

ORIGINAL

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

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MAY 19 2006

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Arkansas Cable Telecommunications) EB Docket No. 06-53
Association; Comcast of Arkansas, Inc.;)
Buford Communications I, L.P. d/b/a)
Alliance Communications Network;)
WEHCO Video, Inc.; and TCA Cable) EB-05-MD-004
Partners d/b/a Cox Communications,)
)
Complainants,)
)
v.)
)
Entergy Arkansas, Inc.,)
)
Respondent.)

To: The Commission

APPLICATION FOR REVIEW

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EXECUTIVE SUMMARY

1. The jurisdictional determinations in the Hearing Designation Order (“HDO”) relating to Entergy Arkansas, Inc.’s engineering standards exceeds the FCC’s authority under the Pole Attachments Act for three reasons. In the first instance, the language of Section 224 does not support the breadth of the Bureau’s statement of its jurisdiction in the HDO and the broad articulation of several points designated for hearing. In particular, the HDO fails to limit its inquiry to rates terms and conditions for “pole attachments,” and instead crosses over to attempt to exercise authority over EAI as a *utility*, not merely as a pole owner.

2. Second, the jurisdictional determinations and several specific issues designated for hearing go well beyond the FCC’s prior interpretations of the Pole Attachments Act. In particular, the Commission has specifically disclaimed the National Electrical Safety Code (“NESC”) as an FCC-required standard. The HDO, however, fails to recognize this, and an evaluation of EAI’s standards in relation to the NESC ultimately would function as a *de facto* global limit on the standards that EAI and utilities could employ – precisely the pronouncement the Enforcement Bureau suggested it would *not* be making. Moreover, several issues designated for hearing exceed even the Enforcement Bureau’s statement of its jurisdiction within the HDO itself, rendering the order internally inconsistent.

3. Finally, the Bureau’s jurisdictional statement and the issues designated are not supported on the record. In particular, the Bureau’s statement of the case does not reflect the impermissible scope of the relief requested by the Complainants. For each of these reasons, the HDO must be reversed, and the relevant portions of the HDO reformed or stricken.

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To: The Commission

APPLICATION FOR REVIEW

1. Pursuant to 1.115¹ of the Rules of the Federal Communications Commission (“FCC” or “Commission”), Entergy Arkansas, Inc. (“EAI” or “Respondent”), hereby submits this Application for Review of the Hearing Designation Order (“HDO”) issued in the above-referenced docket on March 2, 2006 with respect to the Enforcement Bureau’s determination of jurisdiction over EAI’s engineering practices.²

¹ 47 C.F.R. § 1.115.

² *Hearing Designation Order*, DA 06-494, 21 FCC Rcd. 2158 (rel. Mar. 2, 2006), 71 Fed. Reg. 20105 (Apr. 19, 2006); *Erratum* (rel. Mar. 6, 2006).

I. INTRODUCTION

2. There is a fine line between regulating access to utility distribution poles by a cable system, as sanctioned by the Pole Attachments Act, and regulating the utility itself as an electric utility. In the HDO issued in this docket, the FCC's Enforcement Bureau ("Bureau") has crossed that line in a manner that has rendered the HDO *ultra vires* and requires the Commission to reverse the Bureau's determinations. As illustrated below, in the first instance, the Bureau's statement of its jurisdiction in the HDO and several points designated for hearing exceed the scope of both the language of the Pole Attachments Act and the FCC's interpretation of that Act. Moreover, several issues designated for hearing exceed even the Enforcement Bureau's statement of its jurisdiction within the HDO itself, rendering the order internally inconsistent. Finally, the Bureau's jurisdictional statement and the issues designated are not supported on the record. In particular, the Bureau's statement of the case does not reflect the impermissible scope of the relief requested by the Complainants. For each of these reasons, the HDO must be reversed, and the relevant portions of the HDO reformed or stricken.

