

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

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| In the Matter of |) | |
| |) | File No. PA 97-005 |
| Texas Cable & Telecommunications Association, |) | |
| Mississippi Cable Telecommunications Association, |) | |
| and Arkansas Cable Television Association et al., |) | |
| Complainants |) | |
| |) | |
| v. |) | |
| |) | |
| Entergy Services, Inc., et al., Respondent |) | |

ORDER

Adopted: June 7, 1999

Released: June 9, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order we address a complaint ("Complaint") filed with the Federal Communications Commission ("Commission") by Texas Cable & Telecommunications Association, Mississippi Cable Telecommunications Association, and Arkansas Cable Television Association, ("Complainants") pursuant to Section 224 of the Communications Act of 1934, *as amended*, ("Act")¹ and Part 1, Subpart J, of the Commission's Rules,² against Entergy Services, Inc. ("Entergy"). Pursuant to Section 224, the Commission adjudicates disputes between utilities and cable operators concerning allegedly unjust and unreasonable pole attachment rates, terms, and conditions. Complainants request that we terminate and declare unjust and unreasonable an engineering survey fee charged by Entergy upon application for attachments. Complainants also request that we set pole attachment rates in Mississippi to their previous level because Entergy raised them without notice. Lastly, Complainants request that we declare unjust and unreasonable various terms and conditions of a new standard agreement proposed by Entergy. During the course of this proceeding many of the issues raised in the Complaint have been resolved. We address the remaining issues in this Order.

2. The Complaint was filed with the Commission on July 9, 1997. Entergy filed a Motion for Extension of Time to File Answer on August 8, 1997, and the parties filed a Joint Motion for Stay of Filing Deadlines on August 21, 1997. On August 25, 1997, Complainants filed an Addendum to the Complaint expanding Exhibits 1, 2, 3, and 4. Entergy filed its Answer ("Answer") on September 22, 1997, and an Erratum ("Erratum") on September 23, 1997. Subsequently, on September 25, 1997, Entergy filed a Motion for Leave to Supplement Answer and a Supplement to Answer ("Supplement"). Complainants filed an Opposition to Motion for Leave to File Supplement on October 6, 1997. Complainants then filed a Reply ("Reply") on October 8, 1997. Entergy moved for a settlement meeting on October 14, 1997. On October 17, 1997, Entergy filed a Reply to Opposition to Motion for Leave to

¹ 47 U.S.C. §224.

² 47 C.F.R. §§1.1401-1.1418.

Supplement Answer. The parties met with Commission staff on June 25, 1998. On July 9, 1998, Entergy provided, by letter, information requested by Commission staff at the meeting ("Information Letter"). Complainants provided comments on the Entergy submission by letter dated July 13, 1998.

II. BACKGROUND

3. In February 1997, Entergy began informing cable operators that they must pay a \$50 per pole "engineering survey fee" when they made application for new attachments to Entergy's poles. The operators were advised that their applications would not be processed unless the fees were paid.³ Also in early 1997,⁴ Entergy began circulating a draft new agreement to cable systems. The agreement contained controversial terms, including fees for applying for new pole attachment agreements, a bundled rate for certain services, unauthorized attachment fees, a requirement to secure a permit when changing the nature of services provided, and a waiver of the right to file a complaint with the Commission. On or about April 17, 1997, Entergy sent invoices to the cable systems in Mississippi that were attached to Entergy's poles billing them for January through June 1997 at a rate of \$4.34 per annum per pole, an increase from the previous rate of \$3.50 per annum per pole. The parties negotiated through June 1997.

4. The parties have not resolved the issues relating to the engineering survey fee, the inclusion of fees for applying for new pole attachment agreements, and the effective date of the new rate in Mississippi.

III. DISCUSSION

A. Fees

5. A just and reasonable pole attachment rate assures a utility recovery of not less than the incremental cost of providing pole attachments nor more than the fully allocated costs.⁵ A rate that is comprised of both incremental and fully allocated components is not *per se* unreasonable or unjust nor does the Commission view the mandate set out in Section 224(d)(1) of the Act⁶ as requiring a utility to charge rates that are based either on incremental cost or fully allocated costs.⁷ Incremental costs may consist of both recurring and non-recurring costs.⁸ Non-recurring incremental costs are out-of-pocket expenses attributable to pole attachments. They include pre-construction, survey, engineering, make-ready,

³ Complaint, Ex. 5.

⁴ The copy provided with the complaint has 11-7-96 in the footer of each page. Complaint, Ex. 7.

⁵ Memorandum Opinion and Second Report and Order, CC Docket 78-144, Adoption of the Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C. 2d 59 (1979) ("Second Order").

⁶ 47 U.S.C. §224(d)(1).

⁷ In the Matter of Amendment of Rules and Policies Governing Pole Attachments, 68 FCC 2d 1585, para. 42 (1978) ("Initial Order").

