

EB 06-53

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

Arkansas Cable Telecommunications Association;)
 Comcast Of Arkansas, Inc.; Buford)
 Communications I, L.P. d/b/a Alliance)
 Communications Network; WEHCO Video, Inc.;)
 and TCA Cable Partners d/b/a Cox)
 Communications,)
)
 Complainants,)
)
 v.)
)
 Entergy Arkansas, Inc.,)
)
)
 Respondent.)

File No. EB-05-MD-004

HEARING DESIGNATION ORDER

Adopted: March 1, 2006

Released: March 2, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Pursuant to the Commission's rules,¹ we issue this Hearing Designation Order ("HDO") to initiate a hearing before an Administrative Law Judge ("ALJ") in the above-captioned complaint proceeding² that complainants Arkansas Cable Telecommunications Association ("ACTA"), Comcast of Arkansas, Inc. ("Comcast"), Buford Communications I, L.P. d/b/a Alliance Communications Network ("Alliance"), WEHCO Video, Inc. ("WEHCO"), and TCA Cable Partners d/b/a Cox Communications ("Cox") (collectively, "Cable Operators" or "Complainants") filed against respondent Entergy Arkansas, Inc. ("Entergy") pursuant to section 224 of the Communications Act of 1934, as amended ("Act")³ and the Commission's pole attachment rules.⁴ As explained more fully below, the purpose of the hearing will

¹ See 47 C.F.R. §§ 1.1411 (providing that, in pole attachment complaint proceedings, the Commission "may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings"); 0.111(a)(12) (delegating to the Enforcement Bureau the authority to resolve complaints regarding pole attachments filed under 47 U.S.C. § 224); 0.111(a)(17) (delegating to the Enforcement Bureau the authority to issue orders taking appropriate action in response to complaints, including hearing designation orders). See also 47 C.F.R. § 1.415 (providing that the Commission "may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice."). See generally 47 U.S.C. §§ 154(i), 154(j).

² Pole Attachment Complaint, File No. EB-05-MD-004 (filed Feb. 18, 2005) ("Complaint").

³ 47 U.S.C. § 224.

⁴ 47 C.F.R. §§ 1.1401-1.1418.

be to take evidence and make determinations on disputed issues, as set forth in Part IV, *infra*.

II. BACKGROUND

A. The Parties' Submissions

2. Complainants are four cable operators in the state of Arkansas and their trade association.⁵ The four cable operators operate cable television systems within the meaning of section 224(a)(4) of the Act.⁶ Entergy is a "utility" in Arkansas within the meaning of section 224(a)(1) of the Act.⁷

3. The Complaint alleges, *inter alia*, that Entergy violated section 224 by imposing on the Cable Operators a variety of allegedly unjust, unreasonable, and discriminatory terms and conditions of attachment.⁸ The Complaint further alleges that Entergy unlawfully denied complainants Comcast and Alliance access to its poles, in violation of section 224 of the Act⁹ and section 1.1403(a) of the Commission's pole attachment rules,¹⁰ by imposing a permitting freeze on their attachments.¹¹ Entergy filed a Response to the Complaint in which it denied Complainants' allegations.¹² Entergy's Response also raised a number of defenses, including that the Commission lacks jurisdiction over the Complaint insofar as Complainants seek a determination regarding the reasonableness of Entergy's choice and application of engineering standards,¹³ and that complainant Cox is not a proper party to this proceeding.¹⁴ Complainants then filed a Reply.¹⁵

4. Each of the pleadings filed in this proceeding is exceptionally voluminous and raises numerous disputed issues of fact and law. Consequently, Commission staff issued a letter order instructing the parties to meet and confer and file a Joint Statement setting forth all (a) stipulated facts; (b) disputed facts as to which either party or both parties seek a finding from the Commission; and (c) legal issues as to which either party or both parties seek a conclusion from the Commission.¹⁶ In response, the parties filed a Joint Statement that spans nearly 200 pages.¹⁷ It contains few stipulations of fact or law, and consists overwhelmingly of summaries of the numerous factual and legal issues that remain in dispute between Entergy and the Cable Operators.

