example, in *Cable Texas, Inc. v. Entergy Serv., Inc.*, Entergy claimed that its unreasonable engineering survey fee was justified because "[w]ith the increase in requests for access to our poles we find it necessary to inspect each location for which a request for attachment is made in order to protect the integrity of our electrical distribution system."203 The Commission instead found that the fees imposed by Entergy led to double-recovery because such costs were already recovered in the annual rent.204

Even if this case actually did involve *bona fide* efforts to ensure plant safety, the Commission is fully capable of addressing such issues. For instance, in resolving the complaint brought by Newport News against VEPCO, the Commission reviewed VEPCO's safety standards, specifically, its application of the NESC.205 In fact, 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.206 This makes sense. Otherwise

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203 *Cable Texas, Inc. v. Entergy Serv., Inc.*, ¶ 6].

204 *Id.* at ¶ 10. *See also The Cable Television Ass'n of Georgia v. Georgia Power Co.*, ("Georgia Power contends that the terms and conditions of the New Contract are warranted in light of numerous safety violations of safety and prudent engineering procedures that the Cable Operators have committed. . . . While we emphatically share Georgia Power's concern about safety, the record does not support its assertions that the host of new contract provisions are necessary to preserve safe operations.").

205 *See Newport News v. VEPCO* at ¶¶ 15-17. Entergy would be heartened to know that even though it considers the FCC to be "a favorable forum" for attachers, the Commission found that VEPCO's application of the NESC in the Newport News case was reasonable.

206 *See, e.g., Local Competition Order* at ¶¶ 1143-1158.

pole owners would have a blanket exemption to engage in unreasonable conduct, so long as it alleged safety implications.

Indeed, 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.*"207 If Congress did not consider the Commission knowledgeable to address these types of issues, it would have undoubtedly assigned that responsibility to another agency. Additionally, 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 presumed reasonable."208

That determination is the Commission's alone, absent state certification, in which case it would lie with the State's Public Service Commission. Likewise, 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."209 Unless the Commission rules on such issues, it will not have fulfilled its statutory role.

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207 47 U.S.C. § 224(f)(2) (emphasis added).
208 *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11599, ¶ 11 (1999) (citing *Local Competition Order* at ¶ 1158).
209 *Local Competition Order*, ¶ 1154.

B. The Purpose and Intent of the Pole Attachment Act Was To End Utility Pole-Owner Abuse Of Monopoly-Controlled Essential Facilities

Contrary to Entergy's suggestion that the relationship between utility pole owners and cable attachers was "symbiotic" when the Pole Attachment Act ("Act") 210/ was passed in 1978, 211/ the Act was the legislative response to monopoly abuses such as the imposition of "exorbitant rental fees and other unfair terms"212/ imposed on cable operators by pole-owning utilities. In deliberations preceding passage of the Act, Congress observed that "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." 213/ Congress' predominant legislative goal, therefore, was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public."214 /

There is nothing in the legislative history to indicate that the Commission's authority does not reach the conduct complained of here, whether or not tangentially related to safety.

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210 Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.
211 Entergy Response, ¶ 3, p. 2.
212 2001 Pole Order at ¶ 21.
213 H.R. Rep. No. 94-1-1630, at 5.
214 2001 Pole Order at ¶ 21.

The Telecommunications Act of 1996 ("1996 Act") expanded the FCC's jurisdiction over poles and conduit to cover telecommunications, in addition to cable attachments, so that providers of telecommunications services as well as cable operators would be entitled to "nondiscriminatory access" to utility poles and conduit at "just and reasonable" rates terms and conditions.215/ In passing the 1996 Act, Congress hoped "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ."216/

Despite passage of the Act and its amendments, utility pole and conduit owners continue to resist state and federal attempts to restrain their unreasonable conduct. Utility transgressions range from efforts to: set rates at unlawful levels;217 restrict the deployment of fiber-optic cable; 218/ deny attachers access to poles; 219/ and demand illegal charges. 220/ Indeed, Entergy's contempt for the

