of *attachments by inflating Complainants' invoices with phantom attachments to be an unjust, unreasonable and discriminatory term and condition of attachment in violation of 47 U.S.C. § 224;*
- c. declaring that EAI's failure to allocate inspections cost equitably among all attachers to reflect joint benefit to be an unjust, unreasonable and discriminatory term and condition of attachment in violation of 47 U.S.C. § 224 and Commission precedent;
- d. declaring that EAI inspections that took place more than one year after the rebuild of the system are untimely and an unjust, unreasonable and discriminatory term of attachment under 47 U.S.C. § 224;
- e. directing EAI to refund to Complainants the cost of EAI inspections that took place more than one year after the rebuild of the system;
- f. declaring EAI's formula for allocating inspection costs to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- g. declaring that EAI's attempt to charge Complainants for inspection of poles to which Complainants do not attach to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- h. declaring that EAI's attempt to charge Complainants for inspection of poles that EAI does not own or control to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- i. declaring that the EAI Pole Agreements bar Entergy for the cost of the defective pole counts conducted by USS and directing EAI to refund to Complainants the cost of such pole counts;

- j. declaring all overhead charges imposed on Complainants to be an unjust, *unreasonable and discriminatory term and condition on attachment in violation of 47 U.S.C. § 224* and direct EAI to refund all overhead charges paid by Complainants;
- k. declaring the costs associated with the EAI inspections are unjust, unreasonable and discriminatory in violation of 47 U.S.C. § 224 and directing EAI to cease invoicing Complainants for such inspections;
- l. declaring that EAI's attempt to require Complainants to pay for pre-existing safety violations of other attachers to be an unjust, unreasonable and discriminatory term and condition of attachment under 47 U.S.C. § 224;
- m. declaring EAI's construction standards that exceed the requirements set forth in the NESC to be unjust, unreasonable and discriminatory terms and conditions on attachment and in violation of 47 U.S.C. § 224;
- n. declaring that EAI must notify cable operators of all modifications to pole plant as required under federal law and 47 U.S.C. § 224;
- o. directing EAI and Complainants to adhere to the safety standards set forth in the NESC, including the relevant grandfathering provisions, for their attachments in the state of Arkansas;
- p. declaring that EAI's failure to enforce uniform safety requirements upon all telephone company attachers or itself is an unjust, unreasonable and *discriminatory term and condition of attachment in violation of 47 U.S.C. § 224*;
- q. directing EAI to refund to Complainants all *unlawful inspection and related charges* in a manner consistent with this Complaint;

- r. reimbursing Complainants for all out-of pocket expenses incurred due to labor, materials and engineering contractor costs to address Entergy's concerns and conduct a re-audit of Complainants' systems;
- s. awarding Complainants consequential damages for loss of subscribers due to the EAI's unlawful permitting freeze; and
- t. granting Complainants such other relief the Commission deems just, reasonable and proper.

IV. OVERVIEW OF THE COMMON ISSUES ALL COMPLAINANTS FACE

70. While the facts relating to each cable-operator Complainant are to some extent operator-specific, there are many common areas of fact, experience, injury suffered and relief due that warrant prosecuting this matter in a single complaint.

A. **The Roots Of This Dispute**

71. On information and belief, the roots of this dispute can be traced to an ice storm in December 2000 in which Entergy's aerial plant suffered considerable damage. On information and belief, Entergy's impulse was to attempt to blame cable operators for this damage, and Entergy, without input from cable operators, retained USS in the fall of 2001 to implement this plan.

72. Based on information and belief, EAI did not hire USS because it was concerned about damage caused by cable companies. Instead, EAI's main goal was to use the Complainants' presence on the poles to upgrade its own aerial plant, and supplement its pole-related revenues.⁵⁴

⁵⁴ See ¶¶ 187-189, *infra*.

73. USS began auditing Arkansas cable operator facilities shortly thereafter. This included performing the surveying, measuring, counting, identifying, photographing, GPS reading, mapping and other functions discussed at Paragraphs 288 and 289.

74. The communities that USS has audited so far, and which are at issue in this Complaint are the areas of Little Rock (Comcast); Plumerville and Greenbrier (Alliance); Searcy and Pine Bluff (WEHCO); and Magnolia, Malvern, Gurdon and Russelville (Cox).⁵⁵ Those communities are collectively referred to as the “Targeted Communities”.

B. The EAI Pole Attachment Agreements And Past Attachment Practices

75. The Complainants operating in each of the Targeted Communities are subject to separate but identical EAI Pole Agreements governing the attachment of Complainants’ facilities to EAI poles.⁵⁶ Those Agreements provide that the Cable Companies’ use of poles shall conform with “practices as prescribed by the National Electrical Safety Code—ANSI-C2, including all supplements and future revisions and supplements thereto...”⁵⁷

76. In addition, the EAI Pole Agreements contain construction standards that exceed the NESC requirements and standard industry practices. These unreasonable terms either (a) were not in earlier agreements with EAI, under which the vast majority of the Complainants’ Service Area plant was constructed, or (b) existed in the agreements, but EAI did not require the cable operators to adhere to them.⁵⁸

77. For example, the EAI Pole Agreements require bonding to every EAI vertical ground. Although this became an NESC requirement in the most recent 2002 NESC revision, the

⁵⁵ Declaration of Marc Billingsley at ¶ 5 (Exh. 6); Declaration of Bennett Hooks at ¶ 4 (Exh. 4); Declaration of Jeff Gould at ¶ 6 (Exh. 3); Declaration of Charlotte Dial at ¶¶ 6-7 (Exh. 5).

⁵⁶ See EAI Pole Agreements (Exh. 2A-2D).