3. As an initial matter, EAI submits that this Application for Review does not concern an interlocutory decision, but is instead a timely appeal of what appears to be a final determination by the Enforcement Bureau on a matter of law. Although Section 1.115(e)(3) of the Commission's Rules states that applications for review of a hearing designation order are to be deferred until exceptions to the initial decision in the case are filed, EAI is concerned that the Enforcement Bureau's conclusions in the HDO regarding the scope of the FCC's jurisdiction may be construed as a final determination on this issue, thus triggering separate appeal rights under Sections 1.115(a) and 1.115(d) of the Commission's Rules.

4. First, the HDO appears to consist of two distinct actions, each with a distinct heading in the HDO: (1) the resolution of threshold issues, including the issue of the scope of the

FCC's jurisdiction,³ and (2) the designation of issues for a hearing before an Administrative Law Judge.⁴ Further, in the first sentence of the section of the HDO entitled "Resolution of Threshold Issues," the Bureau stated "Entergy raises two threshold issues that we do not designate for hearing, but instead *decide* in this HDO."⁵ The Bureau then proceeded to reject EAI's arguments and to affirm its view of the FCC's jurisdictional authority.⁶ Finally, the Bureau included a separate ordering clause in the HDO expressly denying EAI's request to dismiss certain claims for lack of jurisdiction.⁷ Taken together, these factors strongly suggest that the Bureau's determination in the HDO regarding the scope of the FCC's jurisdiction could be considered a final determination.⁸

5. If the Bureau's determination on the FCC's jurisdiction is indeed final, then Section 1.115(d) of the Commission's Rules require that any application for review of this determination be filed within 30 days of the date the HDO was published in the Federal Register: *i.e.*, by May 19, 2006. In an effort to address the uncertainty regarding the finality of the Bureau's determination – as well as the uncertainty regarding the appropriate provision (and deadline) for filing an application for review of this determination – EAI submitted an Expedited Petition for Clarification of this issue to the Enforcement Bureau on March 9, 2006.⁹ However, the Bureau has yet to respond or otherwise act on this petition. Absent clarification from the

³ HDO at ¶¶ 7 – 17.

⁴ HDO at ¶ 18.

⁵ HDO at ¶ 7 (emphasis added).

⁶ *See* HDO at ¶ 12.

⁷ HDO at ¶ 24.

⁸ *Cf. Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8157 (1997) (describing factors that indicate whether a hearing designation order includes a distinct conclusion of law that is final and immediately appealable).

⁹ Expedited Petition for Clarification, Docket No. 05-63, EB-05-MD-004 (filed Mar. 9, 2006).

Bureau, prudence dictates that EAI treat the Bureau's jurisdictional determination in the HDO as final and, accordingly, submit the instant Application for Review pursuant to Sections 1.115(a) and 1.115(d) of the Commission's Rules.

II. QUESTIONS FOR REVIEW

6. Three questions are posed for review:
 1. Whether the Enforcement Bureau's statement of the FCC's jurisdiction over EAI's engineering standards and the issues for determination by the ALJ are consistent with the Pole Attachments Act;
 2. Whether the Enforcement Bureau's statement of its jurisdiction and issues for determination by the ALJ are consistent with the FCC interpretation of the Pole Attachments Act or are otherwise internally contradictory; and
 3. Whether the HDO's jurisdictional conclusions and issues posed are supported on the record of this case.

III. DISCUSSION

7. The HDO asserts that the FCC has jurisdiction over the justness and reasonableness of rates, terms and conditions of pole attachments under Section 224(b) of the Act.¹⁰ Further, the HDO recites that Section 224 requires distribution pole owners to provide nondiscriminatory access to cable television systems or telecommunications carriers, but permits denials of access for reasons of insufficient capacity, safety, reliability, or generally applicable engineering principles. While accurately reciting the language of Section 224, the HDO also goes on to suggest that EAI's jurisdictional arguments are unfounded because EAI "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."¹¹ Rather, the Bureau suggests that rendering a decision in this

¹⁰ HDO at ¶ 10.

¹¹ HDO at ¶ 9.

case would “not require the Commission to establish a set of engineering standards that utilities must use across the board.”¹² The Bureau’s own HDO, however, and the remedies sought by the Complainants belie this conclusion, ultimately placing the HDO outside the limited jurisdictional grant of the Pole Attachments Act.