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215 47 U.S.C. § 224 (a)(1)(4).
216 Conf. Rep. on S. 652, 142 Cong. Rec. H. 1078 (Jan. 31, 1996).
217 *See RCN Telecom Serv. of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Serv., Inc.* 17 FCC Rcd. 25238 (2002) (requiring PECO to provide a just and reasonable rate for wireless attachments); *see also Alabama Power Co., v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (affirming the FCC's decision to "reject the [$38.81 per pole] price demanded by" Alabama Power).
218 *See Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Util. Elec. Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed,* 7 FCC Rcd. 4192 (1992) (finding that utilities may not limit the types of services offered by a cable operator), *aff'd sub nom Texas Utils. Elec. Co. v. FCC,* 997 F.2d 925 (D.C. Cir. 1993).
219 *See Cavalier Tel., LLC v. Virginia Electric & Power Co.*(mandating that the utility facilitate the CLEC's access to poles).
220 *See Newport News Cablevision v. Virginia Elec. & Power Co.*, ¶ 8 (1992) (rejecting the unreasonable allocation of costs by VEPCO and stating that "[a]n underlying principle of Commission regulation of pole attachments . . . is that costs

Pole Attachment Act (which Entergy refers to as a "thin-reed"), the Commission's role and this process is palpable. Entergy clearly believes that it should have the right to impose any rate, term and condition of attachment that serves its own needs. Entergy's disdain for its obligations and this Commission's authority under the Act, demonstrated in earlier attempts to undermine pole regulation, is the precise type of conduct Congress sought to curb when it charged the FCC with ensuring just and reasonable rates, terms and conditions of pole attachments.

For these reasons, the Commission unquestionably has the requisite authority and expertise to pass on all of the issues raised in the Association's Complaint. Entergy's attempt to avoid Commission jurisdiction must therefore be rejected.

IX. ENTERGY'S EVIDENCE AND AUDIT RESULTS ARE UNRELIABLE

Entergy's evidence simply does not support its attempts to portray Complainants as rogue attachers sowing damage and creating hazardous conditions on EAI poles. The truth is that Entergy did not begin making these arguments until it was forced to defend its inspection and audit scheme. In a scramble to support its unreasonable conduct, Entergy has filled the record with misleading and outright false statements and documentation, inflating its statistics on what it claims to be Complainants' bad acts.

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incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.").

Complainants stress that do not seek a factual determination from the Commission on each and every unlawful act Entergy engaged in with respect to Complainants. Rather, they bring evidence of Entergy's conduct and actions as cumulative evidence that Entergy has targeted Complainants to pay for an unreasonable inspection; imposed a permitting freeze on Complainants; and applied discriminatory set of rules that it does not apply to other attachers. Complainants neither have the time nor the resources to address every single unsupported or misleading statement in Entergy's Response. However, Complainants urge the Commission to review carefully the factual and legal positions Entergy's makes. Many of Entergy's statements are not supported by the citations and documents its submits, or, worse, the citations and documents stand for an entirely different proposition or are simply scandalous. 221/ In so doing, Entergy has made it nearly impossible for Complainants to rebut every false or misleading statement without turning this proceeding into a tit for tat on what are, for the most part, tangential issues. Because the flaws in Entergy's "evidence" against Complainants are so widespread, Complainants should not be required to address the issues one by one. Instead, the Commission should view the evidence as tainted at best and fraudulent at worst. That said, a few low points are particularly noteworthy.

221/ *See* simultaneously filed Motion to Strike.

A. Entergy Filed Erroneous and Misleading Evidence With the Commission

First, as discussed in Section II, above, Complainants did not cause 4102 outages, as Entergy's evidence implies. 222/ To the contrary, Entergy only presented evidence indicating 16 outages known to be caused by Complainants' facilities. 223/

Second, Entergy's claims that Complainants never provided copies of maps is outright false. Each Complainant, at one time, provided copies of these maps. 224/ Conversely, there is no evidence that Entergy had maps before USS created them at Complainants' expense. In fact, when Complainant representatives rode out with Entergy and USS representatives they had old, out-dated and, in many cases, inaccurate maps. 225/

However, in the course of its duties, USS generated updated, digitized maps that Entergy included as Exhibits to its Response. 226/ Comparing these new and improved maps, one can easily see that Entergy used the information USS gathered in the field to update its database. For example, the older maps, attached to Marc Billingsley's Reply Declaration, show hand-drawn poles not previously captured in Entergy's records. The new maps USS generated capture all of these poles.