⁵⁷ *Id.* at § 2.3(A).

⁵⁸ Declaration of Marc Billingsley at ¶ 21 (Exh. 6); Declaration of Bennett Hooks at ¶ 9 (Exh. 4); Declaration of Jeff Gould at ¶ 17 (Exh. 3); Declaration of Charlotte Dial at ¶ 11 (Exh. 5).

agreements and most of the Complainants' plant pre-date this requirement.⁵⁹ Most of Complainants' plant was constructed prior to 1985 (the earliest of the Pole Agreements), and largely complies with the NESC requirements in effect at the time of construction. In accordance with the parties' prior course of dealing, standard industry practice, and the NESC, the Complainants' facilities entitled to the protections of the NESC's grandfathering provision.⁶⁰

78. Another example concerns the placement of power supplies, which are essential equipment for the provision of cable television services. The EAI Pole Agreements contain a "guideline" that power supplies are to be mounted at twelve feet. However, the applicable NESC code section only requires an 11-foot clearance and provides that power supplies "may be mounted at a lower level for accessibility, provided such cases do not unduly obstruct a walkway."⁶¹

79. Similarly, EAI had long permitted Complainants to guy to EAI anchors, a practice permitted by the NESC (in all past and current editions),⁶² even though the Pole Attachment Agreements state that Complainants must get "written permission" from EAI before attaching to an EAI anchor.⁶³ EAI has abruptly changed this practice and is now requiring separate anchors for guys installed prior to the Pole Attachment Agreement.⁶⁴

80. The EAI Pole Agreements also permit EAI to conduct periodic inspections and safety audits relating to Complainants' attachments, purportedly at Complainants' expense.

Specifically, the Agreements state:

⁵⁹ Harrelson Report at p. 16 (Exh. 15).

⁶⁰ See *id.* at p. 9-11 .

⁶¹ See EAI Pole Agreements at § 2.3(B); Harrelson Report at p. 18 (Exh. 15).

⁶² Declaration of Marc Billingsley at ¶ 21 (Exh. 6); Declaration of Bennett Hooks at ¶ 24 (Exh. 4); Declaration of Jeff Gould at ¶ 17 (Exh. 3).

⁶³ EAI Pole Agreements at § 2.4(D) (Exh. 2A-2D).

⁶⁴ Declaration of Marc Billingsley at ¶ 21 (Exh. 6); Declaration of Bennett Hooks at ¶ 24 (Exh. 4); Declaration of Charlotte Dial at ¶ 20 (Exh. 5).

The Electric Company, because of the importance of its service reserves the right to inspect and audit each new Cable Company installation on its poles and in the vicinity of its lines. The Electric Company also reserves the right to make periodic inspections to determine if the Cable Company's construction complies with the attached construction standards and applicable codes and to determine if unauthorized attachments have been made to the Electric Company's poles. If violation of any provision of this contract on the part of the Cable Company is discovered, the Electric Company shall have the right to require a full accounting of all transactions from the Cable Company and request the Cable Company to provide a representative to accompany an Electric Company representative on a complete inspection of all joint use facilities as required. The Cable Company shall on demand reimburse the Electric Company for the expense of such complete inspections. Such inspections made or not, shall not operate to relieve the Cable Company of any responsibility, obligation or liability assumed under this Agreement. Cable Company shall take immediate action to correct any violation of any provision of this Agreement. Until corrective measures are completed, no additional attachments shall be made to Electric Company poles.

EAI Pole Agreements at Art. V (Exh. 2A-2D).

81. Under the parties' prior course of dealing, EAI limited inspections to those associated with the make-ready process.⁶⁵ This changed in 2002 when EAI began conducting inspections of all attachments to EAI poles in the Targeted Communities.⁶⁶ As discussed below, Entergy has attempted to pass virtually all of the inspection costs along to the Complainants, even though most of the facilities have been in place for a minimum of one year.⁶⁷ This, along with the excessive, unreasonable and discriminatory standards EAI uses to conduct its inspections has produced survey results that direct Complainants to pay for the correction of attachment violations where Complainants' attachments are already code-compliant.⁶⁸

82. Perhaps most important, these contract provisions, particularly as Entergy is applying them, are unjust and unreasonable. Far from a bargained-for exchange, these

⁶⁵ See, e.g., Declaration of Bennett Hooks at ¶ 11 (Exh. 4).

⁶⁶ Declaration of Ronnie Colvin at ¶ 10, attached hereto as Exhibit 16.

⁶⁷ See ¶¶ 308-317, *infra*.

⁶⁸ See Harrelson Report at Art. III (Exh. 15).

agreements are contracts of adhesion that have been in place for more than 20 years and contain many outmoded, unlawful and otherwise unreasonable terms and conditions.⁶⁹

V. OPERATOR-SPECIFIC ISSUES

83. The details of Entergy's multi-faceted unreasonable conduct are best understood by examining its specific conduct with each of the cable-operator Complainants.

C. **Comcast: Little Rock, Arkansas**

84. Comcast serves the Targeted Communities of Little Rock and portions of Pulaski County surrounding Little Rock ("Comcast Service Area").⁷⁰

85. Comcast provides service in the Comcast Service Area over approximately 1,200 miles of aerial plant. Comcast's plant is attached to approximately 38,691 EAI poles⁷¹ and 14,646 SBC poles.⁷²

1. **Initial Construction of the Little Rock Systems**

86. Comcast's predecessor began constructing the Little Rock cable system in 1972.⁷³ Comcast has operated the Cable Systems in and around Little Rock since approximately 1987.⁷⁴

87. Comcast predecessors entered into a pole attachment agreement with Arkansas Power and Light on June 2, 1986 and subsequently assigned it to Comcast. This agreement is currently in effect (the "Comcast Pole Agreement").⁷⁵

⁶⁹ See, e.g., *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387 ¶ 17 (1993) (stating "[d]ue to the inherently superior bargaining position of the utility over the [attaching party] in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company"); see also S. Rep. No. 580, 95th Congs., 1st Sess. at 13 (1978). The Commission rejected Entergy's previous attempts to impose additional harsh provisions on cable operators in the late 1990s. *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc.*, 14 FCC Rcd. 9138 (1999); *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd. 6647 (1999).

