

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

COPY ORIGINAL

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, )  
)  
*Complainants,* )  
)  
v. )  
)  
ENTERGY ARKANSAS, INC., )  
)  
*Respondent.* )

EB Docket No. 06-53  
  
EB-05-MD-004

**FILED/ACCEPTED**  
**JAN 26 2007**

Federal Communications Commission  
Office of the Secretary

To: Office of the Secretary  
Attn: The Honorable Arthur I. Steinberg  
Office of the Administrative Law Judge

**COMPLAINANT ACTA'S AMENDED MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS AND ANSWERS TO INTERROGATORIES**

Pursuant to 47 C.F.R. §§ 1.243, 1.323 and 1.325, Complainant Arkansas Cable Telecommunications Association ("ACTA") hereby moves the Presiding Officer for an order compelling Entergy Arkansas, Inc. ("Entergy") to produce all documents and information responsive to Complainant Arkansas Cable Telecommunications Association's Second Set of Interrogatories (attached hereto as Exhibit A) and Complainant Arkansas Cable Telecommunications Association's Second Set of Document Requests (attached hereto as Exhibit B). Respondent

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Entergy objects to ACTA's second set of discovery requests, on various grounds. Entergy's objections lack merit. See Responses to Complainant Arkansas Cable Telecommunications Association's Second Set of Interrogatories (attached hereto as Exhibit C) and Answers to Complainant Arkansas Cable Telecommunications Association's Second Set of Document Requests (attached hereto as Exhibit D). The discovery requests propounded by ACTA are sufficiently narrow and highly relevant to the issues designated for hearing in the Hearing Designation Order entered by the Commission on March 2, 2006.

Further, in Entergy's response to ACTA's second set of document requests, served on January 18, 2007, Entergy states that it will produce or make additional documents available. See Ex. D, at 5-7.<sup>1</sup> Nevertheless, in its General Objections, which are incorporated in each answer, it states, "EAI's responses below that it will produce certain documents in response to document requests should not be taken as representations that such documents exists but as an undertaking to locate and produce relevant, non-privileged documents, if they exist and can be found." Ex. D, at 3, ¶ 11.

Entergy's *noblesse oblige* responses are but the latest installment of the very conduct that gave rise to Complainant's Emergency Motion for Hearing Regarding Discovery Abuses ("Discovery Abuses Motion") filed January 5, 2007. While Entergy's answers to interrogatories and responses to document requests are

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<sup>1</sup> Entergy's refusal to timely produce the additional documents or information demonstrates the, at best, lethargic and casual approach that Entergy has taken to its discovery obligations in this proceeding and its continuing approach of producing only those documents and information that supports Entergy's position.

grossly deficient in a number of ways, the most egregious example of Entergy's continued obstruction is its answer to Interrogatory No. 3 and its response to Document Request No. 8, which is more fully explained below. ACTA's present motion should be evaluated and resolved together with Complainants' pending Discovery Abuses Motion. Good cause exists for this Motion, and in support thereof, ACTA further states as follows.

### **BACKGROUND**

On December 19, 2006, Complainants served on Entergy's counsel, by hand delivery, Complainant Arkansas Cable Telecommunications Association's Second Set of Interrogatories and Complainant Arkansas Cable Telecommunications Association's Second Set of Document Requests. On January 18, 2007, Entergy served answers to ACTA's interrogatories and document requests. Entergy provided general and specific objections to the discovery requests but refused to provide substantive answers or actually produce documents, particularly as to Interrogatories No. 2 and 3 and Document Requests No. 4 and 8. *See Ex. C & D.*