⁵ Complaint at 2, ¶¶ 2-6.

⁶ 47 U.S.C. § 224(a)(4); Complaint at 2, ¶¶ 2-6; 24, ¶ 84; 33, ¶ 126; 37, ¶ 149; 42, ¶ 174; Response to Complaint, File No. EB-05-MD-004 (filed April 19, 2005) ("Response") at 102, ¶¶ 176-80; 153, ¶ 290; 175, ¶ 337; 183, ¶ 360; 190, ¶ 385.

⁷ 47 U.S.C. § 224(a)(1); Complaint at 2, ¶ 7; Response at 102, ¶ 181.

⁸ See, e.g., Complaint at 24-46, 50-84.

⁹ 47 U.S.C. § 224.

¹⁰ 47 C.F.R. § 1.1403(a).

¹¹ See Complaint at 47-50, ¶¶ 202-212; 83-84, ¶ 379(a).

¹² See Response.

¹³ Response at 14-18, ¶¶ 23-24, 28.

¹⁴ Response at 8, ¶ 14; 45, ¶ 73.

¹⁵ Reply to Defendant's Response (filed June 10, 2005) ("Reply").

¹⁶ Letter Order, File No. EB-05-MD-004 (dated July 8, 2005). The letter order also instructed the parties to state briefly their differing positions on each disputed factual and legal issue. *Id.*

¹⁷ Joint Statement, File No. EB-05-MD-004 (filed Aug. 29, 2005) ("Joint Statement").

B. The Propriety of a Hearing

5. The Complaint in this case raises a large number of complex factual and legal issues involving four cable operators with facilities located throughout the state of Arkansas. Broadly speaking, these issues include the reasonableness of certain engineering standards that Entergy has sought to impose on Complainants and whether these standards are consistent with the parties' past practices;¹⁸ whether Entergy has applied its engineering standards in a discriminatory manner; the reasonableness of the design, method, and costs of Entergy-initiated inspections of Complainants' attachments; the allocation of responsibility for the costs of correcting numerous alleged safety and engineering violations; and the extent, circumstances, and reasonableness of Entergy's alleged refusals to grant access to its poles to Comcast and Alliance. The disputed attachments number in the tens of thousands and, in many cases, date back to the 1980's. Some of the conduct at issue spans decades. The parties' submissions include thousands of pages of company documents and photographs, and conflicting declarations both from numerous fact witnesses and experts.

6. In view of the large number of factual and legal issues in dispute, the resolution of which may, in many cases, depend on determinations as to the credibility of opposing witnesses, we conclude that this proceeding should be designated for a hearing before an ALJ.¹⁹ We find that a hearing presents the best opportunity for the Commission to examine and test the many conflicting allegations that all parties have leveled in this case, and to arrive at a just, equitable, and expeditious resolution. Although a hearing is clearly not warranted in every pole attachment dispute, we believe that the breadth and complexity of this proceeding make a hearing appropriate here.²⁰

III. RESOLUTION OF THRESHOLD ISSUES

7. Entergy raises two threshold issues that we do not designate for hearing, but instead decide in this HDO. The first issue concerns the Commission's jurisdiction to decide Complainants' claims regarding engineering standards,²¹ and the second concerns the propriety of joining Cox as a complainant in this proceeding.²² We address each of these issues below.

A. Commission Jurisdiction

8. Entergy challenges the Commission's authority to address the Cable Operators' allegations regarding Entergy's engineering standards. Entergy argues that the Commission lacks "specific expertise with respect to electric utilities and their unique safety and operational issues,"²³ and asserts that the Commission "does not have jurisdiction . . . to specify the engineering standards that a

¹⁸ For example, the dispute concerns engineering standards relating to, *inter alia*, clearance or separation requirements between facilities on poles at residential drops (*see, e.g.*, Complaint at 59, ¶¶ 254-58; 60, ¶¶ 261-66; 61, ¶¶ 270-76; Response at 58, ¶¶ 96-99; 62, ¶¶ 102-3; 65, ¶¶ 108-112); bonding of Complainants' facilities to the poles (*see, e.g.*, Complaint at 60, ¶¶ 259-60; Response at 60-61, ¶¶ 100-01); and anchors (*see, e.g.*, Complaint at 61, ¶¶ 267-68; Response at 63-64, ¶¶ 104-06).