222/ *See* Response Exhibits 90-93; Outage Summary Chart p. 14, above.
223/ *See* Outage Summary Chart p. 14, above.
224/ *See* Section X.B.1., above; Billingsley Reply Decl., ¶ 31; Hooks Reply Decl., ¶ 30; ; Dial Reply Decl., ¶ 10.
225/ Billingsley Reply Decl., ¶ 53; *see also* Hooks Reply Decl., ¶ 30; Dial Reply Decl., ¶ 11.
226/ *See* Response Exhibit 94, Volumes 1-4.

Clearly, Entergy is using these maps to update its own records. 227/ This constitutes a substantial benefit to Entergy.

Moreover, on at least occasion, USS' Tony Wagoner informed Jeff Gould that it was maintaining an integrated database of the data that it had collected during the audit and inspection process that it hoped to "sell" to EAI. 228/ Thus, all evidence points to USS updating Entergy's out of date maps with the information it collected at Complainants' expense. To require cable operators to pay for the costs of these maps is a clear violation of Commission precedent. 229/

Third, Entergy's claims of unauthorized attachments are disingenuous. Entergy has presented no evidence that there were widespread attachments to poles without authorization. In fact, the evidence indicates that Entergy was fairly relaxed about its attachment counts. For example, as described above, when WEHCO offered to provide Entergy real time updates to its attachment count, Entergy declined. 230/ Furthermore, Entergy presents no evidence that it had an adequate system—or any system for that matter—for maintaining records of pole attachments. Perhaps the most significant dispute on so-called unauthorized attachments is with Comcast. Comcast has been attempting to negotiate in good

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227/ Billingsley Reply Decl., ¶ 53.
228/ Gould Reply Decl.
229/ *See Cable Texas, Inc. v. Entergy Serv., Inc.*; *Newport News Cablevision v. Virginia Elec. & Power Co.*, ¶ 8 (1992) (rejecting the unreasonable allocation of costs by VEPCO and stating that "[a]n underlying principle of Commission regulation of pole attachments . . . is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.")
230/ Dial Reply Decl., ¶ 9.

faith with Entergy, paying undisputed amounts. In contrast, Entergy has not acted with the least urgency to resolve this. 231/

Fourth, Entergy makes completely unfounded statements about Complainants activities. For example, Mr. Neumeier alleges that Alliance conducted an upgrade in 1999 in Plummervile and that it had touched each and every one of its attachments in connection with this upgrade. 232/ This is false. Alliance did not perform an upgrade in 1999 in Plummerville. When Alliance actually performed an upgrade several years later in 2003 but it did not visit each and every pole as Mr. Neumeier argues. Alliance simply changed out some of its heavy communications lines and replaced them with lighter weight fiber. In addition, Alliance removed its older electronics and replaced them with newer, smaller, lighter electronics. The net effect after Alliance was done was that it caused less stress on the poles and took up less space. 233/

Fifth, Entergy claims downed cable television lines are evidence that Complainants somehow were negligent in maintaining their lines. These allegations are unfair and misleading. The truth is that cable lines Entergy refers to went down during the ice storm of 2000/2001. 234/ This was practically a once-in-a-generation event. In fact, the Arkansas PSC confirmed this, finding that the ice storms of 2000 and 2001 were extraordinary events and characterized them as

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231/ Billingsley Reply Decl., ¶ 45.
232/ Neumeier Declaration, Response Exhibit 14, ¶ 14; Response ¶ 30, p. 19.
233/ Hooks Reply Decl., ¶ 31.
234/ Billingsley Reply Decl., ¶ 30; *see also* Hooks Reply Decl., ¶ 32; Gould Reply Decl., ¶ 28; Dial Reply Decl., ¶ 5.

once-in-a-hundred-year events. In fact, conditions were so severe, Entergy lost power to over 200,000 customers. 235/ It is not at all unusual for cable drops to break under these conditions. Entergy is well aware of this but – once again – opted against restraint. In connection with proceedings at the APSC in the aftermath of the ice storms, Entergy itself blamed the widespread damage on the ice storms—and not Complainants. 236/ Its motives for this about-face are obvious.

Sixth, Entergy's allegations that Bennett Hooks of Alliance was unable to identify the 100 poles Entergy failed to find during its inspection are completely false. 237/ Although Entergy is very artful in attempting to discredit Mr. Hooks, the fact remains that he identified the poles to Mr. Wagoner clearly and in a way that Mr. Wagoner understood. 238/ Entergy's claims to the contrary are nothing more than an attempt to distract the Commission's attention away from its unlawful conduct.