⁷⁰ Declaration of Marc Billingsley at ¶ 5 (Exh. 6).

⁷¹ This is the last undisputed EAI attachment invoice received for 2003. The precise number of Comcast attachments is currently in dispute. See ¶¶ 213-218.

⁷² Declaration of Marc Billingsley at ¶ 6 (Exh. 6).

⁷³ See *id.* at ¶ 7.

⁷⁴ See *id.*

⁷⁵ See Comcast Pole Agreement (Exh. 2A).

88. However, most of the Little Rock area cable system (approximately 1000 miles) that Comcast now owns was built prior to the execution of the 1986 agreement.⁷⁶ These systems were built according to applicable engineering specifications, and until approximately 2001, 15 to 30 years after the systems were built, neither these specifications nor Comcast's practices had ever been a source of dispute, or even controversy with Entergy.⁷⁷

89. Since the agreement was executed in June 1986, Comcast and/or its predecessors have only constructed about 200 miles of additional aerial cable plant in Comcast's Service Area.⁷⁸ Even though the 1986 Agreement contained more strict construction standards with regard to anchor, bonding and power supply attachments, EAI permitted Comcast and/or its predecessors to make attachments in compliance with current NESC standards. This practice continued until USS arrived in 2001 and began to exploit the difference between the technical requirements in the agreements and the parties' long-standing, mutually-accepted field practices.⁷⁹

2. Comcast's Little Rock Upgrade

90. In 1999 Comcast began an upgrade of its Little Rock-area cable system. The upgrade involved a) overlashing approximately 30 percent of the existing strand with fiber optic cable and b) upgrading of the active electronic components by splicing or otherwise inserting higher capacity electronics into the existing network.⁸⁰

91. Because of the nature of the upgrade, (*i.e.*, limited overlashing, and where necessary, new active electronics) the vast majority of the original attachments were not

⁷⁶ Declaration of Marc Billingsley at ¶ 9 (Exh. 6).

⁷⁷ *See id.* at ¶ 9.

⁷⁸ *See id.* at ¶ 10.

⁷⁹ Declaration of Ronnie Colvin at ¶ 10 (Exh. 16).

⁸⁰ Declaration of Marc Billingsley at ¶ 11(Exh. 6).

materially affected.⁸¹ The upgrade allowed Comcast to expand dramatically the services it could provide over the cable system to residents of Little Rock and surrounding Pulaski County, including high-speed cable modem service and future state-of-the-art advanced entertainment and information services.⁸²

92. Comcast completed the upgrade project in approximately January 2001.⁸³

93. Throughout the entire two-year period of the upgrade, EAI was aware of Comcast's upgrade project but raised no objections to any of Comcast's engineering and construction practices.⁸⁴

3. The December 2000 Arkansas Ice Storm And Comcast's 2001 Plant Clean-Up

94. In December 2000, around the time that Comcast completed its upgrade, an ice storm damaged a significant number of EAI poles in Comcast's Service Area.⁸⁵

95. On April 18, 2001, representatives of EAI and Comcast met to discuss EAI's concerns regarding safety conditions involving Comcast plant on EAI poles.⁸⁶ EAI identified certain problems, and alleged that Comcast's facilities caused damage and outages on EAI's facilities.⁸⁷

96. Entergy provided no support for its accusations that Comcast was at fault.⁸⁸

97. Upon information and belief, EAI's plant and not Comcast's plant caused the damages and outages, and Comcast was being used as a scapegoat for Entergy's sub-standard engineering, construction and maintenance practices.⁸⁹

⁸¹ See *id.* at ¶ 12.

⁸² See *id.* at ¶ 12.

⁸³ See *id.* at ¶ 13.

⁸⁴ See *id.* at ¶ 14.

⁸⁵ Declaration of Ronnie Colvin at ¶ 4 (Exh. 16).

⁸⁶ See *id.* at ¶ 5.

⁸⁷ See *id.*

⁸⁸ See *id.* at ¶ 6.

98. Despite its concerns that its plant had little or nothing to do with the damage that Entergy's facilities suffered, Comcast agreed to provide EAI with a written plan of action to address safety concerns within 120 days.⁹⁰ Comcast submitted a plan on or about April 20, 2001.⁹¹

99. After submitting the plan, which included correcting all violations EAI reported to Comcast, and a complete ride-out of all 1200 miles of Comcast aerial plant,⁹² Comcast immediately went to work implementing it.⁹³

100. In August 2001, Comcast completed its action plan and submitted a report to EAI.⁹⁴ Comcast reported that it had inspected all 1200 miles of aerial plant and that it had made corrections to its plant at 125 separate locations.⁹⁵

4. USS Arrives on the Scene

101. Based on information and belief, in approximately September 2001 EAI retained USS, several months *after* Comcast submitted its report and inspection results.

102. One of the first tasks USS performed was what Entergy called a "test audit."⁹⁶ On information and belief, Comcast was given no prior notice of the "test audit," was not given an opportunity to accompany the USS inspectors, and was not provided a copy of the report documenting the alleged violations for verification.

103. In early 2002, EAI informed Comcast that the audit demonstrated 30 percent violations with respect to Comcast plant.⁹⁷

⁸⁹ See *id.* at ¶ 7.