¹⁹ *See* 47 C.F.R. §§ 1.1411; 0.111(a)(12); 0.111(a)(17); 1.415. *See also* 47 C.F.R. §§ 1.201-1.364

²⁰ *See, e.g., Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, Hearing Designation Order, 11 FCC Rcd 11202 (1996); *TCA Management Co. et al. v. Southwestern Public Service Co.*, Hearing Designation Order, 10 FCC Rcd 11832 (1995); *Florida Cable Telecommunications Ass'n., Inc. v. Gulf Power Co.*, Hearing Designation Order, 19 FCC Rcd 18718 (Enf. Bur. 2004).

²¹ *See, e.g.*, Joint Statement at 4-10.

²² *See, e.g.*, Joint Statement at 11-16.

²³ Response at 14.

utility must employ.”²⁴ According to Entergy, because “[m]ost states, including Arkansas, already have the authority to address safety, engineering and reliability issues, . . . [j]urisdiction, therefore, is properly located with the states as to engineering, reliability and safety.”²⁵

9. Entergy’s argument assumes, incorrectly, that deciding the merits of the Complaint will require the Commission to establish a comprehensive set of engineering standards that Entergy and other utilities would be required to use throughout their operations. The Complainants’ allegations regarding engineering standards raised in the Complaint are actually much narrower in scope. The Complainants challenge particular engineering standards, and seek a determination of whether Entergy’s application of each such standard in the unique circumstances presented constitutes an unjust and unreasonable term or condition of attachment in violation of section 224(b)(1) of the Act.²⁶ The Complaint also accuses Entergy of wrongfully denying Comcast and Alliance access to its poles based on purported safety and reliability concerns in violation of section 224(f)(1) and (2) of the Act.²⁷ This denial of access claim, like Complainants’ allegations of unjust and unreasonable terms and conditions of attachment, challenges the application of specific engineering standards and practices in the unique circumstances presented here.

10. The parties agree that the Commission has jurisdiction over the justness and reasonableness of rates, terms, and conditions of pole attachments under section 224(b) of the Act.²⁸ The parties also acknowledge that, under section 224(f)(1) and (2), a utility must provide cable television systems with “nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it,” but the utility “may deny access to its poles for insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.”²⁹ Pursuant to the provisions of section 224, the Commission, through its Bureaus, has exercised its jurisdiction in prior pole attachment complaint proceedings to determine whether a pole owner’s adoption or application of specific engineering standards was unjust and unreasonable.³⁰ Making such a determination does not require the Commission to establish a set of engineering standards that utilities must use across-the-board. Indeed, in adopting rules governing pole attachments, the Commission expressly declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns.³¹ The Commission concluded, instead, that “the

²⁴ Joint Statement at 10, ¶ 27. See Response at 14-16, ¶¶ 22-27; 17-18, ¶ 28.

²⁵ Joint Statement at 10, ¶ 27. See Response at 17-18, ¶ 28. We note that the parties stipulate that the state of Arkansas has not certified under section 224(c) of the Act that it regulates the rates, terms, and conditions of attachments. Joint Statement at 4, ¶ 15; 47 U.S.C. § 224(c). The state of Arkansas thus has not preempted Commission jurisdiction over the rates, terms, and conditions of pole attachments pursuant to section 224(c).

²⁶ 47 U.S.C. § 224(b)(1). See, e.g., Complaint at 59-62, ¶¶ 254-76.