⁸ Second Order at paras. 28 - 30.

and change-out costs.⁹ Non-recurring incremental costs are directly reimbursable to the utility and are excluded from the incremental rate.¹⁰ A separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based upon fully allocated costs.¹¹ We will look closely at make-ready and other charges to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee.¹²

1. Engineering Survey Fee

6. The engineering survey fee charged by Entergy is to be submitted with applications for attachment to specific poles. It is supposed to cover Entergy's cost for examining the pole to determine whether and what type of make-ready work is necessary.¹³ Originally, Entergy announced a \$50 per pole fee,¹⁴ but reduced it to \$10 plus an additional \$10 to provide an estimate of make-ready work to the cable system.¹⁵ The second \$10 is characterized as optional by Entergy.¹⁶ The engineering survey fee is an estimate of the cost of conducting the surveys averaged on a per pole basis.¹⁷ The estimate was revised downward because the original estimate assumed that the survey would be done by senior engineers whereas Entergy decided that junior engineers would perform the work.¹⁸ Letters sent to the cable systems recite an alleged requirement in the pole attachment agreement that payment for engineering costs be paid when the application is submitted. They state that in many instances this fee has not been requested or paid. They further state that, "With the increase in requests for access to our poles we find it necessary to inspect each location for which a request for attachment is made in order to protect the integrity of our electrical distribution system."¹⁹

7. The letters indicate that the engineering costs are identifiable directly and have been identified in the past. Entergy simply did not collect them. Secondly, the engineering survey has not always been conducted, it is done at Entergy's option, and the practice of inspecting every pole is new.

⁹ Make-ready refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole change-out is the replacement of a pole to accommodate additional users.

¹⁰ Second Order at para. 29.

¹¹ Report and Order, CC Docket No. 86-212, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387, para. 44 (1987) ("Second Proceeding").

¹² See, e.g., *Teleprompter Corp. v. Houston Lighting and Power Co.*, 49 Rad. Reg. 2d 1301(1981).

¹³ Complaint, Ex. 5 (Letters dated between February 10 and March 24, 1999, inclusive, from Entergy to various cable systems).

¹⁴ *Id.*

¹⁵ Answer at 5.

¹⁶ Letter dated July 9, 1998, at 1.

¹⁷ Answer, n. 4.

¹⁸ Answer at 5.

¹⁹ Complaint, Ex. 5.

Lastly, the existence of the requirement that the costs be paid with the application is in question. For example, one agreement provides that the cable system will pay in advance the cost of any preliminary engineering required.²⁰ It is unclear, however, what triggers the requirement, and taken in context it is reasonable to infer the preliminary engineering was done at the discretion of Entergy.

8. Entergy asserts that the engineering survey fee is being imposed for administrative convenience and fairness²¹ and that the \$10 up front fee is cheaper because the administrative costs for collecting the fee on per pole basis would be more expensive.²² Entergy also asserts, in support of the additional fee for providing an estimate of make-ready costs to the cable system, that under existing agreements Entergy undertakes the make-ready work without further notice to or assent from the attacher and bills the attacher for the costs of the make-ready work.²³ By providing the estimate for the attacher, Entergy states, it is providing an optional service.²⁴

9. The Complainants allege that the engineering survey fee is an administrative surcharge that is not based upon actual costs.²⁵ They state that they do not dispute that they should pay reasonable make-ready charges.²⁶ The Complainants also raise doubts about the need for an engineering survey regime that is so extensive.²⁷

10. Entergy is calculating its annual pole attachment fee based upon fully allocated costs.²⁸ The engineering survey fee is charged in addition to the annual fee as a non-recurring, incremental cost for attachment to each pole. A rate based upon fully allocated costs, however, by definition, encompasses all pole related costs and additional charges are not appropriate.²⁹ Complainants have agreed to pay for the actual costs of necessary engineering surveys.³⁰ In these circumstances, we find the engineering survey

²⁰ Addendum to Complaint, Ex. 3, Section 2.4(B). (Agreement between Arkansas Power and Light Company and Riverside Cable TV, Inc., June 2, 1986, witnessed by Carma J. Boyd, current Joint Use Administrator for Entergy).

²¹ Complaint, Ex. 5.

²² Answer, n. 4.

²³ Answer, n. 5.

²⁴ Answer at 6.

²⁵ Reply at 7.

²⁶ Reply at 4.

²⁷ Reply at 5.

²⁸ See, e.g., Addendum to Ex. 3., Exhibit "C". Although all gross as opposed to all net costs are used in the formula, that is acceptable. See *Cable Information Services, Inc., et al, v. Appalachian Power Co.*, 81 F.C.C. 2d 383 (1980).

²⁹ Second Proceeding at para. 74.