Seventh, EAI misrepresents the extent of the problems supposedly created by communications attachers. Complainants have documented elsewhere that EAI has created extremely widespread violations by faulty installation of its electric

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235/ *See In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), pp. 5-6, 15.
236/ *See* News Release, *Entergy System Fully Restored Ahead of Projections*, Jan. 3, 2001, http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=112&RC=Ar&List=Region (visited June 7, 2005); *In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), pp. 5-6, 15;
237/ Wagoner Decl., ¶ 29 (Response Exhibit 18).
238/ Hooks Reply Decl., ¶ 33.

facilities which it attempts to blame on cable. But EAI has also installed *communications* facilities in an unsafe manner throughout Arkansas. Specifically in EAI Response Ex. 86, at the third page of that Exhibit, USS faults "Adelphia" for its purported construction practices. Exhibit 86 is a "preliminary write up" attached to an email from USS' Wil Arnett to EAI's Dave Inman summarizing a "Field Review" conducted September 22 and September 23, 2001. This "write up" says:

> Adelphia attempted to construct their network in the [electric] supply space, but did not consistently adhere to that plan. Portions of their network are in the supply space, other portions are constructed in the communications space. Some sections appear to be full dielectric construction, others consist of fiber optic cable overlashed to 6.6m HSS support messenger. There is a consistent problem with inadequate guying in their construction. There is a need for corrective action of both separations and guying of Adelphia facilities.

The "Adelphia" referred to in this passage is Adelphia Business Solutions ("ABS"). The ABS facilities, upon information and belief, are today owned by a company known as Telcove. The original owner of that network, however, was Entergy Hyperion Telecommunications of Arkansas, Inc. which was "50% owned by Entergy Local Fiber Company, Division of Entergy Technology Holding Company ("ETHC")." 239/ The Entergy Hyperion network was one of perhaps dozens of electric utility fiber-optic networks built by electric utilities using dielectric cable (non-conducting) facilities so that these networks could be built in the electric

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239/ *Application of Entergy Hyperion Telecommunications of Arkansas, L.L.C., Arkansas,* Pub. Serv. Comm'n Docket No. 97-200-U (filed May 14, 1997). (Exhibit 6).

supply space. Only authorized and qualified personnel, are authorized to build communications facilities in the electric supply space. 240/

To the extent that Entergy is looking to blame someone for any poor construction on *that* network, it need look only to itself.

That said, this is typical of many of the statements Entergy makes in its Response. Complainants do not believe that it would be an efficient use of the Commission's resources to address and refute each and every one of Entergy's false and misleading statements. Regardless, Complainants' failure to address any specific factual allegation in no way indicates that Complainants believe it to be true or reliable.

B. The Audit and Inspection Results are Unreliable and Unreasonably Costly

Since USS and Entergy began the audit and inspection program in 2001, Complainants have had significant concerns with the quality of USS' work. Exacerbating the problem is the fact that Complainants have no means of disputing USS' determinations or bills. Since Entergy—not Complainants—entered into the contract with USS, Complainants have little leverage or opportunity to hold USS to reasonable performance standards. Worse, since USS is accountable to Entergy—not Complainants—USS has every incentive to be complicit in Entergy's "gotcha" program and little incentive to deal with Complainants on fair and reasonable terms, not to mention pay no attention to the charges it enters since a third-party other than its client will be on the hood for the charges. This demonstrates

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240/ *See,* NESC Rule 224.A.1.

Entergy's clear contempt for prior Commission precedent on this exact question. 241/ The end result is that Complainants have little confidence in USS' audit and inspection results.

1. USS Inspections Are Inconsistent At Best

USS personnel produce extremely inconsistent results. This affliction is the result of poor training, poor understanding of the NESC, a willingness to be flexible in one case and rigid and unbending in an identical case. It is apparent that that no two USS inspectors produce the same evaluation. 242/

Nothing demonstrates this better than the K130/K110 circuit where USS inspected the same poles twice and produced two entirely different sets of results to Comcast. 243/ Comcast has no way to verify Entergy's claim that it caught this during its quality control and that Comcast was not charged for this inspection. 244/ It is impossible to tell, from the way the invoices are organized, whether USS/Entergy billed for this circuit once, twice or not at all. Entergy's rationalization for this "snafu" defies common sense. If Entergy's explanation that one of the inspections truly was flagged and pulled by Entergy's/USS QC processes, then there was no reason for USS to send copies of both inspection results.