⁹⁰ See *id.* at ¶ 8.

⁹¹ See Comcast Action Plan dated April 20, 2001, attached hereto as Exhibit 17.

⁹² See *id.*

⁹³ Declaration of Ronnie Colvin at ¶ 9 (Exh. 16).

⁹⁴ Notification of Completion of Comcast Action Plan dated August 21, 2001, attached hereto as Exhibit 18.

⁹⁵ See *id.*

⁹⁶ Declaration of Ronnie Colvin at ¶ 10 (Exh. 16).

⁹⁷ See *id.* at ¶ 11.

104. Based on information and belief, this preliminary audit was just a pretext to obscure the fact that Entergy had already decided to conduct a system-wide audit of its entire plant at Comcast's expense.

105. Based on information and belief, EAI retained USS to conduct the system-wide inspection without a Request For Proposal, without competitive bids, and without any input from Entergy's pole tenants. As discussed below, an Entergy representative recently informed Cox that USS' proposal to Entergy included a plan to upgrade aerial plant at the cable operators' expense.⁹⁸

5. The USS Survey Results

106. Since the inspections commenced in early 2002, Comcast has received invoices from EAI for inspection-related charges that total more than \$1.5 million.⁹⁹ EAI invoices Comcast received from May, 2002 through February, 2003 had no itemization or description of charges. These invoices only included information identifying the electric circuit in which the inspected poles were located, the billing period and the total amount due.¹⁰⁰

107. For well over a year, Comcast repeatedly asked EAI to provide adequate itemization and backup so that Comcast could assess the reasonableness of the invoices in order to pay them.¹⁰¹ Comcast did not receive complete itemized billing from EAI until June 2003.¹⁰²

⁹⁸ See ¶¶ 187-189, *infra*.

⁹⁹ Declaration of Marc Billingsley at ¶ 15 (Exh. 6).

¹⁰⁰ For example, the May 17 EAI invoice simply states as explanation "SAFETY AUDIT OF CIRCUITS K210, K220 and K860 with an amount due of \$56,727.18. The invoice stated that payment was due by May 27, 2002. Sample copies of EAI invoices received during this period are attached as Exhibit 19.

¹⁰¹ See, e.g., Letter from Kyle Birch, Comcast Senior Counsel, Webster Darling, Entergy Senior Counsel, dated July 17, 2002, attached hereto as Exhibit 20; Letter from Mark Grimmet, Business Manager, Comcast to David B. Inman, Entergy, dated October 22, 2002, attached hereto as Exhibit 21; Letter from Kyle Birch, Comcast Senior Counsel, Webster Darling, Entergy Senior Counsel, dated February 26, 2003, attached hereto as Exhibits 22.

¹⁰² See Letter from Webster Darling, Entergy Senior Counsel, to Kyle Birch, Comcast Senior Counsel, dated June 4, 2003, attached hereto as Exhibit 23.

108. The backup documentation Comcast received for certain EAI invoices between May 2002 and July 2004 show that EAI has improperly billed Comcast for inspecting installations that have been in place for well over one year.

109. Charging for inspections more than a year after installation is an unjust and unreasonable term or condition of attachment.¹⁰³

110. To the extent that Comcast installed attachments in the year preceding USS' inspection, EAI has nonetheless overbilled Comcast for:

- (a) inspecting EAI poles on which Comcast has no attachments;
- (b) inspecting SBC-owned poles for which Comcast has a separate attachment agreement with SBC;
- (c) failing to allocate properly individual and common costs among other attachers;
- (d) charging for a defective attachment inventory conducted by USS;
- (e) imposing an unreasonable "overhead" charge marking up USS charges by 5 to 8 percent;¹⁰⁴ and
- (f) charging for an excessive number of attachments, including penalties.

111. Over the past two and a half years, EAI and USS have issued numerous work orders to Comcast as a result of the inspection. These work orders directed Comcast to correct more than 45,000 conditions that allegedly violate the NESC or the 1986 Pole Agreement.¹⁰⁵

112. On information and belief, USS has completed its initial inspection work of the Comcast Service area. However, Comcast does not believe it has received the results of the last

¹⁰³ See *Knology*, 18 FCC Rcd. 24615, at ¶¶ 28-35.

¹⁰⁴ See, e.g., Declaration of Marc Billingsley at ¶ 63 (Exh. 6).

¹⁰⁵ See *id.* at ¶ 18.

4 to 6 circuits.¹⁰⁶ Comcast anticipates that Entergy/USS will eventually provide these results, but cannot say with any certainty when they will arrive or what the ultimate costs associated with them will be.¹⁰⁷

113. To date, Comcast has corrected approximately 7,500 items requested on the USS work orders. However, a significant number of the corrections EAI ordered--approximately 18,870-- involve at-pole or mid-span clearances between cable and power or between cable and telephone. Comcast believes that many of these either were not caused by Comcast or are not real NESC violations.¹⁰⁸

114. Many of the remaining requested corrections are completely unnecessary. Approximately 5,303 requested corrections involve detaching cable guys from EAI anchors. The guys have been in place for decades--with the knowledge and consent of EAI. More important, they comply with the NESC.¹⁰⁹

115. Approximately 6,637 requested corrections involve bonding of cable facilities to EAI grounds far in excess of the requirements of the NESC.¹¹⁰ Over 8,000 requested corrections involve residential drop clearances many of which are grandfathered under the NESC.¹¹¹ Another 4,101 requested corrections involve guy markers, which in most cases do not involve an NESC violation.¹¹²

¹⁰⁶ See *id.* at ¶ 19.

¹⁰⁷ See *id.* at ¶ 19.