## ARGUMENT

The Presiding Officer is vested with broad discretionary power in applying the discovery procedures set forth in Commission rules 1.311 to 1.325. *See, e.g., Amendment of Part I, Rules of Practice and Procedure*, 91 F.C.C. 2d 527, ¶ 4 (1982); *In re Application of Jefferson Standard Broadcasting Co., Charlotte, N.C. for a Construction Permit*, 31 F.C.C.2d 756, 1970 WL 18355, \*1 (1970). The Commission's rules set forth discovery procedures whereby parties may discover "any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any . . . documents." 47 C.F.R. § 1.311(b) (emphasis added). Sections 1.323(c) and 1.325 (a)(2) of the Commission's procedures clearly provide that a party may move the Presiding Officer for an order compelling discovery if a party fails to answer interrogatories or to produce documents requested, in whole or in part. *See* 47 C.F.R. §§ 1.323(c) & 1.325(a). Where the Presiding Officer finds that the information or documents requested are "patently germane, thus relevant, and not being in that class of privilege by precedent or tradition shielded from disclosure" the Presiding Officer shall order the information or documents to be produced. *See, e.g.,* 31 F.C.C.2d 756.

## **I. ENERGY'S RESPONSES TO ACTA'S SECOND SET OF DISCOVERY REQUESTS ARE INADEQUATE AND EVASIVE**

### **A. Entergy wrongly refuses to provide an answer to Interrogatory No. 3 and a response to Document Request No. 8.**

Complainants simply seek the truth about why Entergy embarked on the onerous audit and costly inspection which is the focus of issue 2(b) of the Hearing Designation Order which states: "To determine whether Entergy's inspections and clean-up program was initiated in response to safety and reliability problems with Complainants' facilities." In addition, Entergy and its contractor USS have imposed standards that far exceed the National Electrical Safety Code ("NESC") and that—if applied—would require Complainants to replace or vacate huge numbers of Entergy poles across the State. Moreover, in a related FCC proceeding and in state-court litigation, Entergy has unlawfully sought the removal of Comcast facilities from mixed-use transmission/distribution structures that connect Entergy Little Rock substations within the City. *See Comcast of Arkansas, Inc. v. Entergy Arkansas, Inc.*, File No. EB-06-MD-001 (filed Jan. 6, 2006); *see also Entergy Arkansas, Inc. v. Comcast of Arkansas, Inc.*, CV2006-132 (Ark. Cir. Ct. filed Jan. 6, 2006). This, among other things, would instantly make space available for Entergy's Broadband Over Power Line ("BPL") network. Complainants, moreover, have ample reason to believe that Entergy is positioning itself to become a direct competitor with Arkansas cable operators in the provision of broadband services via BPL technology.

Not only does Entergy need to clear space on the poles to accommodate its BPL facilities and the fiber that is needed for a BPL rollout, but Entergy needed to identify all transformer locations. Entergy has largely accomplished the last of

these tasks through the USS inspection program. What now may be coming to light is that Entergy unlawfully discriminated against Complainants in favor of its own *competitive BPL project*. This directly relates to Issue 6, which focuses on whether Entergy discriminated against Complainants and in favor of other communications companies. For these reasons, ACTA's discovery requests tie right to specific issues delineated in the HDO and, therefore, require a complete response.

Entergy offered numerous general objections for not providing the information. However, these objections are neither accurate nor relevant. Nor do they relieve Entergy of its discovery obligations. ACTA's interrogatories and document requests seek to discover facts about Entergy's BPL initiative that are related to several issues that are central to the parties' claims and defenses. The information sought is sufficiently narrow and highly relevant to not only issue 2(b) (to determine whether Entergy's inspections and clean-up program was initiated in response to safety and reliability problems with Complainants' facilities), but also issues 2(e) (to determine whether the costing model used by Entergy is unreasonable), 2(h) (to determine whether the charges Entergy has sought to impose on Complainants for inspections, corrections, and/or clean-up of facilities are contrary to the parties' pole attachment agreements or otherwise unjust and unreasonable), not to mention the critical discrimination issue, Issue 6, as set forth in HDO.

Interrogatory No. 3 asks Entergy to "describe in detail EAI's plans to provide Broadband Over Power Line ("BPL") service. Please include in your answer what

steps Entergy has already taken to upgrade, change, and/or modify its plant to accommodate the new service as well as dates of the upgrades, changes, and/or modifications.” Entergy responded, in addition to its general objections:

Objection. EAI objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, and requests information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, EAI further responds as follows: The information sought by Complainant ACTA is not an issue designated for hearing and not related to the issues designated for hearing. The limited project involving BPL did not begin until the fourth quarter of 2006 well after the safety inspections had been performed by USS and safety violations had been reported to the Complainant cable TV operators.