²⁷ See, e.g., Complaint at 47-50, ¶¶ 202-212; Joint Statement at 148-51, ¶¶ 339-45.

²⁸ Joint Statement at 4, ¶ 15. See 47 U.S.C. § 224(b)(1).

²⁹ 47 U.S.C. § 224(f)(2). See Joint Statement at 153, ¶ 348. See also *id.* at 4, ¶ 15.

³⁰ See, e.g., *Cable Television Association of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd 16333, 16338-39 at ¶¶ 10-12 (Enf. Bur. 2003) (finding that certain proposed contract provisions were unjust and unreasonable, and rejecting the pole owner’s contention that these provisions were necessary to prevent safety violations); *Newport News Cablevision, Ltd. Comm., Inc. v. Virginia Elec. and Power Co.*, Order, 7 FCC Rcd 2610, 2612-13 at ¶¶ 15-16 (Com. Car. Bur. 1992) (rejecting cable operator’s claims that the pole owner’s safety standards relating to guying and clearance were unreasonable).

³¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16067-74 at ¶¶ 1143-1150, 1158 (1996) (subsequent history omitted) (“Local Competition Order”). See *id.* at 16068, ¶ 1145 (noting that the Commission’s “determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into

(continued....)

reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."³²

11. At the same time, the Commission "reject[ed] the contention of some utilities that they are the primary arbiters of such [safety, reliability, and engineering] concerns,"³³ and required utilities "to justify any conditions they place on access."³⁴ Further, the Commission rejected the suggestion — also advanced by Entergy here — that state and local regulators, rather than the Commission, have primary responsibility for determining whether a utility's engineering standards and practices are just and reasonable under section 224.³⁵ Although the Commission found that state and local requirements affecting attachments are entitled to deference, it concluded that "[w]here a local requirement directly conflicts with a rule or guideline we adopt herein, [the Commission's] rules will prevail."³⁶ The Commission thus confirmed that it has jurisdiction to review and reject a challenged engineering standard or practice as unjust or unreasonable under section 224, even where the standard or practice complies with state or local requirements.³⁷

12. Adopting Entergy's suggestion that the Commission lacks jurisdiction to determine the justness or reasonableness of the engineering standards a utility may impose on attachers would largely rob section 224(b)(1) of meaning.³⁸ Under Entergy's construction, the Commission would lack jurisdiction any time a utility raised safety or reliability concerns to justify the engineering standards it imposed on attachers. To allow utilities to thus evade Commission review would undermine the purpose

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account all of the issues that can arise in the context of a single installation or attachment.") See also *id.* at 16070, ¶ 1148 ("Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards").

³² *Local Competition Order*, 11 FCC Rcd at 16067, ¶ 1143.

³³ *Id.* at 16074, ¶ 1158. See *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Order, 14 FCC Rcd 11599, 11604 at ¶ 11 (Cab. Serv. Bur. 1999) (a utility "may rely on the NESC [National Electric Safety Code] to provide standards for safety, reliability, and generally applicable engineering standards, but the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable") (citing *Local Competition Order*, 11 FCC Rcd at 16074, ¶ 1158).

³⁴ *Local Competition Order*, 11 FCC Rcd at 16071, ¶ 1150. The Commission further concluded that, although a complainant challenging a denial of access "must establish a *prima facie* case" and "state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought," the utility bears the burden of justifying why the denial fits within one of the exceptions to the general access mandate of section 224(f)(2). *Id.* at 16100-01, ¶¶ 1222-23. See 47 C.F.R. § 1.1409(b) (providing that, in a pole attachment complaint proceeding, "[t]he complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f)," but "[i]n a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.").

³⁵ See, e.g., *Local Competition Order*, 11 FCC Rcd at 16072-73, ¶ 1154-55.

³⁶ *Local Competition Order*, 11 FCC Rcd at 16072-73, ¶ 1154.