8. In particular, although in one breath the HDO asserts that the FCC would not be required to set engineering standards in rendering a decision, in the next breath the HDO essentially requires the ALJ to rule on what standards EAI can follow by determining whether EAI should only be allowed to use the National Electrical Safety Code (“NESC”). In particular, Issues 1(c) and 5(b) in paragraph 18 of the HDO focus on the NESC as the benchmark for determining reasonableness, contradicting the stipulations by the Complainants, Commission precedent, and the position described by the Enforcement Bureau in the HDO itself.

9. The issue set forth in paragraph 18 of the HDO as Issue 1(c) is as follows:

“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.”¹³

Likewise, Issue 5(b) also focuses on the NESC as the benchmark for determining reasonableness in denying access to poles. Specifically, the issue set forth in paragraph 18 of the HDO as Issue 5(b) is as follows:

“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.”¹⁴

¹² HDO at ¶ 10.

¹³ HDO at ¶ 18.

¹⁴ *Id.* at ¶ 18.

These questions necessarily involve the FCC in standard setting by directly inviting the ALJ to rule on whether a utility has the right to set safety standards which differ from the NESC. If the ALJ were to find that such a practice by EAI was unjust and unreasonable, the FCC would thereby force EAI to adhere to the NESC as a standard. The HDO improperly finds that the NESC is the standard against which reasonableness is measured, although there is no FCC or other precedent that suggests that the NESC is the cap or benchmark by which utility engineering standards can or should be evaluated.¹⁵

10. This is despite the fact that Complainants have stipulated that “EAI is not required to adhere solely to the NESC for its engineering specifications, and standards that exceed the NESC are not *per se* unreasonable.”¹⁶ Further, the Complainants agreed that “Arkansas law, the pole attachment agreements, industry practice and the FCC acknowledge that the NESC is relevant, but not controlling, and that EAI is permitted to impose engineering standards that differ from the NESC to meet its reasonable judgment regarding the safety and reliability of its plant and the business needs of the utility.”¹⁷ This stipulation also comports with FCC precedent, which recognize a variety of considerations that utilities must address in establishing engineering and attachment practices.¹⁸ An evaluation of EAI’s standards in relation to the NESC ultimately would function as a *de facto* global limit on the standards that EAI and utilities

¹⁵ See, e.g., *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶¶ 1143-1150 (1999) (“*Local Competition Order*”); Joint Statement, EB-05-MD-004, at ¶¶ 70-73 (filed Aug. 29, 2005).

¹⁶ Joint Statement at ¶¶ 70-73.

¹⁷ Joint Statement at ¶ 74.

¹⁸ *Local Competition Order* at ¶¶ 1147-1149

could employ – precisely the pronouncement the Enforcement Bureau suggested it would *not* be making in its carefully crafted statement of the FCC’s jurisdiction in this area.¹⁹

11. The Bureau goes on to state that adopting the suggestion that the FCC has no jurisdiction to determine the justness and reasonableness of an engineering standard imposed on an attacher would “rob” Section 224 of meaning.²⁰ This is untrue, particularly if the inquiry proposed was limited to how a particular engineering standard has been *applied* to the Complainants. The questions framed in the HDO and the relief sought by Complainants go directly to the heart of a utility’s right to set its own engineering and safety standards. It engages the FCC in establishing whether the NESC is the only safety standard that a utility may apply under Section 224. The agency may reach the question of whether a utility has applied its own safety standards reasonably, but not whether the utility has chosen the “correct” standard to apply. The enumerated issues for the ALJ referenced above step beyond this jurisdictional line and would have a far reaching impact on the utility’s electric operations, well beyond the relationship between the utility and the attacher.

A. The HDO Exceeds the Jurisdiction Granted to the FCC by Congress in Section 224

12. The HDO suggests without statutory analysis that its authority to review EAI’s engineering standards is grounded in section 224(b)’s “rates, terms and conditions” language and section 224(f)(2)’s access exception for insufficient capacity, safety, reliability or generally applicable engineering practices. The Enforcement Bureau, however, has fundamentally misconstrued the scope of the FCC’s jurisdiction in this regard.

