

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

05752
FCC 06M-30

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,)
)
Complainants,)
)
v.)
)
Entergy Arkansas, Inc.,)
)
Respondent.)

EB Docket No. 06-53

MAILED

SEP 25 2006

FCC Room

File No. EB-05-MD-004

MEMORANDUM OPINION AND ORDER

Issued: September 21, 2006

;

Released: September 25, 2006

1. Under consideration are: (a) a Motion to Enlarge, Change and Delete Issue Presented in the Hearing Designation Order, filed on May 4, 2006, by Entergy Arkansas, Inc. ("Entergy"); (b) an Opposition to Respondent's Motion to Enlarge, Change and Delete Issues in the Hearing Designation Order, filed on May 12, 2006, by 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 (collectively "Complainants"); (c) an Opposition of the Enforcement Bureau to Respondent's Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, filed on May 15, 2006, by the Enforcement Bureau ("Bureau"); (d) a Reply to Oppositions to Respondent's Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, filed on May 19, 2006, by Entergy; (e) a Motion for Leave to Submit Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, filed on May 31, 2006, by Complainants; (f) a Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues in the Hearing Designation Order, filed on May 31, 2006, by Complainants; (g) an Opposition to Complainants' Motion for Leave to Submit a Response to Entergy's Reply, filed on June 1, 2006, by Entergy; and (h) a Reply to Complainants' Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues in the Hearing Designation Order, filed on June 1, 2006, by Entergy.

2. This case was designated for hearing by *Hearing Designation Order*, DA 06-494 (Enf. Bur. released March 2, 2006), Erratum (released March 6, 2006) ("*HDO* "). Issue 4(c) reads as follows:

To determine whether Entergy has installed electric facilities out of compliance with the NESC and/or Entergy's own standards, and if so, whether it has

unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.

3. Entergy seeks to modify this issue. In support, Entergy argues that this issue is excessively broad and exceeds the scope of the jurisdictional determination made in the *HDO*, in that it requires the Presiding Judge to make determinations related to wholly electric operations and practices outside the scope of the FCC's jurisdiction under the Pole Attachments Act. Motion at 2. Specifically, Entergy contends that the Pole Attachments Act encompasses only attachments by a cable television system or other provider of telecommunications services, but does not encompass the electric utility's own electric facilities. Similarly, Entergy claims that the Pole Attachments Act does not provide general jurisdiction for the FCC to assess the compliance of electric facilities with applicable safety and engineering standards. Thus, Entergy maintains, the Commission's jurisdiction over pole attachments extends only to the attachments of cable television and telecommunications service providers. *Id.* at 2-3. Consequently, Entergy requests that Issue 4(c) be narrowed and revised to read as follows:

To determine whether Complainants' attachments are out of compliance with the NESC and/or Entergy's standards, and if so, what would be a reasonable method of determining responsibility for correction.

Id. at 4.

4. Complainants oppose Entergy's motion. Complainants initially allege that Entergy's motion is procedurally defective because it does not raise specific allegations of fact sufficient to support the action requested, as required by Section 1.229(d) of the Commission's Rules. Opposition at 3-4. Complainants also aver that Entergy's motion does not show that the Commission overlooked or misconstrued any pertinent information which was before it at the time of designation and therefore does not meet the test for issue deletion. *Id.* at 4-5. Complainants further assert that Entergy's motion is, in actuality, a vehicle to rehash the jurisdictional arguments that were resolved against Entergy in the *HDO*. *Id.* at 5-6. Moreover, Complainants argue that Issue 4(c) is correctly drafted to account for the alleged fact that Entergy's practices affect cable operators in a way that might run afoul of Section 224 of the Communications Act and Commission precedent. Thus, Complainants contend that it is long-standing Commission precedent that communications-attaching parties, like Complainants, are not responsible for clearing violations created by others. In this connection, Complainants cite instances in which Entergy has allegedly placed its electric facilities on the poles after cable has safely placed its wires on the pole, and where Entergy's practices have allegedly jeopardized cable plant, cable workers, and others. Complainants claim that Entergy has sought to force the correction costs on cable operators, and that Entergy attempted to refurbish its aerial plant at cable's expense. *Id.* at 8-9, 15-16. Therefore, Complainants maintain that a demonstration of non-compliance by Entergy of NESC and other safety codes is essential for a complete resolution of Issue 4(c). *Id.* at 16.