Likewise, Document Request No. 8 requested Entergy to “[i]dentify and produce any and all materials related to Entergy providing Broadband Over Power Line (“BPL”) service.” Entergy responded:

Objection. EAI objects to this request on the grounds that it is overly broad, unduly burdensome, and requests information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, EAI further responds that the materials sought by Complainant ACTA is not an issue designated for hearing and is not related to the issues designated for hearing.

There is no merit to Entergy’s objections. Entergy’s response, furthermore, is disingenuous in the extreme for numerous reasons.

First, Entergy’s response is contrary to both statements its contractor made publicly regarding the BPL project and common sense. In its answer to Interrogatory No. 3, Entergy states that “[t]he limited project involving BPL did not begin until the fourth quarter of 2006 well after the safety inspections had been

performed by USS.” Ex. C. However, in an article published January 23, 2007, in the BPL trade press, Entergy’s contractor PowerGrid’s CEO Chris Britton reported that Entergy first put out “a request for information (RFI) . . . last summer - - looking for bids to deploy network solutions, services and applications.” *Former American CEO joins PowerGrid: Entergy trial moves to rural Arkansas*, BPL TODAY, Jan. 23, 2007, available at <https://www.bpltoday.com/members/977.cfm> (attached hereto as Exhibit E). Additionally, Britton stated, “[w]e worked with Entergy to take their corporate VOIP network - - an existing wide-area network - - and build it into the BPL network all the way down to the desktops.” *Id.* (internal quotation omitted). This means the RFI went out in the *third* quarter of 2006 and that planning for that RFI likely was ongoing for months—if not years—prior to that.

“The firm sent a team of engineers to just about every BPL conference . . . .” *Entergy enters BPL world with Ambient pilot*, 24-7 PressRelease, Dec. 14, 2006, available at [http://www.24-7pressrelease.com/view\\_press\\_release.php?rID=21928](http://www.24-7pressrelease.com/view_press_release.php?rID=21928) (attached hereto as Exhibit F).

Complainants believe that Entergy’s Troy Castleberry is head of the Entergy BPL initiative. He was one of the individuals who assisted in putting together responses to Complainants’ first set of discovery requests. Perhaps most significantly, he was David Inman’s boss when the decision was made to hire USS and during much of the USS’ inspections. Moreover, he may have mined—for Entergy’s sole benefit—the very data that USS collected and that Entergy still is attempting to force Complainants to pay for.

Complainants have noticed Mr. Castleberry for deposition. The materials related to Entergy's BPL project are necessary for Complainants' to prepare for Mr. Castleberry's deposition. Entergy's BPL initiative and Entergy's BPL personnel are closely connected to this litigation and these materials must be produced without further delay. Entergy's continuing efforts to block Complainants' access to these materials is entirely consistent with its strategy to deprive Complainants of documents needed to conduct proper discovery and develop a proper record.

Second, Entergy also states that its BPL service is not relevant to issues in this proceeding because the roll out of service occurred "well after the safety inspections had been performed by USS and safety violations had been reported to the Complainant cable TV operators." Ex. C. However, common sense dictates that in order for a 2006 roll out to have occurred, planning and design of that installation must have been going on for some time—perhaps many years – before then. Despite Entergy's tired mantra that ostensibly "rampant" cable operator safety violations necessitated the harsh USS inspections, it is entirely possible that Entergy had been plotting its BPL entry for years. This is directly related to the cited issues in the HDO and establishes a potentially anti-competitive motive.