¹⁹ *Id.* at ¶¶ 8-12.

²⁰ HDO at ¶ 12.

13. In the first instance, the HDO purports not only to address the rates, terms and conditions for *pole attachments* – attachments by cable television systems or telecommunications providers²¹ - but goes further to suggest that the FCC may review EAI's application of its engineering standards to its own *electric plant*.²² This is clearly impermissible as such an exercise would stray too far from the statutorily required nexus to the communications attachments as opposed to the electric plant and the utility's electric operations. EAI also filed a motion with the ALJ addressing this issue, to which the Bureau filed a response that recognized that the sweeping nature of issue 4(c) as drafted in the HDO was inappropriate. Commission jurisdiction, in the Bureau's view, must be tied to the communications attachment and the FCC is not free to address wholly electric matters.²³

14. In the second instance, the HDO assumes that the mere invocation of a denial of access, despite the fact that the cable plant is already attached to EAI's facilities and applications for new attachments are being processed by EAI, entitles the FCC to open up engineering standards that have been in place for decades to examine whether EAI had a sufficient basis in safety for preventing attachment in the first instance.²⁴ In this regard, the HDO fails to explain how its detailed review of engineering criteria used to evaluate the maintenance of existing attachments is tied to a denial of access by the utility based on one of the 224(f)(2) statutory criteria. Rather, the only possible basis for jurisdiction here would be Section 224(b) relating to

²¹ § 224(a)(4).

²² HDO at ¶ 18, item 4(c).

²³ See, Entergy Arkansas, Inc. Motion to Enlarge, Delete, and Change Issues Presented in the Hearing Designation Order, Docket No. 05-63, Eb-05-MD-004 (filed May 4, 2006); Opposition of the Enforcement Bureau to Respondent's Motion to Enlarge, Change and Delete Issues (filed May 15, 2006).

²⁴ In this regard, the Bureau also erred in failing to address EAI's argument that the Complainant's denial of access claims are moot. Without a viable access claim, moreover, the FCC has no statutory basis upon which it may proceed to evaluate EAI's engineering standards.

just and reasonable “rates, terms and conditions.” The Bureau, however, has not conducted any analysis as to how the present inquiry falls within this language. Moreover, as discussed above, the broad language of the HDO’s enumerated issues relating to EAI’s standards relative to the NESC is not tied, as required by 224(b), to the pole attachment itself.

15. The Pole Attachments Act, as amended,²⁵ is a precisely crafted and highly limited grant of jurisdiction. In initially considering the Pole Attachments Act, Congress recognized that the FCC is not the primary agency responsible for overseeing the electric utility industry, nor does it have any specific expertise with respect to electric utilities and their unique safety and engineering issues. For this reason, Congress carefully circumscribed the FCC’s authority in this area solely to the determination of whether the rates, terms, and conditions for pole attachments are just and reasonable, and the language of the Act must be read in light of Congress’s understanding of the FCC’s core competencies.²⁶ These competencies, and indeed, the mission of the agency, do not put the FCC in a position to evaluate electric safety and reliability and the methods that the electric industry uses to fulfill its obligations in this regard.

16. Congress also recognized the local nature of pole attachment issues, allowing state public service commissions (“state PSCs”) to effect a “reverse preemption” of FCC jurisdiction over pole attachments should they choose to do so. Even where a state has not specifically preempted FCC jurisdiction with respect to communications attachments, most state commissions, including the Arkansas Public Service Commission, possess the statutory authority and expertise to address the electric utility engineering issues that the HDO appropriates for the

²⁵ 47 U.S.C. § 224.

²⁶ S. Rep. No. 95-580 at 15 (1977) (“This expansion of FCC regulatory authority is strictly circumscribed...”).

FCC.²⁷ It is strained, however, to read the Pole Attachments Act to say that, in specifying that the FCC may regulate the rates, terms and conditions of communications attachments, Congress intended to provide the *communications* agency with jurisdiction over *electric* engineering issues that are local in nature and already regulated on a variety of fronts by other expert agencies.