³⁰ Letter dated July 18, 1998, para. 1.

fee is not just and reasonable. Complainants may be held only to the agreed to obligation to reimburse Entergy for the actual cost of necessary engineering survey expenses.

2. Application Fee

11. Entergy has included in its proposed new agreement a fee of \$5,000 for origination of a new pole attachment agreement and a fee of \$2,000 for a major expansion of the cable system. Later, they clarify that the \$5,000 fee should be described as for companies who either themselves or their predecessors have never had a pole attachment relationship with Entergy. Entergy also clarifies that the \$2,000 fee applies where the cable system is expanding into new territory which is not a line extension or where an attaching entity seeks to negotiate a new standard agreement.³¹

12. Entergy asserts that, as the application fees are terms or conditions in a proposed standard agreement, Complainant's challenge to them is premature and should not be considered by the Commission.³² Entergy also asserts, however, "that the Commission should reaffirm that the cable company practice of agreeing to a contract term, then immediately filing a pole attachment complaint challenging that term, will not be tolerated."³³ This latter assertion is accompanied by a note alleging that challenging the term before it is in a final agreement is more egregious.³⁴ Entergy believes that "...sign-and-sue" practices completely undermine the negotiation process."³⁵ It would appear that Entergy is asserting that the Commission should not consider a complaint either before or after an agreement is consummated. Entergy does not cite an instance where we have "affirmed" that cable companies should not file a complaint regarding a pole attachment agreement. We are aware of none. Rather we have repeatedly "affirmed" quite the opposite, recognizing the unequal bargaining power of the parties.³⁶ We have also asserted the efficacy of the complaint process in resolving disputes where negotiation fails.³⁷ It is clear at this point that the parties are at an impasse, that Entergy is insisting on the attachment fees and Complainants insist they would result in an unjust and unreasonable rate. The facts and issues have crystallized to the point that the Commission can make a ruling. To do so at this point benefits both parties allowing them to reach agreement, avoiding further negotiation expense and, perhaps, a later complaint proceeding.

13. Entergy characterizes these fees as non-recurring charges, and states that it directly bills attachers for any non-recurring charge.³⁸ Entergy asserts that these fees are justified based upon cost and

³¹ Information Letter at 3.

³² Answer at 7.

³³ Answer at 14.

³⁴ Answer, n. 14.

³⁵ Answer at 14.

³⁶ See, e.g., Second Proceeding at para. 77.

³⁷ Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, 13 FCC Rcd 6777, paras. 11 & 16 (1998).

³⁸ Answer, n. 9.

offers estimates of the costs allegedly incurred.³⁹ Estimates are provided because "each agreement varies in the amount of work and negotiation necessary to complete" ⁴⁰ It points out that, ". . . to the extent those costs are booked to FERC accounts included in the Commission's pole attachment formula, a deduction is made from the appropriate FERC account. Entergy does not, therefore, recover twice for any costs."⁴¹ Entergy also asserts that, if it did include the costs in the accounts, they would be reflected in the pole attachment rate and be borne by all attachers.⁴² Entergy urges that it wishes to reduce fees and that, if the cable companies and the Commission will support a standard agreement for all cable and telecommunications companies attaching to Entergy's poles, it could eliminate much of the cost.⁴³

14. Complainants argue that the costs covered by the fees are already included in the rate and that costs incurred by Entergy as a result of its negotiating strategy should be borne by Entergy.⁴⁴ Complainants are amenable to a standard pole attachment agreement for all attachers to Entergy's poles.⁴⁵ As discussed above, a rate based upon fully allocated costs encompasses all pole related costs. That costs included in a such a rate are borne by all users is expected. Entergy has not made a persuasive argument that the annual rate it would charge together with these fees would be significantly less than one based upon fully allocated costs, or that recovering these costs through direct reimbursement rather than through the annual fee is preferable.

B. Mississippi Rate

15. Entergy acknowledges that it made a mistake, and violated Section 1.1403(c)(2) of the Commission's Rules,⁴⁶ when it issued its invoice in April 1997 increasing the annual fee and making it effective retroactively to January 1.⁴⁷ Entergy states that a small number of attachers have paid the new rate and that Entergy is issuing credits to them for the difference between what they have paid and what was due under the old rate.⁴⁸ Entergy asserts, however, that the April 1997 invoice meets the notice requirements of Section 1.1403, and that it will make the new rate effective July 1, 1997.⁴⁹ Complainants assert that Entergy did not provide effective notice of the new rate until it acknowledged in its Answer

³⁹ Answer at 8; Information Letter at 2-3.

⁴⁰ Information Letter at 2.

⁴¹ Answer, n. 9.

⁴² *Id.*

⁴³ Information Letter at 3.

⁴⁴ Reply at 16-17.

⁴⁵ Reply at 17.