5. The Enforcement Bureau also opposes Entergy's motion. However, the Bureau supports the modification of Issue 4(c) to narrow its scope and limit consideration of Entergy's electric operation practices only to those practices that relate to Complainants. Bureau Opposition at 1-2. To this end, the Bureau suggests that Issue 4(c) be modified to read as follows:

To determine whether, on the Entergy poles to which Complainants' facilities are attached, Entergy has installed electric facilities out of compliance with the NESC and/or Entergy's own standards, and if so, whether Entergy has

unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.

Id. at 3-4.

6. In its consolidated reply to the oppositions of Complainants and the Bureau, Entergy alleges that the issue suggested by the Bureau is still too broad because it would require the Presiding Judge to make determinations related wholly to electric operations and practices outside the scope of the Pole Attachments Act simply because there happens to be a communications attachment on the pole. Entergy asserts that there must also be a causal relationship between the utility practice in question and the cited safety violations charged to the communications attachment. Reply at 3. Thus, Entergy submits that the Bureau's revision of Issue 4(c) should be further revised to read as follows:

To determine whether, *on those poles where Entergy has reported violations by Complainants, Entergy's installation of electric facilities resulted in Complainants' attachments being out of compliance with [...] NESC and/or Entergy's own standards, and if so, whether Entergy has unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.*

Id. at 4 and 6 (italics added to show where Entergy's revision differs from the Bureau's).¹

7. Entergy's motion will be granted to the extent that Issue 4(c) will be modified as suggested by the Bureau. In all other respects, Entergy's motion will be denied. Initially, to the degree that Entergy seeks to challenge the jurisdictional basis for the inclusion of this issue, its claims may not be entertained. It is well established that where a hearing designation order contains a reasoned analysis of a particular matter, subordinate officials are precluded from revisiting that matter. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (1981); *Frank H. Yemm*, 39 RR 2d 1657, 1658-59 (1977); *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720 (1966); *Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965). Since the *HDO* in this proceeding thoroughly addressed Entergy's arguments relating to the Commission's jurisdiction, *HDO* at ¶¶8-12, the Presiding Judge lacks the authority to consider that matter.

8. As noted by the Bureau, Issue 4(c) does appear to be too broad. As written, this issue may be interpreted to require a review of all of Entergy's facilities for out-of-compliance conditions, and may involve a general, wholesale examination of all of Entergy's electric operations. However, the intended focus of this issue is to determine which party was responsible for non-compliant conditions on a given pole, to determine which party should bear the costs associated with correcting those conditions, and to assess the reasonableness of Entergy's attempts to charge Complainants for correcting those conditions. In other words, Issue 4(c) is only intended to address those out-of-compliance electric facilities, installed by Entergy, which Entergy has attempted to hold Complainants responsible for correcting. Consequently, to make it clear that consideration of Entergy's electric operation practices is limited only to those practices that relate to Complainants, Issue 4(c) will be modified as recommended by the Bureau.

¹ Complainants seek leave to submit a response to Entergy's reply, contending that the reply fundamentally changed the nature of the relief Entergy requested. Motion for Leave to Submit Response at 2. Complainants' motion will be denied. Suffice it to say, the portion of Entergy's reply which is in dispute was in direct response to an argument which was raised in the Bureau's opposition to Entergy's motion, namely, the Bureau's alternate phrasing of Issue 4(c).

Accordingly, *IT IS ORDERED* that the Motion for Leave to Submit Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, filed by Complainants on May 31, 2006, IS DENIED.

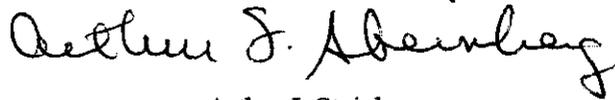
IT IS FURTHER ORDERED that the Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues in the Hearing Designation Order, filed by Complainants on May 31, 2006, and the Reply to Complainants' Response to Entergy's Reply in Support of its Motion to Enlarge, Change and Delete Issues in the Hearing Designation Order, filed by Entergy on June 1, 2006, ARE DISMISSED.

IT IS FURTHER ORDERED that the Motion to Enlarge, Change and Delete Issue Presented in the Hearing Designation Order, filed by Entergy on May 4, 2006, IS GRANTED to the extent discussed above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED that Issue 4(c) IS MODIFIED to read as follows:

To determine whether, on the Entergy poles to which Complainants' facilities are attached, Entergy has installed electric facilities out of compliance with the NESC and/or Entergy's own standards, and if so, whether Entergy has unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge