

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

FEB - 8 2007

Federal Communications Commission
Office of the 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: Office of the Secretary
Attn: The Honorable Arthur I. Steinberg
Administrative Law Judge

OPPOSITION TO COMPLAINANTS' INTERLOCUTORY REQUEST

Pursuant to Section 1.294(a) of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.291, Respondent Entergy Arkansas, Inc. ("EAI") hereby submits its Opposition to Complainants' Interlocutory Request for authorization from the Administrative Law Judge ("ALJ") to have Complainants' Reply to EAI's Response to Complainants' Emergency Motion ("Complainants' Reply"), accepted into the record.

For purposes of clarification, Complainants' Request for Authorization was not submitted as a separate filing, but rather as a separate Section II.B. to Complainants' February 5, 2007

Opposition to EAI's Motion to Strike. Because this is the first time that this Request for

No. of Copies rec'd 016
List A B C D E

Authorization has been presented, it is a new interlocutory request under Section 1.291 of the Commission's Rules, 47 C.F.R. § 1.291, and EAI is therefore entitled to file the instant Opposition under Section 1.294(a) of the Commission's Rules, 47 C.F.R. § 1.294(a).¹

As set forth herein, the grant of Complainants' Request for Authorization and acceptance of Complainants' Reply would be an unwarranted departure from the Commission's well-established procedural rules for hearing proceedings, as made specifically applicable to the instant proceeding in the Hearing Designation Order ("HDO").² Furthermore, the acceptance of Complainants' Reply would unduly prejudice EAI and frustrate the Commission's intent "to arrive at a just, equitable, and expeditious resolution."³ Complainants' Request for Authorization must therefore be denied and Complainants' Reply accordingly rejected and excluded from the record and from consideration in this proceeding.

I. PROCEDURAL BACKGROUND

On January 5, 2007, Complainants filed an interlocutory pleading styled as an "Emergency Motion" in which Complainants requested a hearing on alleged discovery abuses. Pursuant to Section 1.294(a) of the Commission's Rules, 47 C.F.R. § 1.294(a), EAI timely filed its Response to Complainants' Emergency Motion on January 25, 2007.⁴ On February 1, 2007,

¹ / Pursuant to Section 1.294(b) of the Commission's Rules, Complainants may not file a reply to the instant Opposition, thus bringing the pleading cycle on these issues to an end.

² / *Arkansas Cable Telecommunications Association, et al., v. Entergy Arkansas, Inc.*, EB Docket No. 06-53, File No. EB-05-MD-004, Hearing Designation Order, DA 06-494 (rel. March 2, 2006) ("HDO"), ¶¶ 19, 27 (ordering that this hearing be governed by the rules of practice and procedure pertaining to the Commission's Hearing Proceedings, 47 C.F.R. §§ 1.201 – 1.364). Accordingly, the generally applicable provisions of Section 1.45 of the Commission's Rules, upon which Complainants rely, are irrelevant to this proceeding.

³ / *Id.*, ¶ 6.

⁴ / *See Arkansas Cable Telecommunications Association, et al., v. Entergy Arkansas, Inc.*, EB Docket No. 06-53, File No. EB-05-MD-004, Order, FCC 07M-04 (rel. Jan. 12, 2007) (granting EAI an extension of time to file its Response).

Complainants filed a Reply to EAI's Response, which EAI subsequently moved to strike on the basis that Complainants' Reply is not permitted under the Commission's hearing rules. On February 5, 2007, Complainants filed their Opposition to EAI's Motion to Strike, and included in their opposition a new interlocutory request for authorization to have Complainants' Reply accepted into the record. This new interlocutory request by Complainants is the subject of the instant Opposition.

II. A GRANT OF COMPLAINANTS' REQUEST IS UNWARRANTED AND WOULD UNFAIRLY PREJUDICE EAI

In Section II.B. of their Opposition to EAI's Motion to Strike, Complainants requested that their filing "be construed as a request for authorization to file [Complainants'] Reply" (Opposition to Motion to Strike at 4). According to Complainants, their proffered Reply would be "helpful" in resolving the questions raised in Complainants' Emergency Motion and in EAI's Response because it "corrects" certain propositions of law and "offers additional relevant precedent." (*Id.* at 5). Complainants also contend that their Reply would "create a complete record by alerting the Hearing Officer to the arguments Complainants *may* make at a subsequent hearing on the Emergency Motion." (*Id.*) (emphasis added). Finally, Complainants assert that their Reply should be accepted because the issues raised in the Emergency Motion "are serious and extraordinary, not routine." (*Id.*) However, most of the factors relied on by Complainants are common to any reply proffered by any party in any proceeding, whether in a hearing, a rulemaking proceeding, or any other matter before the Commission and/or one of its Bureaus.⁵ If these factors were sufficient to authorize the filing of a reply, then the explicit prohibitions in

⁵ This is illustrated by Complainants' reliance on a footnote in *Mediacom Southeast, LLC*, 18 FCC Rcd 7718, n.4 (2003), which involves neither a hearing nor any of the Commission's hearing rules, such as Section 1.294. Rather, this case addresses a cable system's Section 76.7 petition (for a determination of effective competition) before the Media Bureau – in other words, a routine petition before a Bureau.

the Commission's hearing rules against the filing of replies would be meaningless. *See, e.g.*, 47 C.F.R. §§ 1.294(b) and 1.323(c). These rules clearly establish a sequence of motion-response-ALJ decision. Complainants filed their motion, and EAI responded accordingly. Complainants have shown no reason for departing from this well-established sequence, nor have they shown why they – unlike every other party subject to the Commission's hearing rules – should be afforded another bite at the same apple.