⁴⁶ 47 C.F.R. §1.1403(c)(2).

⁴⁷ Answer at 6.

⁴⁸ Erratum.

⁴⁹ Answer at 6.

that the new rate had been imposed in error. Thus, Complainants argue that the new rate should not become effective until 60 days after the Answer was filed, November 22, 1997.⁵⁰

16. The 60 days notice provided by Section 1.1403 was intended to "permit a CATV operator adequate notice and an opportunity to file a 'petition for Temporary Stay' (Petition) with the Commission" ⁵¹ The Complainants responded to the increase in the April invoice by requesting justification from Entergy for the new rate⁵² and eventually filed this Complaint on July 9, 1997. Had Complainants wished to contest the reasonableness of the new rate, there was adequate opportunity to include that issue in the Complaint and preserve the right to a refund. There certainly was adequate time to file a petition for Temporary Stay. We find that the April 1997 invoices constituted actual notice sufficient for the purposes of Section 1.1403. The effective date of the rate increase will be July 1, 1997.

IV. CONCLUSION

17. Entergy's unilateral imposition of a fee for engineering surveys together with an increased requirement to perform such surveys is an unreasonable term or condition and results in an unjust and unreasonable rate. Complainants are required to pay only the direct costs for necessary surveys actually performed. It is unreasonable for Entergy to be reimbursed directly by Complainants for costs it incurs for contract negotiation with Complainants. The application fees proposed by Entergy in its new agreement would require direct payment to Entergy for costs already recovered by Entergy in the annual fee. Offsetting the amounts collected in fees in the administrative accounts used to calculate the carrying charges is not sufficient to meet the requirements of the statute. Entergy improperly imposed its 1997 fee increase effective January 1, 1997. It may make the increase effective July 1, 1997. Therefore, we will order Entergy to refund to the Complainants any amounts paid for the referenced engineering survey fees after July 9, 1997, plus interest. We will also order Entergy to reimburse any amounts paid for pole attachments at the new rate of \$4.34 per annum, less any amount due at the prior rate of \$3.50 per annum, through June 30, 1997, less any amount already reimbursed, plus interest.⁵³

⁵⁰ Reply at 15.

⁵¹ Initial Order at para. 8.

⁵² Complaint, Ex. 9.

⁵³ The Commission has determined previously that the current interest rate for Federal tax refunds and additional tax payments is the appropriate rate of interest on the overcharges. *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C. 2d 232, para. 24 (1980), *recon.* 85 F.C.C. 2d 243 (1981). We take official notice that the Commissioner of Internal Revenue has set a daily compounded rate of 8 percent per annum from July 1, 1997, until March 31, 1998; of 7 percent per annum effective April 1, 1998, through December 31, 1998; of 6 percent per annum effective January 1, 1999, through March 31, 1999, and of 7 percent per annum effective April 1, 1999, through June 30, 1999. Rev. Rul. 99-16, 1999-13 I.R.B. 5.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§0.321 and 1.1401-1.1418, that the relief requested by Texas Cable & Telecommunications Association, Mississippi Cable Telecommunications Association, and Arkansas Cable Television Association, et al., IS GRANTED TO THE EXTENT INDICATED HEREIN.

19. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§0.321 and 1.1410(a), that the fee variously described as an engineering fee, engineering survey fee, or survey fee imposed by Entergy IS TERMINATED, effective upon the release of this Order.

20. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1410(c) of the Commission's Rules, 47 C.F.R. §§0.321 and 1.1410(c), that Entergy Services, Inc., SHALL REFUND, within thirty (30) days of the release of this Order, to all cable systems who have made such payments all sums paid to Entergy Services, Inc., as an engineering fee, engineering survey fee, or survey fee after July 9, 1997, plus interest until the date of full payment.

21. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1410(a) and (b) of the Commission's Rules, 47 C.F.R. §§0.321 and 1.1410(a) and (b), that the increase in the annual rate for attachment to Entergy's poles in the State of Mississippi from \$3.50 per pole to \$4.34 per pole IS EFFECTIVE July 1, 1997.

22. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1410(c) of the Commission's Rules, 47 C.F.R. §§0.321 and 1.1410(c), that Entergy Services, Inc., SHALL REFUND, within thirty (30) days of the release of this Order, to all cable systems who have made such payments all sums paid to Entergy Services, Inc., over the rate of \$3.50 per annum, through June 30, 1997, less any amount already reimbursed, plus interest until the date of full payment.

23. IT IS FURTHER ORDERED, pursuant to Sections 0.321, 1.1410(c) and 1.1415 of the Commission's Rules, 47 C.F.R. §§0.321, 1.1410(c) and 1.1415, that the Application Fees, both for new attachments and for major expansion, ARE UNJUST AND UNREASONABLE as proposed.

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief, Cable Services Bureau