17. Section 224(c) of the Pole Attachments Act, 47 U.S.C. §224(c), also implicitly recognizes that state law already addresses issues of safety, reliability and generally applicable engineering matters. For a state to preempt the FCC under section 224(c) with respect to both (1) rates, terms and conditions, and (2) pole or conduit access issues under section 224(f), a state need only certify that it regulates rates, terms and conditions. Section 224(c) does not require the state to additionally certify that it has authority to regulate access rights under section 224(f), including the safety, reliability, or engineering issues noted in section 224(f)(2). Thus Congress understood that states already have and adequately exercise such authority.²⁸ The FCC also recognized this in the *Local Competition Order*, concluding that even where a state had not affirmatively preempted the Pole Attachments Act as to regulation of rates, terms and conditions, state and local pole attachment regulations are entitled to deference.²⁹

18. This is logical and appropriate, as state PSCs are in day-to-day contact with the utilities under their jurisdiction, and are the most proficient bodies with respect to evaluating and understanding the utility both as a whole and in the context of the locality to ensure the safety and maintenance of their plants. In Arkansas, the public service commission is charged by

²⁷ Letter dated April 19, 2005 from Edison Electric Institute and United Telecom Council to Wm. Webster Darling, Response to Complaint Exhibit "81", EB-05-MD-004 (filed April 19, 2005).

²⁸ Response to Complaint Exhibit "81" at 4.

²⁹ *Local Competition Order*, 11 FCC Rcd. 15499 at ¶ 1154.

statute to ensure that retail customers have access to safe, reliable, and affordable electricity.³⁰

Among other things, this includes the obligation to: (1) find and fix just, reasonable, and sufficient public utility rates; (2) determine the reasonable, safe, adequate, and sufficient service to be observed, furnished, enforced, or employed by any public utility and to fix this service by its order, rule, or regulation; and (3) ascertain and fix adequate and reasonable standards, classifications, regulations, practices, and services to be furnished, imposed, observed, and followed by any or all public utilities.³¹

19. The FCC has recognized the unique interest utilities have in preserving the safety and stability of their electric plants by making sure that attachments to their poles are “safe and in accordance with agreed upon standards.”³² Further, the Commission has recognized the expertise of other agencies in addressing safety and reliability issues associated with the electric plant and those who come in contact with it, including the federal Occupational Safety and Health Administration (“OSHA”), the Federal Energy Regulatory Commission (“FERC”), state occupational safety commissions, and state PSCs.³³

20. The cable industry’s own engineering standards manual published by the Society of Cable Telecommunications Engineers also acknowledges the utility’s experience and expertise in managing its plant and gauging its plant’s safety, integrity and stability, and instructs cable companies installing facilities on utility poles to defer to the utility’s judgment and the

³⁰ Ark. Code Ann. § 23-2-304 (2004).

³¹ Ark. Code Ann. § 23-2-304 (2004).

³² *Mile-Hi Cable Partners v. Public Service Company of Colorado*, 14 FCC Rcd. 3244, ¶ 19 (1999).

³³ *See, Local Competition Order* at ¶ 1147.

standards of the pole attachment agreement in the design and maintenance of CATV facilities.³⁴ The FCC has also declined in the past to adopt specific rules to determine when access may be denied because of safety, capacity, reliability, or engineering concerns.³⁵ For these reasons, the sound and reasonable judgment of the electric utility as to the measures needed to safeguard the integrity and safety of its electric plant should be accorded substantial weight and deference by the FCC.

21. In short, while the HDO asserts that the utility is not the “primary arbiter” of safety, reliability, and engineering concerns for utility poles, neither is the FCC.³⁶ A variety of other agencies possessing greater electric utility and safety expertise than the FCC already have authority over those aspects of EAI’s standards that Complainants seek to reduce or to eliminate. The FCC should let those expert agencies and the utility address these issues, rather than relying on the Pole Attachments Act to justify sweeping changes over subject matter that is more comprehensively addressed by other, more specific statutes and regulations.