241/ *See Cable Texas, Inc. v. Entergy Serv., Inc.* at ¶ *11* (FCC finding that errors in the survey raised serious questions about the credibility of the circumstances surrounding the 1996 Count.")

242/ Billingsley Reply Decl., ¶ 55; Hooks Reply Decl., ¶ 34; Gould Reply Decl., ¶ 40.

243/ *See* Complaint, ¶ 233.

244/ Response ¶ 154, pp. 91-92; Wagoner Decl., ¶¶ 36-39 (Response Exh. 18)

2. USS Conducts Multiple Inefficient, Unnecessary Rounds of Inspections

USS fails to coordinate its activities with Complainants or even its own administrative personnel, resulting in multiple unnecessary rounds of inspections. Complainants believe that they are being charged for all of these rounds of inspections. As Complainants explained in the Complaint, many times this includes USS' transportation costs for hundreds or thousands of miles of travel. 245/ Some abuses are easy to spot, but from the appearances of the invoices, it is extremely difficult to determine how or when Complainants were billed for these services. 246/ However, both USS and Entergy have been clear that they bill Complainants on an hourly basis for time spent on the project.247/ The available evidence shows that Complainants are indeed being charged for these multiple unnecessary rounds of inspections. 248/

Complainants certainly do not receive any benefit from these multiple unnecessary rounds of inspections. The Commission has consistently held that pole owners may not charge attachers for duplicative or defective work. 249/ The Commission has also made clear that pole owners must provide detailed bills clearly showing for what work they are requesting payment. 250/ In this case, Entergy's conduct violates both the principles set forth in *Cavalier* and *Knology* and is therefore unjust, unreasonable and in violation of 47 U.S.C. § 224.

245/ Complaint ¶¶ 346-353.
246/ Billingsley Reply Decl., ¶ 58; Dial Reply Decl., ¶ 16.
247/ Response Sec. V.G.
248/ Billingsley Reply Decl., ¶ 58; Hooks Reply Decl., ¶ 36.
249/ *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, ¶ 23.
250/ *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, ¶¶ 61-62 (2003).

3. Entergy's construction crews do not follow the same standards USS and Entergy's joint use department are following

In many cases, it is evident that USS and Entergy's joint use staff have neither conveyed their zero-tolerance approach to non-compliance nor their heightened standards to the EAI construction crews. As described above, Entergy crews are building violations virtually everyday—many times within months after Complainants have cleared poles of violations. In other cases, Entergy construction crews determine in the field that the make-ready Complainants must perform to satisfy USS and the joint use department are unnecessary. In other words to the extent that there truly is a legitimate plant rehabilitation program, EAI is getting no respect from its own construction crews. When internal utility dysfunction interferes cable operations, the Commission must intervene. Examples of these consequences abound.

In one case, Complainant Cox ordered *and paid for* make-ready in accordance with USS' and Entergy's joint use requirements. After receiving notification from Entergy joint-use personnel that it had completed the work, Cox visited the field to find that only about 50% of the work had actually been completed. Cox notified Entergy's Cindy Thompson who, in turned pledged to have the work completed properly. About 3 and a half weeks later, Entergy again erroneously notified Cox that the work was complete. Cox's field review revealed that the two make-ready

orders were incomplete and that Entergy created 3 or 4 new violations on those poles. 251/

It is clear to Complainants that USS' and Entergy's internal lines of communication have suffered a major breakdown at least with respect to joint-use and plant correction. Under these circumstances, Entergy cannot only produce an accurate, internally consistent audit, but it cannot begin to even hope for an ordered, effective and reasonable plant clean-up effort. Blaming cable operators for its plight is far easier.

