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Federal Communications Commission
Office of the 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.; CoxCom, Inc., and Cebridge Acquisition, L.P, d/b/a Suddenlink Communications

EB Docket No. 06-53

EB-05-MD-004

Complainants,

v.

Entergy Arkansas, Inc.,

Respondent

To: Office of the Secretary

Attn: The Honorable Arthur I. Steinberg
Administrative Law Judge

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ENERGY ARKANSAS, INC.'S OPPOSITION TO REQUEST FOR ISSUANCE OF SUBPOENA DUCES TECUM TO UTILITY SUPPORT SYSTEMS, INC.

Pursuant to Section 1.294(b) of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.294(b), Entergy Arkansas, Inc. ("EAI") hereby submits its Opposition to Complainants' Request for Issuance of Subpoena Duces Tecum to Utility Support Systems, Inc. ("USS"), a nonparty to the above-captioned proceeding.¹ As set forth herein, Complainants have failed to demonstrate an adequate basis for issuance of the requested subpoena for the following reasons: (i) the request for documents is overly broad

¹ Complainants' Request for Issuance of Subpoena Duces Tecum, EB Docket No. 06-53, File No. EB-05-MD-004 (filed August 24, 2006) ("Complainants' Request").

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and not reasonably limited in scope; (ii) it seeks information that is protected by the attorney-client privilege and the work-product doctrine; (iii) it requests documents that contain confidential and/or proprietary business information; (iv) the cost burden of compliance with the requested production of documents is unduly burdensome; and (v) it seeks information that is unreasonably cumulative or duplicative.

Complainants' request for issuance of a subpoena seeks information that is overly broad, beyond the scope of this matter, and not reasonably calculated to lead to the discovery of admissible evidence. It is well established that issuance of a subpoena duces tecum must be predicated upon a showing of "general relevance and reasonable scope of the evidence sought."² In evaluating Complainants' request for certain documents, the "relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."³ Complainants have failed to demonstrate the general relevancy and materiality of the documents requested in relation to the limited scope of the issues to be addressed in this hearing.⁴ Furthermore, the documents requested have not been described with sufficient particularity.

² See 5 U.S.C. § 555(d); see also *In Re Applications of Florida-Georgia Television Co., Inc., et al.*, Memorandum Opinion and Order, 19 FCC 2d 517, 522 (1969); (Holding that subpoena must be duly limited as to temporal and geographic scope and define the documents with reasonable particularity); *In Re Applications of Syracuse Television, Inc., et al.*, Memorandum Opinion and Order, 7 FCC 2d 56, 57 (1967) (Stating that failure of subpoena to restrict the subject matter to specific meetings, construction projects, or buildings was unduly broad); *In re Applications of Syracuse Television, Inc., et al.*, Memorandum Opinion and Order, 7 FCC 2d 56, 58-59 (1967).

³ *Oklahoma Press Publishing Co. v. Wailing*, 327 U.S. 186, 209 (1946).

⁴ See 47 C.F.R. § 1.333(c); *Arkansas Cable Telecomm. Ass'n et al. v. Entergy Arkansas, Inc.*, EB Docket No. 06-53, File No. EB-05-MD-004, Hearing Designation Order, DA 06-494 (rel. Mar. 2, 2006), ("HDO") at ¶ 18.

While the Complainants' stated goal is to seek documents relevant to the actions of EAI's contractor, the broad categories of the documents requested goes well beyond the limited amount of documents relevant to these issues. In particular, Complainants allege that the requested documents will demonstrate that EAI's inspections of Complainants' attachments and the allocation of costs were unreasonable.⁵ However, Complainants seek numerous categories of documents that are either unrelated to these issues or not specific to the actions of USS. Therefore, Complainants' are not entitled to issuance of a subpoena because the scope of the documents requested is not reasonably limited to the specific issues relevant to this proceeding.⁶

The Administrative Law Judge ("ALJ") should also deny the Complainants' subpoena request because it seeks information or production of documents protected by the attorney-client privilege and the work-product doctrine. Pursuant to Federal Rule of Civil Procedure 26(b), attorney-client communications ordinarily are privileged and are protected from discovery.⁷ The request for issuance of a subpoena requests memoranda, correspondence, and notes that were communications made with counsel in order to obtain legal advice. Thus, these documents are protected by the attorney-client privilege.⁸ Complainants also seek the production of written statements, private memoranda, and other documents protected under the work-product doctrine because they were prepared by or under direction of counsel in the

⁵ See Complainants' Request at 5-6.

⁶ See *U.S. v. Morton Salt Co.*, 338 U.S. 635, 652 (1950) (Holding that administrative subpoena must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.").

⁷ See Fed. R. Civ. P. 26(b); see also *In re: Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984).

⁸ See *Fisher v. United States*, 425 U.S. 391, 403 (1976).

course of performing legal duties. The work-product doctrine “reflects the strong public policy against invading the privacy of any attorney’s course of preparation.”⁹ As such, any documents prepared by or under direction of counsel that are sought by the request for issuance of a subpoena fall outside the discovery process.

EAI objects to the Complainants’ subpoena request insofar as it requests documents or other materials which contain confidential and/or proprietary business information. A request for issuance of an agency subpoena for confidential information must contain a showing of relevance and immediate need for the protected information.¹⁰ The production of the documents requested by Complainants would require the disclosure of trade secrets and commercial or financial information that is confidential, without any showing of the immediate need for the requested documents. Complainants have not demonstrated that they have made any attempt to obtain information from non-confidential documents or that relevant information is not available from alternative sources.

The ALJ should deny the request for issuance of subpoena because the cost burden of compliance with the requested production of documents is unduly burdensome. USS, as a nonparty witness, should not be subjected to unreasonable and burdensome processes.¹¹ The time requested by the Complainants for the production of documents would provide USS with less than thirty days to review and make available a significant amount of documents at considerable expense. Regardless of the timeframe for compliance, USS should not be

⁹ *In re: Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988).

¹⁰ See e.g., *Federal Trade Commission v. Lonning*, 539 F.2d 202, 209-210 (D.C. Cir. 1976) (Upholding issuance of subpoena duces tecum for confidential information where federal agency had “shown both relevancy and need in connection with its subpoena in this case.”).

¹¹ See *Applications of Florida-Georgia Television*, 19 FCC 2d at 523.

required at significant expense in terms of time and money to produce documents that may be obtainable from EAI or other sources.

Finally, Complainants' subpoena request should be denied because it seeks information that is unreasonably cumulative or duplicative.¹² Issuance of the subpoena request would impose an undue burden on USS given that the broad categories of documents requested by Complainants have already been requested from EAI. Therefore, compliance with Complainants' request would be unduly burdensome and the ALJ should deny the request for issuance of a subpoena to USS.

¹² See Fed. R. Civ. Pr. 26(b)(2)(i).

WHEREFORE, THE PREMISES CONSIDERED, Entergy Arkansas, Inc.

respectfully requests that the Administrative Law Judge take action on the instant Opposition consistent with the views expressed herein.

Respectfully submitted,



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Dated: August 30, 2006

CERTIFICATE OF SERVICE

I, Erika E. Olsen, do hereby certify that on this 30th day of August, 2006, a single copy (unless otherwise noted) of the foregoing "Entergy Arkansas, Inc.'s Opposition to Cable Telecommunications Association's Request for Issuance of Subpoena Duces Tecum" was delivered to the following by the method indicated:

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