22. Even assuming, *aguardo*, that the language of Section 224 is sufficiently vague to permit the FCC leeway in interpretation to address EAI’s engineering standards, public policy counsels against this broad foray into electric operations. If the FCC were to dictate specific engineering parameters, which it would in fact be doing if it were to determine that any standards beyond the NESC are unjust and unreasonable, the FCC would place EAI and other utilities in the untenable position of trying to conform to both the dictates of the FCC and those of the state PSC. While the HDO has suggested that the Pole Attachments Act gives the Commission

³⁴ Society of Cable Telecommunications Engineers, Inc., *Recommended Practices for Coaxial Cable Construction and Testing*.

³⁵ *Local Competition Order* at ¶ 1158.

³⁶ HDO at ¶ 11.

authority to preempt conflicting state engineering requirements,³⁷ the HDO also states that it does not intend to establish such rules. The Bureau is, in effect, speaking out of both sides of its mouth, as a broad determination in this case would effect a *de facto* preemption without directly addressing the Commission's ability, or its prudence, in doing so.

B. The HDO Contravenes FCC Precedent

23. The FCC's own precedent has been consistent in this respect: the Commission has always declined to establish specific rules to govern access determinations under Section 224(f).³⁸ Rather, only broad principles have been outlined that recognize the multitude of standards and considerations that a utility typically draws upon to establish its own criteria. In particular, as noted above, the FCC has acknowledged state and local considerations, and has specifically declined to adopt the NESC as a mandatory standard.³⁹ The HDO, however, fails to recognize this. In particular, the jurisdictional pronouncements of the HDO in paragraphs 8 to 12 and its "narrow" view of the issues posed in the dispute do not comport with the broad issues posed related to the evaluation of EAI's standards versus the NESC – which further conflicts with the FCC's consistent stance that "the NESC is not a specific Commission rule."⁴⁰

24. Moreover, the two cases cited by the HDO for the proposition that the FCC has ruled on its jurisdiction and competence to evaluate utility engineering practices actually

³⁷ HDO at ¶ 11, n. 37.

³⁸ It is only this section, and not 224(b) as relied upon by the HDO, that references safety and engineering, and does so only in the context of denials of access. Access, however, is not an issue for the vast majority of the attachments at issue in this case, and is governed by a requirement of "non-discrimination" rather than the requirement of being just and reasonable, which pertains to "rates, terms and conditions" for pole attachments under 224(b). Rather, here it is the continued non-compliance and lack of maintenance *after* access has been granted that has been challenged.

³⁹ *Local Competition Order* at ¶ 1154.

⁴⁰ *Id.*

carefully avoid making any specific pronouncement as to the utility's standard,⁴¹ and did not address the jurisdictional question at all. In *CTAG*, the Bureau focused solely on the adequacy of Georgia Power's showing that its engineering standards were violated, not whether such standards were appropriate in the first instance.⁴² *Newport News* also focuses on the inadequacy of the cable operators showing as to the unreasonableness of the guying standard questioned, and notes that "the interpretive body of NESC does not disagree with VEPCO's guying standard."⁴³ Jurisdiction to make a judgment as to the utility's guying standard was also not raised in that case, and accordingly does not support the suggestion that the FCC has affirmatively addressed and affirmed its ability to hear these disputes within the jurisdictional strictures of the Pole Attachments Act.

C. The HDO's Jurisdictional Findings are Not Supported in the Record

25. The HDO also misstates the scope of the questions posed and the request for relief made by Complainants with respect to EAI's engineering specifications. As such, the Bureau's determination that its jurisdiction is sufficient to grant the relief requested is similarly erroneous and must be reversed. The Bureau asserts that EAI "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."⁴⁴ EAI, however, is far from incorrect in this assertion. In the first instance, the Complaint seeks relief well beyond the scope of the relief characterized in the HDO. In

⁴¹ HDO at 10, citing *Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333 (2003) ("*CTAG*"); *Newport News Cablevision v. Virginia Elec. & Power Co.*, 7 FCC Rcd 2610 (1992) ("*Newport News*").