4. Complainants have no confidence in USS' and Entergy's lines of communication and recordkeeping

Complainants have concerns that the information it relays to USS is not accurately recorded in Entergy's records. In one of many examples, at paragraph 70 of the Response, Entergy argues that WEHCO has failed to correct 55 bonding violations USS identified. This is incorrect. The truth is that Entergy submitted a list of violations to WEHCO. WEHCO corrected all of the violations belonging to its own plant and determined that 55 remaining violations were on Cebridge's (another operator) plant. WEHCO brought this to USS' attention and USS' Troy Platt assured WEHCO that the records would be updated to reflect this. 252/ It is clear from Entergy's Response, that it did not update its records. Unfortunately, it is unlikely that there is any formal documentation.

Ultimately, Complainants have no way to verify Entergy and USS' statements. This puts operators like WEHCO, who have trusted and relied on

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251/ *See* Gould Decl., ¶ 18.
252/ Dial Reply Decl.,¶ 20.

Entergy's representations in the field in an impossible situation. Entergy's willingness to punish Complainants for relying on the parties historical practices is, in and of itself, an unjust and unreasonable term or condition of attachment. 253/

X. ENTERGY'S AUDIT AND INSPECTION PROGRAM IS DESIGNED TO BENEFIT ENTERGY, NOT COMPLAINANTS

The very purpose and certain effect of the audit and inspection program is to provide maximum value to Entergy. First, it received a GPS reading of every one of its poles. Second, it has a digital photo of each of those poles. Third, it now has a detailed database of massive portions of its distribution plant. Fourth, it has updated, digital maps of its grid. Finally, it found a convenient scapegoat (Complainants) on which to unload the blame and expenses for plant rehabilitation.

This is extremely valuable to EAI. This should come as no surprise. In 2001, when Entergy designed the audit, it was struggling to recover from the ice storms. A database undoubtedly is critical element of plant rehabilitation.

The crowning triumph for Entergy may be that it thought that it had designed a way to shift these costs to Complainants at a time when it was facing a $3.8 million shortfall in expenses. 254/ However, it is a fundamental principle of pole attachment law that a pole owner cannot force an attaching party to pay for work—whether construction, make-ready, plant corrections or engineering and

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253/ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, ¶¶ 15-16.

254/ *See In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), p. 8; News Release, Mar. 11, 2002, http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=334&RC=Ar&List=Region (visited June 7, 2005); *Entergy Arkansas Says It Still Needs Surcharge*, Commercial Appeal, Oct. 26, 2001.

inspections—if that work is to benefit another party.255 The value and benefit that Entergy derives from inspection and audit far exceeds what is reasonable or permissible for an attacher to fund under this prevailing law.256

A. EAI Prevented Complainants From Participating in the Audit

First and foremost, it is unjust and unreasonable to require Complainants to pay for the audit because they did not have an opportunity to participate in its design or execution. Entergy's claims that it gave Complainants the opportunity to participate in the audit are not true. The truth is that Complainants had no input at all in the design of the audit and inspection. The result is that the audit was not geared toward providing useful information to Complainants. Meaningful participation in an audit includes consultation and input in its design—before the trucks begin rolling—as well as consultation and input with respect to its execution.257/ Entergy provided Complainants neither opportunity.

Without the opportunity to provide input, Complainants' ability to participate was limited to observing USS conduct the inspections. In stark contrast to Entergy's claims, some complainants, such as Alliance, took the opportunity to ride out with USS staff during the inspection. For example, Bennett Hooks rode with Mr. Wagoner on several occasions. Unfortunately, Alliance determined that it was

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255 47 U.S.C. § 224(i); *Local Competition Order*, ¶¶ 1211-16 (requiring all parties to pay for their own make-ready); *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, at ¶ 12, 16 *Newport News Cablevision, Ltd. Communications Inc. v. Virginia Elec. & Power Co.*, ¶ 8 (1992) ("costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary").
256 *Cable Texas, Inc. v. Entergy Servs., Inc.*; *Newport News Cablevision, Ltd. Communications Inc. v. Virginia Elec. & Power Co.*, ¶ 8 (1992).
257/ Harrelson Report, ¶ 24.

not a productive use of its time to have its employees spend whole days riding along with USS when they could have been engaged in their normal duties. As a result, Alliance stopped "participating" in the ride-alongs. 258/

Other Complainants, such as Comcast, did not feel that it was a productive use of time to go on ride-a-longs. Comcast's Jim Davies refused to ride out with USS because no one from either USS or Entergy would provide him with a copy of either the standards they use to evaluate poles or the scope of USS' work. 259/ Essentially, Complainants was not invited to participate. From Comcast's perspective, Complainants were only invited to observe. Without an objective set of standards to work from, Comcast, like Alliance could not understand what value a ride-a-long would provide. 260/