¹⁰⁸ See *id.* at ¶ 20.

¹⁰⁹ See *id.* at ¶ 20.

¹¹⁰ See *id.* at ¶ 21.

¹¹¹ See ¶¶ 244, 261-266, *infra*.

¹¹² See ¶ 244, *infra*.

116. Comcast conservatively estimates that the cost of correcting the remaining items, most of which either EAI and the telephone companies caused themselves or are not actually required by the NESC, is approximately \$5 million.¹¹³

6. Comcast's Years-Long Effort To Resolve This Dispute

117. For literally years, Comcast has been attempting to negotiate with EAI to resolve this dispute.¹¹⁴ These efforts have been fruitless.

118. After countless meetings, emails, phone calls and other correspondence between and among Comcast, USS and Entergy involving field representatives, engineers, plant managers, attorneys and others, Comcast had little choice but to escalate this matter to the highest levels of EAI management. Towards that end, in the Spring of 2004, Comcast's Vice President and General Manager Ronnie Colvin sent a letter to EAI president Hugh MacDonald notifying him of the nature of the disagreement between the parties.¹¹⁵

119. The parties met on May 26, 2004, for several hours.¹¹⁶ Representatives from Comcast, USS, EAI and Comcast's engineering consultant UCI discussed in detail many problems with the USS/EAI audit, and the excessive costs associated with that audit.¹¹⁷

120. As a result of that meeting, Entergy was willing to discuss *flexibility* in the application of *some* of the engineering standards, but it was not going to budge on the costs of the audit.¹¹⁸

¹¹³ Declaration of Marc Billingsley at ¶ 22 (Exh. 6).

¹¹⁴ See *id.* at ¶ 23.

¹¹⁵ Declaration of Ronnie Colvin at ¶ 13 (Exh. 16).

¹¹⁶ See *id.* at ¶ 14.

¹¹⁷ See *id.* at ¶ 15.

¹¹⁸ See *id.* at ¶ 15.

121. By letter dated July 27, 2004 EAI President, Hugh McDonald, demanded immediate payment of one-half of the outstanding inspection balance and the establishment of a payment plan for the remaining amounts.¹¹⁹

122. Although Mr. McDonald was clear that Entergy would accept nothing less than immediate unconditional payment of all amounts due, Comcast nonetheless continued to attempt to work with Entergy to find a mutually satisfactory resolution to the parties' dispute. Those efforts were not successful.¹²⁰

123. In light of EAI's unwillingness to negotiate and its refusal to comply with the Commission prior rulings, Comcast believes further attempts at negotiated resolution would be futile.

D. Alliance Communications: Greenbrier and Plumerville

124. Alliance's experience is similar in many ways to Comcast's, although Alliance's service area is virtually entirely rural. As a result, Alliance has fewer subscribers and is attached to fewer poles than Comcast.¹²¹

125. Even though the total number of poles Alliance attaches to is less than Comcast, the fact that it serves rural areas with lower population densities means that it must attach to more poles to reach fewer customers.¹²² Consequently, even a modest increase in pole-related costs can have a detrimental effect on Alliance's ability to provide its rural service. In this case,

¹¹⁹ See Letter from Hugh McDonald, EAI President and CEO, to Ronnie Colvin, Comcast Vice President and General Manager, dated July 27, 2004, attached hereto as Exhibit 24.

¹²⁰ Declaration of Ronnie Colvin at ¶ 16 (Exh. 16). Comcast also has engineering meetings with EAI to work out mutually agreeable engineering standards applicable to existing and future attachments. These meetings have failed to produce any final agreement because, among other things, EAI has refused to recognize the applicability of NESC Section 13B to Comcast facilities which applies a grandfathering policy for already installed facilities (including maintenance replacements) that were installed consistent with the code in effect at the time of installation.

Declaration of Marc Billingsley ¶ 26 (Exh. 6).

¹²¹ Declaration of Bennett Hooks at ¶ 47 (Exh. 4).

¹²² See *id.* at ¶ 47.

the charges Entergy is requiring the cable operators to pay create a significant increase in Alliance' pole-related costs.

126. Alliance serves the Targeted Communities of Plumerville and Greenbrier in Arkansas ("Alliance Service Area").¹²³

127. Alliance provides service in Arkansas over approximately 250 miles of aerial plant.¹²⁴ In the Alliance Service Area, this plant is attached to approximately 8,610 EAI poles and a small number of SBC poles.¹²⁵ Alliance serves approximately 3,000 customers in Greenbrier and Plumerville.

1. Initial Construction of the Greenbrier and Plumerville Systems

128. Alliance acquired the Plumerville and Greenbrier systems in 1999.¹²⁶ Alliance's predecessors entered into Alliance's current pole agreement with Entergy (the "Alliance Pole Agreement") on April 1, 1991.¹²⁷

129. Most of the Plumerville area cable system--approximately 35 miles--that Alliance now owns was built prior to 1991.¹²⁸ Based on information and belief, Alliance's predecessors constructed this system beginning in approximately 1978, and in accordance with engineering specifications applicable at that time. Until approximately 2002, approximately 20 years after Alliance's predecessor built the system, neither these specifications nor Alliance's practices had ever been a source of dispute, or even controversy with EAI.¹²⁹

¹²³ *See id.* at ¶ 4. Alliance serves numerous other communities in Arkansas with attachments to EAI facilities and is concerned that the inspection tactics applied by EAI and USS in Plumerville and Greenbrier will spread throughout the states.

¹²⁴ *See id.* at ¶ 5.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See* Alliance Pole Agreement (Exh. 2B)

¹²⁸ Declaration of Bennett Hooks at ¶ 8 (Exh. 4).