⁴² *CTAG* at ¶¶ 10-12.

⁴³ *Newport News* at ¶ 15.

⁴⁴ HDO at ¶ 9.

particular, the HDO suggests that the issues posed by the Complaint are “narrow” and relate to the “application of specific engineering standards and practices in the unique circumstances presented here.”⁴⁵ The Complaint, however, asks that the FCC “declare EAI’s engineering standards that exceed the requirements set forth in the NESC to be unjust, unreasonable and discriminatory terms and conditions on [sic] attachment in violation of 47 U.S.C. § 224,” and suggest that the FCC should direct EAI to adhere to the NESC standards for EAI’s *own* attachments.⁴⁶ The HDO reflects Complainants’ suggestion, specifying that the Administrative Law Judge should hear evidence on, and pass judgment as to, “whether Entergy has installed *electric facilities* out of compliance with the NESC and/or Entergy’s own standards...” and whether EAI’s standards exceed the NESC and its exceptions, and if so whether “heightened” standards are unjust and unreasonable.⁴⁷ The Complaint challenges virtually all of EAI’s contractual engineering standards, with its only argument being that such standards are unjust and unreasonable solely because they do not track precisely the NESC and all exceptions.⁴⁸ As noted above, the FCC has consistently declined to establish the NESC as an FCC standard and as such this suggestion flies in the face of the FCC’s prior determinations.

26. The Complainants’ broad pleading seeks to have the FCC reach beyond the scope of this case, beyond any rational relationship to the language of the Pole Attachments Act, and asks the FCC to establish a *de facto* national standard that caps utility pole engineering at the NESC without regard to local considerations. The wholesale adoption of these issues for

⁴⁵ HDO at ¶ 9.

⁴⁶ Complaint at ¶ 379, items m, o.

⁴⁷ HDO at ¶ 18, list item 4(c), 1(c) (emphasis added).

⁴⁸ Complaint, Docket No.1 EB-05-MD-004, at ¶¶ 254-276 (filed Feb. 18, 2005) (arguing that bonding, service drops and clearance requirements are unlawful because they do not conform to the NESC); ¶ 379, items m, o (seeking relief from all standards that “exceed” the NESC).

consideration of the ALJ also belies the Bureau's determination that the questions posed are "narrow" and steers the discussion into precisely the determination that the Bureau has stated it need not decide – an industry-wide uniform engineering mandate. While the Bureau has sought to recraft the Complaint to make it more palatable, and to avoid the jurisdiction question that the Complainants have posed, the FCC must acknowledge the relief requested by the Complaint goes beyond the power of the FCC to grant and reverse the Bureau's jurisdictional determination in the HDO.

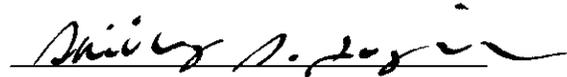
IV. CONCLUSION

27. With the HDO, the Bureau has stepped over a line and gone beyond determining just and reasonable rates, terms and conditions for pole attachments, and has affirmatively stepped into the realm of regulation of utility safety standards. As a legal matter, this is erroneous. As a policy matter, this is also ill-advised. As crafted, the HDO and its broad statement of jurisdiction and even broader application of that purported jurisdiction in the HDO's enumerated issues threatens to place EAI and other utilities in the untenable position of either (1) requiring adherence to safety and engineering standards to fulfill their obligations to ensure safe and reliable electricity and facing repeated bouts of litigation before the FCC, or (2) capitulating to cable and telecommunications attachers demands to employ lesser standards that avoid FCC scrutiny, but which places the utility's plant and personnel at greater risk. While balancing is certainly necessary, the HDO and its sweeping jurisdictional pronouncements overload the scales in favor of cable and telecommunications attachers, and must be overturned.

WHEREFORE, THE PREMISES CONSIDERED, Entergy Arkansas, Inc.

respectfully requests the FCC to take action in this matter to reverse the HDO, and to revise or strike the relevant portions thereof to conform to the narrow jurisdiction of Section 224.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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