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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
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,	)	File No.: EB-05-MD-004
	)	
v.	)	
	)	
EAI ARKANSAS, INC.	)	
	)	

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AUG 3 1 2005

Chief, MDRD
Enforcement Bureau

To: Enforcement Bureau

JOINT STATEMENT

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Dated: August 29, 2005

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
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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,	)	File No.: EB-05-MD-004
	)	
v.	)	
	)	
EAI ARKANSAS, INC.	)	
	)	

To: Enforcement Bureau

JOINT STATEMENT

1. In response to the FCC's letter ruling dated July 8, 2005, Complainants Arkansas Cable Telecommunications Association ("ACTA"), Comcast of Arkansas, Inc. ("Comcast"), Buford Communications 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") and Respondent Entergy Arkansas, Inc. ("EAI" or "Respondent"), (the "Parties"), through their undersigned counsel, hereby submit this Joint Statement addressing the stipulated and disputed issues of fact and law that Complainants and

Respondent believe should be decided by the Enforcement Bureau in order to rule on the relief sought or defense asserted by the parties in this proceeding.

2. Unless otherwise indicated Complainants' responses involve all Complainants. The Parties neither stipulate to nor deny those facts or points of law not specifically addressed in this Joint Statement.

I. STIPULATED FACTS – NON-ISSUE SPECIFIC

3. The Parties hereby stipulate to and agree to the following non-issue specific facts.

4. Complainant Association is a trade association representing the interests of cable television operators in the state of Arkansas. The Association has a general office address of 411 South Victory, Little Rock, Arkansas 72201.

5. Complainant Comcast is a company engaged in the provision of cable television services in Arkansas. Comcast has a general office address of 1020 West Fourth Street, Little Rock, Arkansas 72201.

6. Complainant Alliance is a company engaged in the provision of cable television services in Arkansas. Alliance has a general office address of 290 South Broadview, Greenbrier, Arkansas 72058.

7. Complainant WEHCO is a company engaged in the provision of cable television in Arkansas. WEHCO has a general office address of P.O. Box 2221, Little Rock, AR 72203.

8. Complainant Cox is a company engaged in the provision of cable television services in Arkansas. Cox has a general office address of 4901 S. 48th Street, Springdale, Arkansas 72762.

9. Respondent EAI is an electric utility engaged in the provision of supplying electricity and energy services in the state of Arkansas. EAI has a general office address of 425 West Capitol Avenue, Little Rock, Arkansas, 72203.

10. This Commission has jurisdiction over this action under Section 224 of the Communications Act of 1934, as amended.

11. Complainants possess attachments on EAI poles pursuant to pole attachment agreements executed with EAI and set forth in Exhibits 2A-2D to the Complaint.

12. EAI owns or controls poles in the state of Arkansas used for wire communications. EAI is not owned or controlled by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

13. The state of Arkansas has not certified to the FCC that it regulates the rates, terms and conditions of pole attachments.

14. The pole attachment agreements appended to the Complaint are representative of the pole attachment agreements signed by the Complainants or their predecessors.

II. JURISDICTION

A. Extent of FCC's Authority To Determine Whether Engineering Standards and Practices Are Just and Reasonable Rates, Terms and Conditions of Attachment Pursuant to Section 224.

1. Stipulated points of law

15. The FCC has jurisdiction over the just and reasonableness of rates, terms and conditions of pole attachments.[1] A utility may deny access to its distribution poles on a non-discriminatory basis where there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes.[2] A state may regulate pole attachments so long as it complies with the requirements set forth at Section 224(c), including certifying that it regulates the rates, terms and conditions of pole attachments.[3] Arkansas has not made such a certification.

2. Disputed points of law

a) Complainants

16. The FCC has the authority under 47 U.S.C. § 224 to determine whether EAI's engineering standards and practices are just and reasonable terms and conditions of attachment. The FCC's authority under Section 224

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[1] 47 U.S.C. § 224(b).
[2] § 224(f)(2).
[3] § 224 (c).

extends both to terms in the pole attachment agreements and how EAI implements the terms in the agreements.[4]

17. The FCC has exercised its authority in the past to determine whether engineering standards and practices are just and reasonable in *Newport News Cablevision, Ltd. Comm., Inc. v. Virginia Elec. and Power Co.*, 7 FCC Rcd. 9 (1992) and *Cable Texas, Inc. v. EAI Serv., Inc.*, 14 FCC Rcd. 6647 (1999).[5] [EAI cannot stipulate to these statements. The FCC's determinations in these cases were limited to the facts of these cases. *Newport News* did not require the FCC to interpret or apply the utility's application of the NESC. Rather, the Bureau found that the utility's guying standard was reasonable because it was less onerous than the complex calculations that would need to be performed to determine if guying was necessary for safety reasons. Moreover, the Bureau found that "the interpretive body of NESC does not disagree with VEPCO's guying standard." This is far different than reviewing a utility's application of the NESC and passing judgment on it or otherwise dictating the standard that must be employed.[6]]