¹²⁹ *See id.* at ¶ 8

130. Alliance's Greenbrier cable system, which consists of approximately 200 miles of plant, was built in approximately 1998.¹³⁰ Even though the 1991 Agreement contained construction standards in excess of NESC requirements with regard to anchor, bonding and power supply attachments, EAI permitted Alliance to make attachments in compliance with then-current NESC standards. This practice continued until USS arrived in the Alliance Service Area in 2002 and began to exploit the difference between the technical requirements in the agreements and the parties' long-standing, mutually-accepted field practices.¹³¹

2. USS Arrives on the Scene

131. Beginning in approximately July 2002 (some 10 months after USS was hired by EAI, and approximately 6 months after the Comcast system audit began), USS began a "test audit" inspection of EAI poles in the Alliance Service Area. Neither EAI nor USS involved Alliance in this test audit.¹³²

132. At the time, EAI's representative claimed Alliance's facilities caused outages to EAI facilities and that the inspection was therefore necessary.¹³³ EAI provided no support for its accusations that Alliance was at fault.¹³⁴

133. On September 13, 2002, Alliance and EAI met to review the results of this "test" audit.¹³⁵ At this meeting, EAI informed Alliance that the audit showed significant violations with respect to Alliance's plant in Plumerville.¹³⁶

¹³⁰ The Greenbrier system was constructed in 1998. *See id.* at ¶ 9.

¹³¹ *See id.* at ¶ 8.

¹³² *See id.* at ¶ 12. Although Alliance was initially told by EAI that it would be permitted to have an Alliance representative accompany the USS inspector, EAI later informed Alliance that such participation was not necessary. Alliance was never contacted as when or where the inspections were taking place or given an opportunity to provide a representative during the USS inspections. *See id.*

¹³³ *See id.* at ¶ 12.

¹³⁴ *See id.* at ¶ 13.

¹³⁵ *See id.* at ¶ 14.

¹³⁶ *See id.*

134. Based on information and belief, this preliminary audit was just a pretext to obscure the fact that Entergy had already decided to conduct a system-wide audit of its entire plant at Alliance's expense.

135. Entergy's real motive was to upgrade its aerial plant at the expense of cable operators.¹³⁷

136. Upon information and belief, EAI engaged USS to audit Alliance's plant as part of the same scheme that led to the USS audits of Comcast's plant. Just as with Comcast, EAI hired USS to audit Alliance's plant without competitive bidding and without input or participation by Alliance.¹³⁸

137. Since the inspections commenced in early 2002, Alliance has received numerous EAI invoices for inspection related charges, in excess of \$250,000.¹³⁹

3. The USS Survey Results

138. The itemized invoices show that EAI has improperly billed Alliance for inspecting installations that have been in place for well over one year. Charging for inspections more than a year after installation is an unjust and unreasonable term or condition of attachment.¹⁴⁰

139. To the extent that Alliance installed some limited amount of attachments in the year preceding USS' inspection, EAI has nonetheless overbilled Alliance for:

- (a) failing to allocate properly individual and common costs among other attachers;
- (b) charging for defective attachment inventory conducted by USS; and

¹³⁷ See ¶¶ 187-189, *infra*. Specifically, an Entergy representative indicated to another cable operator that Entergy had retained USS and that an integral part of USS' marketing strategy included a promise that Entergy would be able to recover the full amount of its audit costs from cable operators, get its aerial plant refurbished, *plus* earn a profit of 10%. See Declaration of Jeff Gould at ¶ 25.

¹³⁸ Declaration of Bennett Hooks at ¶ 16 (Exh. 4).

¹³⁹ See *id.* at 18.

¹⁴⁰ See *Knology*, 18 FCC Rcd. 24615, at ¶¶ 28-35.

- (c) imposing an unreasonable “overhead” charge marking up USS charges by 5 to 8 percent.¹⁴¹

140. Based on information and belief, EAI has also inspected EAI poles on which Alliance has no attachments. Worse, USS inspected SBC-owned poles for which Alliance has a separate attachment agreement governing Alliance’s independent relationship with SBC.

141. Over the past two years, EAI and USS have issued numerous work orders to Alliance as a result of the inspection. These work orders direct Alliance to correct approximately 7,000 alleged violations of the NESC or the 1991 Pole Attachment Agreement.¹⁴²

142. On information and belief, USS has completed initial inspection work on the Alliance communities, but is still conducting post-inspection of Alliance attachments. Alliance does not have a completion date for the project.¹⁴³

143. To date, Alliance has corrected approximately 1,500 items the USS work orders requested. However, the vast majority of the corrections Entergy/USS requested--approximately 4,200--involve bonding of cable facilities to EAI grounds far in excess of NESC requirements.¹⁴⁴

144. Further, EAI ordered corrections for at-pole or mid-span “violations” that involve clearance between cable and power or between cable and telephone. Alliance believes that many of these either were not caused by Alliance or are not real NESC violations.¹⁴⁵

145. Many of the remaining requested corrections are completely unnecessary. Approximately 200 requested corrections involve detaching cable guys from EAI anchors.

¹⁴¹ Declaration of Bennett Hooks at ¶ 18 (Exh. 4).

¹⁴² *See id.* at ¶ 19.

¹⁴³ *See id.* at ¶ 20.

¹⁴⁴ *See id.* at ¶ 21.

¹⁴⁵ *See id.* at ¶ 22.

However, the guys have been in place for decades--with the knowledge and consent of EAI.