Indeed, utilities like Entergy, and even this Commission, have framed BPL as a major competitive alternative to existing broadband networks, including those of cable operators. See 19 F.C.C.R. 21265, 2004 WL 2411391, \*2 (Oct. 28, 2004). ("Because Access BPL capability can be made available in conjunction with the delivery of electric power, it may provide an effective means for "last mile" delivery

of broadband services and may offer a competitive alternative to digital subscriber line (DSL), cable modem services and other high speed Internet access technologies.”) (emphasis added). However, the potential downsides have been noted by important observers. In fact, since the beginning of the BPL rulemaking in 2005, Commissioner Michael Copps has had concerns about pole owners’ abusing the pole resource to give their BPL ventures a leg up. *See id.* (“[I]ssues such as . . . pole attachments, competition protections, and, critically, how to handle the potential for cross-subsidization between regulated power businesses and unregulated communications businesses remain up in the air.”).<sup>2</sup>

Complainants’ discovery requests are reasonably calculated to lead to the discovery of admissible evidence related to issues designated for hearing. Complainants would suffer irreparable prejudice and harm as the record will be incomplete and skewed if Entergy is successful in withholding information regarding its BPL initiative.

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<sup>2</sup> Moreover, Entergy’s Little Rock trial is one of three that Entergy is conducting—it is doing one in rural Arkansas and one in Baton Rouge (Entergy Louisiana). *See* Ex. E. BPL, without question, is (and may have been for some time) a major corporate initiative for Entergy which directly affects Complainants and the issues in this proceeding. Parallel with its BPL initiatives, Entergy has plans to locate a major data center in Little Rock and clearly is diversifying into the data and information business, possibly—some day—in competition with Arkansas cable operators. *See Entergy to locate data center in old downtown library*, Stephans Media Group, Dec. 13, 2006, available at <https://stephansmedia.com> (attached hereto as Exhibit G).

**B. Entergy's objections to Interrogatory No. 2 and Document Requests No. 4 lack merit and its answer and responses are inadequate.**

Interrogatory No. 2 asks Entergy to "please state whether Entergy field inspectors had instructions to clear all violations on a pole or span as opposed to only addressing the plant conditions that the USS inspection specifically noted when Entergy field inspectors were sent to [the] field with Entergy violations that USS had detected." Entergy responded, in addition to its general objections:

Objection. EAI objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, vague, unclear, and requests information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, EAI responds as follows: In addition to visual inspection of violations which EAI was responsible for correcting as reported by USS, engineering associates also report any other conditions observed by them related to EAI's electric facilities which required correction, regardless of whether a condition was located on any specific pole, pole span or distribution circuit.

Entergy's objections are ill-founded. Entergy claims Interrogatory No. 2 is vague and unclear, yet it answers the interrogatory (in a round about way). Also, Entergy asserts that it is unduly burdensome for Entergy to answer the interrogatory, but nevertheless, answers it despite that fact. Most important, however, Entergy's answer is evasive. A complete answer at the very least would have acknowledged whether or not Entergy provided instructions to its field personnel to check for and clear all violations on the pole or span. One possible inference from Entergy's answer is that Entergy field personnel may have been instructed to turn a blind eye to additional problems with its plant. At a minimum, it is certainly a fair question to ask whether Entergy applied the same exacting scrutiny to itself that it applied

to cable operators—which exacting standards led to state-wide permitting freezes for cable network expansions. Entergy’s responses also indicate that Mr. Darling *was the only person who assisted in the preparation of these discovery responses.* Can in-house counsel alone really answer what instructions were given to Entergy’s field personnel?

Likewise, Document Request No. 4 requested Entergy to “[i]dentify and produce copies of all company organizational information including but not limited to organizational charts, a list of names, titles, contact information, and job descriptions and duties.” Entergy responded:

Objection. EAI objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, and requests information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, EAI responds as follows: This information has been previously obtained by counsel for Complainants through the deposition of EAI witnesses.

Yet again, Entergy’s objections are illogical. One of the fundamental purposes of discovery is for the parties to discover “persons having knowledge of relevant facts.” 47 C.F.R. § 1.311(b). Moreover, the Commission’s discovery rules provide for discovery by way of various methods. Entergy cannot arbitrarily choose ACTA’s method to discover the facts. Just because Entergy witnesses may have testified in deposition about limited organizational matters, does not mean that Complainants are not entitled to the organizational charts. In fact, an organizational chart is more likely accurately and comprehensively to detail the information requested, saving precious deposition time.