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[4] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450 (Cab. Ser. Bur. 2000), *affirmed on reconsideration* 17 FCC Rcd. 6268 (2002), *affirmed sub nom Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (FCC authority over pole attachment practices includes both the reasonableness of the contract provisions and the reasonableness of pole owner practices implementing them).
[5] *See* Reply Sec. VIII.
[6] *Newport News* at ¶ 15.

18. Complainants do not believe that EAI disputes FCC jurisdiction over engineering standards and practices. In its Response, ¶ 29, p. 18, EAI asks the FCC to exercise its authority to "require[] the Cable Operators to remedy [their alleged] safety violations. . . ."[7] [EAI cannot stipulate to this statement. EAI's request in this regard was pleaded in the alternative and made to the extent that the FCC determines it has jurisdiction. Jurisdiction, however, is not conceded. Moreover, the FCC has general jurisdiction over Complainants as communications entities, whereas jurisdiction over EAI is limited to Section 224.[8]]

19. Congress specifically charged the Commission with ensuring that access denials are reasonable, based on insufficient capacity or reasons of safety, reliability and generally applicable engineering standards.[9] [EAI will stipulate to the following: The FCC has jurisdiction under 47 USC § 224 to regulate the rates, terms and conditions of pole attachments and to determine if such rates, terms and conditions are just and reasonable.]

20. Although a "utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards . . . the utility is not the final arbiter of such issues and its conclusions are not

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[7] 47 U.S.C. § 224(f)(2) (*See* Reply Sec. VIII).
[8] S. Rep. No. 95-580 at 15 (1977) ("This expansion of FCC regulatory authority is strictly circumscribed...").
[9] (See Reply Sec. VIII); 47 U.S.C. § 224(f)(2).

presumed reasonable."[10] That determination is the Commission's alone, absent state certification, in which case it would lie with the State's Public Service Commission.[11] [EAI can stipulate that the quotation is accurate in the first sentence, but cannot stipulate to Complainants' interpretation that the Commission is the sole arbiter of a utility's practices absent state certification. As stated below, EAI asserts that engineering standards are the province of the state agencies that regulate the utility on a day-to-day basis.[12] Moreover, these agencies and authorities recognize the expertise of the utility, and utility determinations are entitled to weight.]

21. While state and local safety requirements may apply in certain cases even in states that have not certified, those requirements may not "conflict with federal policy. Where a local [safety] requirement conflicts with a rule or guideline [of the Commission's, the Commission's] rules will prevail."[13] [EAI will stipulate to the following: The FCC's *Local Competition Order* states, "Where a local requirement conflicts with a rule or guideline [of the Commission's, the Commission's] rules will prevail. We note that the standard prescribed by the NESC is not a specific Commission rule, and

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[10] *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11599, ¶ 11 (1999) (*citing 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, ¶ 1158 (1996) ("*Local Competition Order*"~~at~~).

[11] (See Reply Sec. VIII).

[12] Resp. ¶¶ 24-27; Letter from UTC/EEI to W. Darling, Resp. Ex. 81; Strickland Decl. Resp. Ex. 16.

[13] *Local Competition Order*, ¶ 1154. (See Reply Sec. VIII).

therefore a state requirement that is more restrictive than the corresponding NESC standard may still apply."[14] EAI cannot stipulate to this statement without the complete quotation for context, as EAI believes that Complainants' use of this language is misleading. As noted by the Commission in the *Local Competition Order*, the NESC is not a specific FCC rule and more restrictive local rules are permissible.[15] There are, therefore, no conflicts, and Complainants have not identified any.]