Moreover, none of the Complainants have ever understood how they could dispute USS' findings. 261/ The idea to have a professional engineer settle disputes did not come up until the May-June 2004 meetings. 262/ By that time, a significant amount of the field inspections had already been completed—with no mechanism for dispute resolution. In other words, at the time the bulk of the inspections were under way, Complainants had no process to dispute USS' results. Under these

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258/ Hooks Reply Decl., ¶ 39. However, on one occasion, Alliance sent someone to follow USS to observe what they were doing. The USS personnel did not appear comfortable with this and left Alliance's service area.
259/ Billingsley Reply Decl., ¶ 57.
260/ *Id.*
261/ Billingsley Reply Decl., ¶ 57; Hooks Reply Decl., ¶ 39; Gould Reply Decl., ¶ ; Dial Reply Decl., ¶ 15.
262/ *See* Harrelson Report, ¶ 78.

circumstances, Complainants were hard-pressed to find a benefit in riding along with USS personnel.

B. Complainants derived no benefit from USS' services, whereas the product is very useful for Entergy

Complainants do not derive any benefit from the audit services USS provides. Entergy 's claims to the contrary are simply untrue. The truth is that if Entergy had consulted with Complainants and sought their input, Complainants could have helped Entergy to design the audit and inspection to maximize safety and efficiency, to Complainants' benefit. Instead, Entergy designed the audit and inspection to produce information that Complainants already had, but that Entergy desperately needed for its own plant management purposes.

1. Complainants already have accurate maps

To begin, none of the Complainants derived any benefit from the GPS measurements USS recorded or the maps USS produced with them. Those functions are purely for Entergy's benefit. As described above, each of the Complainants have maps of their own networks that they have attempted to share with Entergy at some point during their relationships. In many aspects, Complainants maps were more accurate and contained more useful information than Entergy's maps.

For example, after WEHCO's last upgrade, Entergy worked with WEHCO's maps to take an attachment count. In fact, during that comparison, WEHCO helped Entergy update its maps by pointing out poles that appeared on WEHCO's

maps but not on Entergy's maps. 263/ Similarly, Comcast offered Entergy use of its maps. Even though Entergy now claims that Comcast's strand maps are deficient, Entergy currently accepts identical strand maps from Cebridge, another cable operator in Arkansas. 264/ As detailed elsewhere, this is just one element of the kind of consideration that should be routine but which has been the exception for Complainant.

Further, Cox's maps are far more accurate and detailed than the GPS maps USS creates for Entergy. Cox's maps contain a wealth of information including street addresses and distances between poles. In fact, Cox specifically told USS and Entergy that, because it had these very detailed maps, GPS measurements and new maps would be of no use to Cox. 265/

2. Entergy needs USS' maps to modernize its plant management records

USS' maps are, however, extremely valuable to Entergy. As can be seen from a comparison of Response Exhibit 94 and Reply Exhibit 6, Entergy has been using USS' maps to update its plant records. For example, Reply Exhibit 6 is the type of design map that Complainants typically see Entergy using in the field. Notice that Entergy or USS has marked in additional poles that were not depicted on the maps. Response Exhibit 94, however, is a map of the same area that has been updated electronically to include those previously missing poles.

263/ Dial Reply Decl., ¶ 11
264/ Billingsley Reply, Decl., ¶ 64.
265/ Gould Reply Decl., ¶ 45

Further, one of USS' functions is to number Entergy's poles. 266/ This is extremely valuable to Entergy, from a plant management perspective. It is clear from Entergy's Response that prior to USS, it did not have its own maps or pole numbering system. 267/ Entergy's records, prior to the audit, did not include all of the poles that appear in the field. Without a complete record of the poles, Complainants doubt Entergy would have been able to number its poles accurately without this audit.

That USS is performing these mapping and database functions for Entergy should come as no surprise. Mr. Arnett took care to explain in his credentials that he specialized in database and mapping issues. 268/ Indeed, this may explain why Entergy believed that USS, above the other contractors, was uniquely qualified for the project. 269/ Whereas Complainants believe that Entergy's decision to modernize its plant records may be prudent, it is not reasonable for Entergy to require them to pay for it.