To the extent that Complainants have additional precedent or arguments to offer, they provide no explanation as to why they were not offered as part of their initial Emergency Motion where, as the party initiating the interlocutory request, Complainants had every opportunity to present their case in full. To the extent Complainants intend to “alert” the ALJ to arguments they *may* make at a hearing, then that hearing is where those arguments should be made. To the extent the issues raised in their Emergency Motion are “serious and extraordinary,” Complainants fail to explain why their initial Emergency Motion was insufficient to address these issues, and furthermore fail to explain why the seriousness of these issues warrants the extraordinary measure of departing from the Commission's long-standing hearing practice by authorizing Complainants' Reply.

Allowing Complainants to now file a reply would not only undermine the Commission's procedural rules, but would unfairly prejudice EAI by denying EAI the opportunity to respond to allegations and arguments that should properly have been presented in Complainants' initial Emergency Motion, as well as denying EAI the opportunity that would be given to Complainants to “alert” the ALJ to arguments that may be made at any subsequent hearing on the Emergency Motion. Moreover, Complainants' representations regarding the seriousness of the issues raised in their initial Emergency Motion demonstrate the extent of prejudice that EAI would suffer if

Complainants were to be granted – and EAI effectively denied – a further opportunity to make their case beyond what is explicitly provided for in the Commission’s hearing rules.

In short, the Commission’s rules on hearing proceedings – which clearly apply to all practice and procedure in the instant hearing, by their own terms and pursuant to the HDO – do not allow the filing or consideration of replies. Although Section 1.124(d) of the Commission’s Rules does provide the ALJ discretion to specifically request or authorize the filing of replies in certain circumstances, such circumstances are not present here. The acceptance of Complainants’ Reply would unfairly prejudice EAI, and Complainants have failed to show that good cause exists for their proffered reply to be accepted into the record. Accordingly, Complainants’ Interlocutory Request for Authorization should be rejected and Complainants’ Reply excluded from the record and from consideration in this proceeding.

In the event Complainants’ Interlocutory Request for Authorization is nevertheless granted, EAI respectfully requests authorization to submit a response to Complainants’ Reply. Allowing Complainants to further argue their case while denying EAI the opportunity to respond – as would be its right under Section 1.294(a) if these arguments had been properly presented in Complainants’ initial Emergency Motion – would result in substantial and unfair prejudice to EAI. If Complainants’ Reply were to be accepted, the interests of equity would thus require the acceptance of a response from EAI.

WHEREFORE, THE PREMISES CONSIDERED, Entergy Arkansas, Inc. respectfully requests that Complainants' Request for Authorization, as set forth in Complainants' Opposition to EAI's Motion to Strike, be denied and that Complainants' Reply to Entergy Arkansas, Inc.'s Response to Complainants' Emergency Motion be excluded from the record and from consideration in this proceeding, and that that the Administrative Law Judge grant EAI all other appropriate relief consistent with the views expressed herein.

Respectfully submitted,



Shirley S. Fujimoto
David D. Rines
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096
T: 202.756.8000
F: 202.756.8087

Gordon S. Rather, Jr.
Stephen R. Lancaster
Michelle M. Kaemmerling
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201-3699
T: 501.371.0808
F: 501.376.9442

Wm. Webster Darling
Janan Honeysuckle
Entergy Services, Inc.
425 West Capitol Avenue
27th Floor
Little Rock, AR 72201
T: 501.377.5838
F: 501.377.5814

Attorneys for Entergy Arkansas, Inc.

Dated: February 8, 2007

CERTIFICATE OF SERVICE

I, David D. Rines, do hereby certify that on this 8th day of February 2007, a single copy (unless otherwise noted) of the foregoing "Opposition to Complainants' Interlocutory Request" was delivered to the following by the method indicated:

Marlene H. Dortch (hand delivery) (**ORIGINAL PLUS 6 COPIES**)
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Hon. Arthur I. Steinberg (overnight delivery, fax, e-mail)
Administrative Law Judge
Office of the Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Fax: (202) 418-0195

John Davidson Thomas (hand-delivery, e-mail)
Paul Werner, III
Dominic F. Perella
Sharese M. Pryor
Hogan & Hartson LLP
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004

Alex Starr (overnight delivery, e-mail)
Lisa Saks
Michael Engel
Federal Communications Commission
Enforcement Bureau
Market Dispute Resolutions Division
445 12th Street, S.W.
Washington, DC 20554

Best Copy and Printing, Inc. (U.S. Mail)
Federal Communications Commission
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

Federal Energy Regulatory Commission (U.S. Mail)
888 First Street, N.E.
Washington, D.C. 20426

Arkansas Public Service Commission (U.S. Mail)
1000 Center Street
Little Rock, AR 72201

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

David D. Rines