³⁷ Notably, the Commission observed in the *Local Competition Order* that nothing in section 224 "compels us to preempt . . . local [pole attachment] regulations as a matter of course" and concluded that "it would be unduly disruptive to invalidate summarily all such local requirements." *Id.* at 161072-73, ¶ 1154. These comments indicate that the Commission recognized its authority to preempt state and local engineering requirements, but declined to exercise that power summarily to invalidate local regulations across-the-board.

³⁸ Entergy's suggestion also conflicts with statements in Entergy's Response requesting that the Commission require Complainants to remedy alleged safety violations that Entergy has identified. Response at 18, ¶ 29; 101, ¶ 173.

of section 224 to "prohibit utilities from engaging in unfair pole attachments practices"³⁹ and to "ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of . . . scarce infrastructure and rights-of-way."⁴⁰ For all the foregoing reasons, we reject Entergy's overly restrictive view of the Commission's jurisdiction. We affirm the Commission's authority to decide whether Entergy's application of the particular engineering standards at issue in the Complaint is unjust and unreasonable under section 224(b), and whether Entergy unlawfully denied Complainants access to its poles based on purported safety and reliability concerns in violation of section 224(f).

B. Joinder of Cox

13. Entergy contends that we should dismiss complainant Cox from this action, because the allegations in the Complaint regarding Cox's attachments differ so substantially from the allegations regarding the other Cable Operators as to make joinder of Cox in this proceeding improper.⁴¹ Entergy asserts that the purpose of joinder is to prevent duplicative complaint proceedings where there are common issues of fact and law, and argues that such commonality is absent here.⁴² Complainants acknowledge that the facts in this proceeding "are to some extent specific to each Complainant," but argue that there are "many common areas of fact, experience, injury suffered, law and relief due that warrant prosecuting this matter in a single complaint."⁴³

14. Section 1.1404(a) of the pole attachment rules, which governs joinder of complainants in a single proceeding, does not specify particular requirements for joinder. It simply states: "Complainants may join together to file a joint complaint."⁴⁴ Still, the rule would seem to contemplate joinder of claims by multiple attachers against a pole owner only in situations where each of the attachers' claims involve comparable contractual provisions and similar grievances.⁴⁵

15. In this case, the parties stipulate that all the Complainants, including Cox, "are subject to separate but identical pole attachment agreements governing the attachment of Complainants' facilities to

³⁹ *Promotion of Competitive Networks*, Report and Order, 15 FCC Rcd 22983, 23014-15 at ¶ 70 (2000)(citing S. Rep. No. 580, 95th Cong., 1st Sess. at 19, 20 (1977)) (internal quotations omitted). See also *id.* at 23,015, ¶ 71 (noting that amendments to section 224 enacted in the Telecommunications Act of 1996 extended the protections of section 224 to telecommunications carriers; gave both cable operators and telecommunications carriers a mandatory right of access to utility poles; and maintained "a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.")

⁴⁰ *Implementation Of Section 703(e) Of The Telecommunications Act Of 1996*, Report and Order, 13 FCC Rcd 6777, 6780 at ¶ 2 (1998) (subsequent history omitted) (citing S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977)).

⁴¹ Joint Statement at 16, ¶ 44; Response at 8, ¶ 14; 45, ¶ 73.

⁴² Joint Statement at 16, ¶ 44.

⁴³ Joint Statement at 11, ¶ 30.

⁴⁴ 47 C.F.R. § 1.1404(a). By contrast, section 1.723(a) of the Commission's rules, which governs formal complaints under section 208 of the Act, specifies that joinder of two or more complainants in one complaint is permitted only "if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act." 47 C.F.R. § 1.723(a). This proviso does not appear in rule 1.1404(a).

⁴⁵ See *Adoption Of Rules For The Regulation Of Cable Television Pole Attachments*, First Report and Order, 68 F.C.C.2d 1585 (1978). In adopting section 1.1404(a), the Commission noted that "a utility will typically enter into comparable agreements with several CATV operators in its service area so that if there is troublesome language or a contentious provision in the agreement, the filings by affected CATV operators will likely focus on the same or similar contractual provisions." *Id.* at 1591, ¶ 17. Rule 1.1404(a) was designed "to simplify the process for handling such situations . . . [by] permit[ing] aggrieved parties to initiate a consolidated multiple-issue complaint procedure." *Id.*

Entergy's poles."⁴⁶ The Complaint allegations concerning Cox's attachments share many elements in common with the allegations concerning the other Cable Operators' attachments. For example, the Complaint asserts that Entergy is imposing on Cox the same allegedly unreasonable, discriminatory, and unjust charges that it is imposing on Comcast, Alliance, and WEHCO.⁴⁷ The Complaint further alleges, with respect to Cox's attachments, that Entergy unlawfully failed to allocate properly the costs of inspections among attachers;⁴⁸ imposed unreasonable overhead charges on the costs of inspections;⁴⁹ improperly inspected poles on which Cox has no attachments;⁵⁰ and cited Cox for purported violations of clearance standards for facilities that allegedly fall well within the standards in the National Electric Safety Code ("NESC").⁵¹ These allegations are similar, if not identical, to the allegations the other Complainants assert against Entergy.⁵²

16. In an effort to demonstrate the absence of common factual and legal issues between Cox and the other Complainants, Entergy points out that Cox's attachments, unlike those of the other Complainants, have not been subject to an Entergy-initiated test inspection or a full safety inspection.⁵³ Instead, Entergy has engaged a contractor to conduct pre-construction engineering, make-ready, and post-construction inspections with respect to Cox's upgrades to its facilities.⁵⁴ Although Cox acknowledges that Entergy has not yet conducted a test audit or safety inspection of Cox's facilities,⁵⁵ Cox asserts that Entergy has indicated its intent to impose on Cox's upgrade process many of the same objectionable inspection and engineering standards that Entergy has allegedly imposed on the other Complainants.⁵⁶

17. We conclude that the factual distinctions that Entergy has identified do not warrant dismissal of Cox from this proceeding. Cox's allegations challenge many of the same engineering standards, contractual provisions, and charges that the other Complainants have put at issue in this proceeding. Nothing in section 1.1404(a) of the pole attachment rules requires a total identity of allegations among complainants.⁵⁷ Given the significant degree of overlap between Cox's claims and those of the other Complainants, we believe that forcing Cox to litigate its claims in a separate proceeding would result in a needless duplication of effort and increased expenditure of resources by both the parties and the Commission. For these reasons, we deny Entergy's request to dismiss Cox from this proceeding.

IV. ISSUES TO BE ADDRESSED IN HEARING

18. We hereby designate for a hearing before an ALJ each of the following disputed issues set forth in the parties' Joint Statement:

⁴⁶ Joint Statement at 10, ¶ 28.

⁴⁷ Complaint at 45, ¶ 190.

⁴⁸ Complaint at 45, ¶ 191(a).

⁴⁹ Complaint at 45, ¶ 191(d).

⁵⁰ Complaint at 45, ¶ 192.

⁵¹ Complaint at 47, ¶ 199.

⁵² See Complaint at 24, ¶¶ 86-116; 33, ¶¶ 128-47; 38-41, ¶¶ 151-70; 55-83, ¶¶ 239-378.

⁵³ Joint Statement at 15, ¶ 41.

⁵⁴ Joint Statement at 13, ¶ 35.

⁵⁵ Joint Statement at 13, ¶ 35.

⁵⁶ Complaint at 42, ¶ 173.

⁵⁷ Indeed, although only two of the four Complainants allege that Entergy imposed a freeze on their applications for new attachments, Entergy has not sought to dismiss any of the Complainants based on that distinction. See Complaint at 47-50, ¶¶ 202-212.