More important, they comply with the NESC.¹⁴⁶

146. EAI has also notified Alliance that a number of poles require replacement because of clearance issues associated with Alliance facilities. However, on a very significant number of these poles, EAI is in violation as well, with the *only* way to bring EAI's electric facilities into compliance is by replacing the pole. Nevertheless, EAI is holding Alliance responsible for the full cost of the pole replacement regardless of the benefit EAI receives for the pole change-out.¹⁴⁷

147. To date, Alliance has spent over \$63,000 in clean-up of EAI's plant, including labor, materials and engineering contractor costs to address Entergy's concerns.¹⁴⁸ In addition, Alliance conservatively estimates that the cost of correcting the remaining items Entergy/USS requested, but that are already NESC-compliant, is approximately \$500,000.¹⁴⁹

148. For two years Alliance has been attempting to negotiate with EAI for a resolution of the disputes.¹⁵⁰ These efforts have been fruitless.

E. WEHCO Video: Searcy and Pine Bluff

149. WEHCO serves the Targeted Communities of Searcy and Pine Bluff in Arkansas ("WEHCO Service Area").¹⁵¹

¹⁴⁶ See *id.* at ¶ 23.

¹⁴⁷ See *id.* at ¶ 25.

¹⁴⁸ See *id.* at ¶ 31

¹⁴⁹ See *id.* at ¶ 31

¹⁵⁰ See, e.g., Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm Webster Darling, Senior Counsel for Entergy, dated January 17, 2003 (Exh. 10) Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm Webster Darling, Senior Counsel for Entergy, dated December 15, 2003 (Exh. 11); Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm. Webster Darling, dated December 18, 2003 (Exh. 12); Letter from Wm. Webster Darling, Counsel for Entergy, to J. D. Thomas, Counsel for Alliance, dated February 17, 2004, attached hereto as Exhibit 25.

¹⁵¹ Declaration of Charlotte Dial at ¶ 3 (Exh. 5). WEHCO serves numerous other communities in Arkansas with attachments to EAI facilities and is concerned that the inspection tactics applied by EAI and USS in Searcy and Pine Bluff will spread throughout the state.

150. WEHCO provides service in Arkansas over approximately 2,199 miles of aerial plant and is attached to approximately 60,000 EAI poles and 5,052 SBC poles.¹⁵² So far, EAI has audited WEHCO's attachments on 1,314 poles within five circuits.¹⁵³

1. Initial Construction of the Searcy and Pine Bluff System

151. WEHCO constructed the Searcy cable system in 1979. WEHCO has operated cable systems in and around Searcy since that time.¹⁵⁴

152. WEHCO acquired the Pine Bluff cable system from its predecessor in 1976. WEHCO has operated cable systems in and around Pine Bluff since that time.

153. WEHCO entered into a pole attachment agreement with Arkansas Power and Light Company on January 1, 1985. This agreement is currently in effect (the "WEHCO Pole Agreement").¹⁵⁵

154. Based on information and belief, WEHCO and its predecessors constructed the Searcy and Pine Bluff systems in accordance with engineering specifications applicable at that time. Until approximately March 2004, almost 30 years after the systems were initially built, neither these specifications nor WEHCO's practices had been a source of dispute, or even controversy with EAI.¹⁵⁶

155. Based on information and belief, since 1985, WEHCO has constructed all additional aerial cable plant in compliance with the NESC standards. Although construction did not necessarily conform to the more strict construction standards set forth in the 1985 pole attachment agreement, on information and belief, WEHCO constructed its facilities with EAI's knowledge and consent.

¹⁵² See *id.* at ¶ 4.

¹⁵³ See *id.* at ¶ 6.

¹⁵⁴ See *id.* at ¶ 7.

¹⁵⁵ See WEHCO Pole Agreement (Exh. 2C).

2. Upgrade of the WEHCO Service Area

156. WEHCO began upgrading its cable systems in Arkansas in 1991.¹⁵⁷ As a result, WEHCO was able to expand dramatically the video services provided over the cable systems and, ultimately, was able to provide the residents of Arkansas, including those in Pine Bluff and Searcy, advanced communications services such as high-speed Internet access.¹⁵⁸

157. The Searcy upgrade project was begun in 1993 and completed in 1995. The Pine Bluff upgrade was started in 1996 and completed in 2000. Throughout the decade-long period of these upgrades, EAI was aware of the WEHCO upgrade projects. To the extent Entergy raised any objections to WEHCO's engineering, construction and maintenance practices, the parties addressed those issues contemporaneously.

3. USS Arrives on the Scene

158. On information and belief, in March 2004, four years after WEHCO completed the Pine Bluff upgrade and almost a decade after the Searcy rebuild, USS began a "test audit" inspection in five circuits: one circuit in Pine Bluff and four circuits in Searcy.¹⁵⁹

159. USS/Entergy conducted the test audit without WEHCO's involvement.¹⁶⁰ Although WEHCO requested that a representative accompany USS during the inspection of the Searcy audit, EAI told WEHCO it was unnecessary because EAI was only conducting a pre-audit, and that USS only had one more day of inspections. EAI indicated that if USS conducted a full inspection, WEHCO could have a representative accompany USS.¹⁶¹

¹⁵⁶ Declaration of Charlotte Dial at ¶ 10 (Exh. 5).

¹⁵⁷ *See id.* at ¶ 12.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at ¶ 17.

¹⁶⁰ *See id.*

¹⁶¹ *See id.* at ¶ 18.