22. In resolving the complaint brought by Newport News against VEPCO, the Commission reviewed VEPCO's safety standards, specifically, its application of the NESC.[16] [EAI cannot stipulate to this statement for the reasons cited above.[17]]

23. Pole attachment complaints and rulemakings often involve issues relating to safety, including applicable provisions of the National Electrical Safety Code and other generally applicable engineering standards.[18] [EAI cannot stipulate to this statement. The FCC has specifically recognized that the NESC is not the only authority in developing engineering standards, and has also acknowledged the need to address local concerns, business issues,

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[14] *Local Competition Order* at ¶ 1154.
[15] Id.
[16] *See Newport News v. VEPCO*, 7 FCC Rcd. 9 at ¶¶ 15-17. (See Reply Sec. VIII).
[17] *Newport News* at ¶ 15.
[18] *See, e.g., Local Competition Order* at ¶¶ 1143-1158. (See Reply Sec. VIII).

and other obligations the utility has with respect to the reliability of its plant and the business of providing electricity to the general population.[19]]

b) EAI

24. EAI's position on the law related to jurisdiction of the FCC is addressed below in Section I.B.

B. What Is The Scope Of The FCC's Jurisdiction (If Any) To Determine The Engineering Standards That a Utility May Apply with Respect to its Regulated Plant?

1. Stipulated law

25. Complainants cannot stipulate to any points of law for the reasons set forth in subsection 2(a) below.

2. Disputed points of law

a) Complainants

26. Complainants do not believe that this question is appropriate for the Commission's consideration. Complainants have not requested that the FCC determine engineering standards or apply them in the field. In fact, Complainants have neither briefed this issue nor taken a position one way or the other on this issue in the pleadings. The question Complainants asks and has briefed is whether certain of EAI's standards and EAI's application of those standards are unjust and unreasonable terms or conditions of attachment. Complainants address the FCC's competence and jurisdiction to answer that question in Issue II.A. above. [EAI cannot stipulate to this

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[19] *Local Competition Order* at ¶¶ 1143-1150.

statement. Complainants have specifically asked the FCC to pass on EAI's application of engineering standards, and to limit EAI to the NESC in terms of setting its standards, as described below.[20] This necessarily implicates an evaluation of the FCC's authority or lack of authority to do so pursuant to the Pole Attachments Act.]

b) EAI

27. The FCC does not have the jurisdiction or expertise to specify the engineering standards that a utility must employ. The FCC's jurisdiction is informed by the reverse preemption provisions of the statute, and is strictly circumscribed.[21] States may fully preempt FCC jurisdiction by certifying that they regulate rates, terms and conditions, and need not separately certify that they regulate the safety and reliability of poles.[22] Most states, including Arkansas, already have the authority to address safety, engineering and reliability issues.[23] Jurisdiction, therefore, is properly located with the states as to engineering, reliability and safety. [Complainants cannot stipulate to this paragraph for the reasons set forth in its Disputed Law section above.]

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[20] Complaint at pp 83-85.
[21] 47 U.S.C. § 224; S. Rep. 95-580 at 15; H.R. Rep. No. 94-1630 at 6; Resp. at 22, 23.
[22] *Local Competition Order* at ¶¶ 1154 ("State and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulation under section 224(c).").
[23] 47 U.S.C. § 224(c); Letter from UTC/EEI Resp. Ex. 81 at p. 4; Strickland Decl. Resp. Ex. 16 at ¶¶ 5-9; Resp. at ¶¶ 24-26; Ark. Code Ann. § 23-2-304; Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments, Docket No. 03-M-0432 (NY PSC Aug. 6, 2004).

III. COMPLAINANTS

A. Whether Cox Is A Proper Party.

1. Stipulated facts

28. Complainants are subject to separate but identical pole attachment agreements governing the attachment of Complainants' facilities to EAI's poles.[24]

29. All Complainants' pole attachment agreements with EAI contain the same provision (Article V) governing periodic inspections and safety inspections.[25]

2. Disputed facts

a) Complainants

30. While the facts relating to this case are to some extent specific to each Complainant, there are many common areas of fact, experience, injury suffered, law and relief due that warrant prosecuting this matter in a single complaint. [EAI cannot stipulate to this statement for the reasons cited below.]

31. EAI and USS have audited each Complainant to some extent.[26] [EAI cannot stipulate to this statement because it inappropriately lumps EAI's engineering activities into a broad "audit" label. EAI has conducted

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[24] EAI Pole Agreements, Compl. Exh. 2A-2D (*See* Complaint Sec. IV).
[25] EAI Pole Agreements (Exh. 2A-2D) (*See* Complaint Sec. IV).
[26] Declaration of Marc Billingsley at ¶ 5 (Compl. Exh. 6); Declaration of Bennett Hooks at ¶ 4 (Compl. Exh. 4); Declaration of Jeff Gould at ¶ 6 (Compl. Exh. 3); Declaration of Charlotte Dial at ¶¶ 6-7 (Compl. Exh. 5) (*See* Complaint Sec. IV).

safety inspections with respect to Comcast, Alliance and WEHCO, but not with respect to Cox. EAI has conducted pre-construction make-ready and post-construction inspections with respect to Cox's facilities.[27]]

32. All Complainants object to EAI's engineering standards as being unjust, unreasonable and inconsistent with the parties' prior practices.[28] [EAI cannot stipulate to this statement. In EAI's view, the issue is not to what the Cable Operators are objecting, but whether the facts of this case support a common complaint as to all Cable Operators.]

33. All Complainants challenge the charges, scope and quality of USS' inspections.[29] [EAI cannot stipulate to this statement for the reasons identified above.]

34. Cox did not enter into its relationship with USS voluntarily and is not at all satisfied with USS' work.[30] [EAI cannot stipulate to this statement because this is Cox's characterization of its own actions. Moreover, this statement is irrelevant to the issue of joinder.]

b) EAI

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[27] Resp. at ¶ 73; Harrell Decl. Resp. Ex. 7 at ¶ 17-19; Wagoner Decl. Resp. Ex. 18 at ¶ 52; Reply at p. 97.
[28] Declaration of Marc Billingsley (Compl. Exh. 6); Declaration of Bennett Hooks (Compl. Exh. 4); Declaration of Jeff Gould (Compl. Exh. 3); Declaration of Charlotte Dial (Compl. Exh. 5). (*See* Complaint Sec. IV; Reply V.D.1.(a)).
[29] Declaration of Marc Billingsley (Compl. Exh. 6); Declaration of Bennett Hooks (Compl. Exh. 4); Declaration of Jeff Gould (Compl. Exh. 3); Declaration of Charlotte Dial (Compl. Exh. 5)
[30] Gould Reply Decl. ¶¶ 47-49.

35. EAI has not conducted a test inspection or a full safety inspection with respect to Cox's plant. EAI has engaged USS to conduct pre-construction engineering/make-ready and post-construction inspections with respect to Cox's system upgrades.[31] [Complainants cannot stipulate to this paragraph. Complainants acknowledge that Entergy has not *yet* conducted a test audit or safety inspection of Cox's facilities. However, Complainants disagree that EAI engaged USS to conduct inspections with respect to Cox's system upgrades. Entergy engaged USS to upgrade its facilities and it plant management records at Complainants' expense.[32]]

3. Stipulated points of law

36. Complainants may join together to file a joint complaint.[33]

4. Disputed points of law

a) Complainants

37. Cox is a proper party to this suit because it has joined with the other Complainants to file a complaint against EAI regarding whether EAI's rates, terms and conditions are just, reasonable and nondiscriminatory in accordance with 47 U.S.C. § 224. [EAI cannot stipulate to this statement as it is a circular argument, as addressed below. Just because a party seeks to join, this does not automatically mean joinder is proper. Common questions of fact and law must be the limiting criteria.]

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[31] Resp. at ¶ 73; Harrell Decl. Resp. Ex. 7 at ¶ 17-19; Wagoner Decl. Resp. Ex. 18 at ¶ 52; Reply at p. 97.
[32] Gould Decl. ¶¶ 24-25; Agenda, 2nd Joint Wire & Pole Usage Conference at 5 (Reply Exh. 1).
[33] 47 C.F.R. § 1.1404(a).

b) EAI

38. Complainants' arguments are circular, arguing that because a party may join, any party that joins is proper. As a general principle, joinder requires a common set of facts and circumstances.[34] The underlying facts with respect to Cox are so different that it is improper to include them in this complaint.[35] Cox has not been subject to the alleged behavior for which the other Complainants seek relief, and accordingly its claims are speculative and unripe, and unnecessarily complicate an already complex proceeding.[36] Joinder is intended to streamline the complaint process and prevent duplicative proceedings where there are common issues of law and fact. Neither are present here with respect to Cox, and accordingly the complaint should be dismissed as to Cox. [Complainants cannot stipulate to this paragraph. Complainants disagree that there are not a common set of facts and circumstances because, as explained in Complainants' disputed law section, all Complainants allege the same unlawful conduct. The circumstances under which the unlawful conduct arises need not be identical for there to be common facts and law surrounding the claims.]

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[34] *See, e.g.*, 47 C.F.R. § 1.723; *See also, In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Television Poles*, 2 FCC Rcd 4387, at ¶ 79 (1987) (suggesting the inclusion of suits by cable associations mirrors the joint complaint provision to assist in situations where "one set of data applies to several CATV operators"); *Texas Cable & Tel. Ass'n v. GTE Southwest*, 17 FCC Rcd. 6261, at ¶ 12 (2002).
[35] Harrell Dec. Resp. Ex. 8 at ¶¶ 16-21.
[36] Resp. ¶¶ 73-76.