Issues Relating to Entergy's Engineering Standards

- 1(a). To determine whether it is unjust and unreasonable for Entergy to require Complainants to comply strictly with the engineering standards in the pole attachment agreements as a condition of access.
- 1(b). To determine whether, and under what circumstances, it is reasonable for Entergy to require Complainants to obtain "sign off" from an Arkansas-licensed professional engineer as to the grandfathered status of an attachment or as to the applicability of an NESC exception.
- 1(c). To determine whether the Entergy engineering standards that Complainants challenge in the Complaint exceed those of the NESC, or its grandfathering provisions or exceptions, and if so, whether such heightened standards are unjust and unreasonable.

Issues Relating to Entergy's Charges to Complainants

- 2(a). To determine whether Entergy designed its pole surveys without Complainants' input, and if so, whether such conduct was unjust and unreasonable.
- 2(b). To determine whether Entergy's inspection and clean-up program was initiated in response to safety and reliability problems with Complainants' facilities.
- 2(c). To determine whether Entergy unlawfully inflated cable operator invoices with so-called "phantom" attachments.
- 2(d). To determine whether Entergy and its survey contractor failed to ensure quality control in the survey.
- 2(e). To determine whether the costing model used by Entergy is unreasonable.
- 2(f). To determine whether it is unjust and unreasonable for Entergy to charge an overhead fee for processing contractor invoices.
- 2(g). To determine whether Entergy may recover directly from Complainants the cost of inspections that occurred more than one year after the installation of Complainants' facilities.
- 2(h). To determine whether the charges Entergy has sought to impose on Complainants for inspections, corrections, and/or clean-up of facilities are contrary to the parties' pole attachment agreements or are otherwise unjust and unreasonable.

Issue Relating to Complainants' Allegedly Unauthorized Attachments

3. To determine whether the Complainants have made unauthorized attachments to Entergy's poles, and if so, whether Entergy's charges for such unauthorized attachments are unjust and unreasonable.

Issues Relating to the Responsibility for Correcting Allegedly Non-Compliant Pole Conditions

- 4(a). To determine the extent to which Entergy or its contractor made assignments of responsibility for remediation based on field evidence and/or presumptions as to the normal course of installation, and if so, whether such presumptions were unjust and unreasonable.
- 4(b). To determine whether Entergy seeks to impose record-keeping responsibilities on Complainants with respect to their attachments on Entergy's poles that are inconsistent with the parties' prior practices and are unjust and unreasonable.
- 4(c). To determine whether Entergy has installed electric facilities out of compliance with the NESC and/or Entergy's own standards, and if so, whether it has unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.

Issues Relating to Pole Access

- 5(a). To determine whether Entergy has denied Complainants access to its poles, or placed conditions on access, based on reasonable concerns about existing widespread safety violations, or potential safety violations, associated with Complainants' proposed new attachments.
- 5(b). To determine whether Entergy has denied access to its poles based on Complainants' failure to adhere to standards that exceed the requirements of the NESC, and if so, whether such conduct by Entergy is unjust and unreasonable.
- 5(c). To determine whether Complainants have installed and maintained their facilities in accordance with the parties' past practices, and if so, whether Entergy may deny access to its poles based on Complainants' conduct that may not comply with the pole attachment agreements but is consistent with the parties' past practices.

Issue Relating to Allegations of Discrimination

- 6. To determine whether Entergy has discriminated against Complainants and in favor of other communications companies in violation of Section 224 of the Act.

Issue Relating to Relief

- 7. To determine, in light of the evidence adduced on the foregoing issues, whether Complainants are entitled to the relief requested in the Complaint,⁵⁸ and if so, the nature and scope of the relief to which Complainants are entitled.

⁵⁸ See Complaint at 83-86, ¶ 379(a) through (t).