## II. ENTERGY'S REFUSAL TO PRODUCE DOCUMENTS OR INFORMATION RELATING TO ITS BPL INITIATIVE IS BUT ANOTHER INCIDENT IN A LONG STRING OF ON-GOING DISCOVERY ABUSES

Entergy has previously claimed that all relevant and responsive documents have been produced. Nonetheless, its answer to Request No. 1 of ACTA's Second Set of Document Requests states:

Employee Brad Welch has been requested to furnish all documentation in his possession relating to Complainants. At the time Entergy was responding to Complainants' First Set of Interrogatories and Document Requests, Mr. Welch no longer held a position relating to the issues in this proceeding. Entergy believed that any relevant and responsive documents which Mr. Welch possessed in his previous position [as Joint Use Coordinator] had been transferred to the custody of his replacement. However, it appears that possession of various documents was retained by Mr. Welch. Additionally, at this time employees David Kelley and Lucinda Thompson have been requested to furnish additional documentation to counsel.

Entergy's response to Interrogatory No. 1 highlights the very issues that are now the subject of Complainant's Discovery Abuses Motion. While it is useful that Entergy is conducting further investigation regarding any documents in its custody that should have been turned over, its "further investigation" is deficient. Entergy had numerous opportunities over the course of the last seven months to conduct multiple additional investigations. Complainants raised the sparseness of its production on several occasions. It wasn't until Complainants escalated their concern by filing the January 5, 2007, Discovery Abuses Motion that Entergy decided it was time to conduct additional investigations.

As is now clear from Entergy's concession, its initial sweep of documents was inadequate – a point that should be more fully explored at a hearing on Complainants' pending Discovery Abuses Motion. Entergy apparently has now

admitted that it failed to take the most basic step: to inquire of its very own employees, who were intimately involved in the audit and inspection which lies at the very center of the dispute in this matter, if all documents responsive to Complainant's requests submitted more than seven (7) months ago had been collected. Yet Entergy has represented time and again that all responsive documents have been produced.

Moreover, in answering ACTA's second set of discovery requests, Entergy again apparently has failed to take a comprehensive approach to conducting its investigation: according to its verified responses, Mr. Darling, Entergy's in-house counsel, was the only person Entergy consulted in answering ACTA's discovery requests. This, of course, raises the question of whether Entergy also failed to consult other Entergy representatives, past and present, who have played at least some role in the issues in dispute. The list is long and includes CEO Hugh McDonald, P. J. Martinez, Greg Grillo and Steve Strickland. It also includes Entergy "middle" management—individuals like Wayne Harrell and Michael Willems. It extends beyond Brad Welch and his successor (Carol Pennington), David Kelley and Lucinda Thompson and includes others such as Mike Glancy, Bernard Neumeier, Brad Vance, Misty Osborne and Rodney Caldwell—not to mention Entergy contractors other than USS that may have performed work related to the disputed USS' inspections. No mention is made of these individuals or entities and whether or not there has been any effort to contact them in connection with Complainants' discovery requests. More significant, Entergy makes no

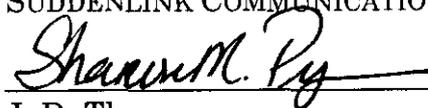
mention of Entergy computers or other digital processing or storage devices, or those of its employees and contractors. This continues to be a critical area of inquiry.

### III. CONCLUSION

For these reasons, Complainant ACTA respectfully requests that this motion be granted and that Entergy be ordered to provide answers to Interrogatories No. 2 and 3 and documents in response ACTA's second set of discovery requests. Complainants request, further, that the issues raised in this Motion be addressed simultaneously by the Presiding Officer with the issues raised in Complainants January 5, 2007, Discovery Abuses Motion.

Respectfully submitted,

ARKANSAS CABLE  
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January 26, 2007

Its Attorneys

**CERTIFICATE OF SERVICE**

I, Sharese M. Pryor hereby certify that on January 26, 2007, a copy of the foregoing COMPLAINANT ACTA'S AMENDED MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND ANSWERS TO INTERROGATORIES was hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, postage prepaid, to:

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A handwritten signature in cursive script, appearing to read "Sharon M. R.", written over a horizontal line.

\* Served via U.S. Mail  
\*\* Also served via Electronic Mail