3. Complainants do not derive a benefit from surveys of poles owned by other utilities or poles that do not have cable television attachments

Furthermore, Entergy has no legitimate explanation for auditing and inspecting poles owned by other utilities as well as poles with no cable facilities on them. If the audit and inspection program was truly about the safety of

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266/ *See* Reply Exhibit 6.
267/ This is consistent with Complainants' experiences. Historically, Complainants would apply for particular poles by identifying the street address or other geographic identifiers. Billingsley Reply Decl., ¶ 64; Gould Reply Decl., ¶ 46.
268/ Response Exhibit 1, ¶ 6.
269/ Response ¶ 141, pp. 83-84.

Complainants' attachments, Entergy would have no reason to collect information about poles without cable facilities.

As explained above, Complainants have maps and have historically shared them with Entergy. Consequently, neither Entergy nor USS should have had much difficulty identifying Complainants' service areas. The more likely explanation is that Entergy has an interest in surveying poles owned by other utilities or that have no cable facilities for its own plant management purposes. Attached as Exhibit 8 is a document showing information USS collected on a pole without cable facilities. To summarize, Entergy collects the following information:

1. Identification of pole owner
2. Recording of GPS coordinates
3. Verification and notation that the pole was not on the map EAI provided to USS
4. Notation of the condition of the pole
5. Recording the height of the pole
6. Recording the class of the pole
7. Existence of street light
8. Assignment of pole sequence number
9. Assignment of pole number
10. Digital picture and file number
11. Location of the pole. 270/

270/ Billingsley Reply Decl., ¶ 65.

This is a significant amount of information from which Entergy derives a significant benefit. More important, there is no reason for Entergy to collect this information about a non-cable occupied pole unless it was useful to itself. It logically follows, then, that all of this same information it collects on cable-occupied poles is valuable to Entergy as well.

Finally, USS has made very clear to Complainants that its goal is to deliver mapping and database information to Entergy by the end of the audit and inspection program. However, when, on August 12, 2004 Cox' Jeff Gould challenged the collection of GPS data USS' Tony Wagoner told Cox that USS is working on a database to sell to Entergy, based on the information collected during the audit. 271/ Entergy may be truthful in stating that it does not currently have this database, but it conveys a false impression.

Complainants do not dispute that it is Entergy's right to gather this information or compile it in a database. However, again, it is not reasonable, or lawful for Complainants to pay for it.

C. USS Provides Minimal Services to Complainants at Maximum Costs

One of the fundamental principles of pole attachment law is that all charges must be just and reasonable. Six years ago, in another case involving Entergy, the Commission expressed this principal very clearly, holding "Entergy cannot engage a contractor to perform a pole count and disregard the cost because [the cable

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271/ Gould Reply Decl., ¶ 45.

operator] is paying for it." 272/ Despite the fact that the Commission admonished Entergy for this conduct in 1999, Entergy's audit and inspection program, which was hatched in 2001, perpetuates this exact same conduct.

Having lost a similar case at the FCC with the Arkansas Cable Telecommunications Association, 273/ Entergy was on notice that Complainants would not blindly pay whatever charges Entergy ostensibly incurred on Complainants' behalf. To the contrary, Entergy should have anticipated that Complainants would expect detailed explanations of the charges it presented as well as explanations as to why the audit and inspection was both reasonable and necessary.

At a fundamental level, the audit and inspection program is flawed in its design. Standard industry practice is to hire contractors to perform survey and inspection work on a per-pole basis. 274/ This creates an incentive for the contractor to do the work properly the first time because it cannot collect additional payment for time spent correcting defective work or defending its assessment. Typically, the contracting party negotiates the per pole price based on the scope and parameters of the project. If the contracting party asks the contractor to perform additional services outside the scope of the audit, then it is common for the parties to reach an agreed upon hourly rate for those services. 275/

272/ *Cable Texas, Inc. v. Entergy Servs., Inc.*,¶ 14.
273/ *Texas Cable & Telecom. Ass'n v. Entergy Servs., Inc.*, ¶ 17.
274/ Billingsley Reply Decl., ¶ 55; Hooks Reply Decl., ¶ 35; Gould Reply Decl., ¶ 41; Dial Reply Decl., ¶ 17.
275/ *Id.*