V. PROCEDURAL DESIGNATIONS

A. Procedural and Evidentiary Rules

19. The proceeding before the ALJ shall be governed by sections 1.201 through 1.364 of the Commission's rules of practice for hearing proceedings, to the extent practicable for the adjudication of this matter.⁵⁹ The ALJ may, in his discretion, require the parties to submit all or any portion of their case in writing if he determines that such written submissions would contribute significantly to the disposition of the proceeding.⁶⁰

B. Discovery

20. Discovery shall be conducted in accordance with sections 1.311-1.325 of the Commission's rules.⁶¹

C. Burdens of Proceeding and Proof

21. The Complainants shall have both the burden of establishing a *prima facie* case and the burden of proof with respect to Issues 1(a) through (c), 2(a) through (h), 3, 4(a) through (c), and 6.⁶² With respect to Issues 5(a) through (c), the Complainants shall have the burden of establishing a *prima facie* case that Entergy denied them access to its poles in violation of Section 224(f)(1) and (2) of the Act, and Entergy shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the Complainants.⁶³

D. Bureau Participation

22. The Enforcement Bureau shall be a party to the hearing before the ALJ and will determine its level of participation, as appropriate. Pursuant to section 1.47(c) of the Commission's rules,⁶⁴ the Bureau shall be served with documents in the same manner as other parties.

VI. ORDERING CLAUSES

23. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 0.111, 0.311, 1.1411, and 1.1415 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, and 1.1411, and 1.1415, that the above-captioned complaint proceeding IS DESIGNATED FOR A HEARING before an ALJ, at a time and place to be specified in a subsequent Order, upon the issues specified in paragraph 18 of this Order;

24. IT IS ORDERED, pursuant to section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 47 C.F.R. §§ 1.1401-1.1418, that Entergy's request to dismiss certain claims for lack of jurisdiction is DENIED;

⁵⁹ 47 C.F.R. §§ 1.201-1.364.

⁶⁰ See 47 U.S.C. §§ 154(i), 154(j).

⁶¹ 47 C.F.R. §§ 1.311-1.325.

⁶² See 47 C.F.R. § 1.1409(b).

⁶³ See 47 C.F.R. § 1.1409(b).

⁶⁴ 47 C.F.R. § 1.47(c).

25. IT IS FURTHER ORDERED, pursuant to section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, and section 1.1404(a) of the Commission's rules, 47 C.F.R. §§ 47 C.F.R. §§ 1.1404(a), that Entergy's request to dismiss Cox for improper joinder is DENIED;

26. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard and the right to present evidence, the designated parties, pursuant to section 1.221 of the Commission's rules, 47 C.F.R. § 1.221, SHALL FILE in triplicate, within twenty (20) days of the mailing of this Order, a WRITTEN NOTICE OF APPEARANCE, stating an intention to appear on whatever date the ALJ shall fix for the hearing, and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, that this hearing will be governed by the rules of practice and procedure pertaining to the Commission's Hearing Proceedings, 47 C.F.R. §§ 1.201-1.364, subject to the ALJ's discretion to regulate the hearing.

28. IT IS FURTHER ORDERED, that all discovery shall be conducted in accordance with 47 C.F.R. §§ 1.311-1.325, subject to the ALJ's discretion.

29. IT IS FURTHER ORDERED, pursuant to section 1.1409(b) of the Commission's rules, 47 C.F.R. § 1.1409(b), that the Complainants shall have the both the burden of establishing a *prima facie* case and the burden of proof with respect to Issues 1(a) through (c), 2(a) through (h), 3, 4(a) through (c), and 6 listed in paragraph 18 above.⁶⁵

30. IT IS FURTHER ORDERED, pursuant to section 1.1409(b) of the Commission's rules, 47 C.F.R. § 1.1409(b), that, with respect to Issues 5(a) through (c) listed in paragraph 18 above, the Complainants shall have the burden of establishing a *prima facie* case that Entergy denied them access to its poles in violation of Section 224(f)(1) and (2) of the Act, and Entergy shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the Complainants.⁶⁶

31. IT IS FURTHER ORDERED, that the Enforcement Bureau shall be a party to the proceeding.

32. IT IS FURTHER ORDERED, that the Secretary of the Commission shall cause to have this Order published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION


Kris A. Monteith
Chief
Enforcement Bureau

⁶⁵ See 47 C.F.R. § 1.1409(b).

⁶⁶ See 47 C.F.R. § 1.1409(b).