160. On or about March 30, 2004, EAI conducted an “Entergy Pole Attachment Training Session” with WEHCO plant managers at WEHCO’s call center facility in Little Rock, Arkansas.¹⁶² Entergy billed WEHCO for the costs associated with this meeting.¹⁶³

161. At that time, EAI informed WEHCO that the preliminary audit of Searcy revealed 83.4% safety violations.¹⁶⁴

162. On or about May 20, 2004, representatives of WEHCO, EAI and USS met to discuss the Pine Bluff “test audit” results.¹⁶⁵ At this meeting, Entergy/USS informed WEHCO that its Pine Bluff plant was at 86.7% violation.¹⁶⁶

163. Based on information and belief, this preliminary audit was just a pretext to obscure the fact that Entergy had already decided to conduct a system-wide audit of its entire plant at WEHCO’s expense. Entergy recently acknowledged this to be true.¹⁶⁷

164. Upon information and belief, EAI engaged USS to audit WEHCO’s plant as part of the same process that led to the USS audit of the Alliance and Comcast plant. Just as with the other Complainants, Entergy hired to audit WEHCO’s plant without a Request For Proposal, competitive bidding and WEHCO’s input or participation.¹⁶⁸

4. Unjust and Unreasonable Inspection Charges

165. To date, WEHCO has received two invoices from EAI totaling \$15,227.61.¹⁶⁹ These charges cover facilities WEHCO installed between 4 and 10 years ago.¹⁷⁰ Under applicable law, EAI must recover routine plant inspection costs through the annual pole rent.¹⁷¹

¹⁶² Declaration of Charlotte Dial at ¶ 21(Exh. 5). At this meeting, Entergy informed WEHCO of what EAI considers a “violation,” including failing to bond at every vertical ground and the sharing of EAI anchors. *See id.*

¹⁶³ *See id.* at ¶ 21.

¹⁶⁴ *See id.* at ¶ 20.

¹⁶⁵ *See id.* at ¶ 22.

¹⁶⁶ *See id.*

¹⁶⁷ *See* ¶¶ 187-189, *infra.*

¹⁶⁸ Declaration of Charlotte Dial at ¶ 16 (Exh. 5).

¹⁶⁹ *See id.* at ¶¶ 13-14.

166. To the extent that WEHCO installed some number of attachments in the year prior to the inspection, EAI nonetheless overbilled WEHCO for:

- (a) failing to allocate properly individual and common costs among other attachers;
- (b) charging for USS' defective attachment inventory; and
- (c) imposing an unreasonable "overhead" charge marking up USS charges by 5 to 8 percent.¹⁷²

167. In addition, upon information and belief, EAI has inspected EAI pole on which WEHCO has no attachments and inspected telephone poles for which WEHCO has separate attachment agreements.

168. Over the past several months, EAI and USS have cited WEHCO for 1,546 violations of the NESC or the 1985 Pole Attachment Agreement.¹⁷³

169. However, USS' inspection of the WEHCO Service Area has a number of obvious and substantial errors, including missed poles and poor inspection analysis.¹⁷⁴

170. To date, WEHCO has corrected approximately 653 items requested on the USS work orders, however, a large percentage of the corrections (approximately 332) demanded by EAI involve bonding of grandfathered cable facilities to EAI grounds far in excess of the requirements of the NESC.¹⁷⁵

¹⁷⁰ See *id.* at ¶ 23. Initial invoices received from Entergy failed to contain any breakdown or itemization of the charges contained therein, prompting WEHCO to request a detailed explanation of the work performed and itemized calculations of the charges. See Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated September 30, 2004, attached hereto as Exhibit 13; Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated October 27, 2004, attached hereto as Exhibit 14.

¹⁷¹ See ¶¶ 308-317, *infra*.

¹⁷² Declaration of Charlotte Dial at ¶ 23 (Exh. 5).

¹⁷³ See *id.* at ¶ 25.

¹⁷⁴ See *id.* at ¶ 26.

¹⁷⁵ See *id.* at ¶ 27.

171. Since WEHCO is in the preliminary stages of the inspection process, it cannot yet state with certainty what the costs associated with the inspection process, including correcting all of the violations.¹⁷⁶ However, WEHCO anticipates that these costs will be excessive.¹⁷⁷

172. Beginning in May 2004, WEHCO has attempted to negotiate with EAI for a resolution of its disputes over the pole attachment survey,¹⁷⁸ but believes attempts to resolve this dispute will be fruitless.

F. Cox: Magnolia, Malvern, Gurdon and Russellville

173. Unlike Comcast, Alliance and WEHCO, the fourth Cable Operator Complainant, Cox Communications, recently completed system rebuilds in a number of Arkansas Communities. In addition, Cox is in the early stages of undertaking system upgrades throughout its Arkansas service territory. EAI has indicated that it intends to impose many of the same flawed, overreaching and otherwise objectionable inspection and engineering standards that it has imposed on other Arkansas operators as part of the Cox upgrade process.

174. Cox serves the Targeted Communities of Magnolia, Malvern, Gurdon and Russellville in Arkansas (“Cox Service Area”).¹⁷⁹

175. Cox provides service in Arkansas over approximately 8,000 miles of aerial plant.¹⁸⁰ This plant is attached to approximately 65,000 EAI poles and a small number of SBC poles.¹⁸¹

1. Initial Construction of the Cox Service Area

¹⁷⁶ See *id.* at ¶ 29.

¹⁷⁷ See *id.*

¹⁷⁸ See Letter from J. D. Thomas, Counsel for WEHCO, to Webster Darling, Entergy dated May 24, 2004, attached hereto as Exhibit 26; Letter from Webster Darling, Entergy, to J. D. Thomas, Counsel for WEHCO, dated June 18, 2004, attached hereto as Exhibit 27.

¹⁷⁹ Declaration of Jeff Gould at ¶ 6 (Exh. 3) Cox serves numerous other communities in Arkansas with attachments to EAI facilities and is concerned that the inspection tactics applied by EAI and USS in Magnolia and Malvern will spread throughout the state.

¹⁸⁰ See *id.* at ¶ 5.

¹⁸¹ See *id.*