

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
ENFORCEMENT BUREAU**

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| In the Matter of |) | |
| |) | |
| Amendment of Procedural Rules Governing |) | |
| Formal Complaint Proceedings Delegated to the |) | EB Docket No. 17-245 |
| Enforcement Bureau |) | |
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**INITIAL COMMENTS REGARDING THE COMMISSION’S
NOTICE OF PROPOSED RULEMAKING REGARDING AMENDMENT OF
PROCEDURAL RULES GOVERNING FORMAL COMPLAINT PROCEEDINGS**

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Ameren Corporation, American Electric Power Service Corporation, Oncor Electric Delivery Company LLC, and Southern Company (the “Electric Utilities”) respectfully submit the following comments in connection with the Commission’s Notice of Proposed Rulemaking regarding amendment of the procedural rules governing formal complaint proceedings in the above-referenced docket.¹

INTRODUCTION

Each of the Electric Utilities is the owner of a large number of utility poles, and is subject to the Commission’s pole attachment jurisdiction and its complaint rules governing pole attachment complaint proceedings.

Ameren Corporation (“Ameren”) is an electric utility holding company. Through its operating company subsidiaries—Ameren Illinois Company d/b/a Ameren Illinois and Union Electric Company d/b/a Ameren Missouri—Ameren owns electric distribution infrastructure,

¹ *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Notice of Proposed Rulemaking, FCC 17-115 (rel. Sept. 18, 2017) (the “NPRM”).

including a substantial number of utility poles, in Illinois and Missouri. Ameren's operating companies provide electric power service to more than 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois.

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly-owned subsidiary of American Electric Power Company, Inc. ("AEP"). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP is one of the largest investor-owned electric utilities in the United States with more than 5 million customers linked to its electricity transmission and distribution grid covering 197,500 square miles. AEP, through its operating company subsidiaries, owns and operates critical electric distribution infrastructure in eleven states across the Midwest and Southeast: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.

Oncor Electric Delivery Company LLC ("Oncor") is an electric utility serving more than 400 cities and 91 counties in Texas—nearly one-third of the state's geographic area—and in the United States' highest-growth region in electric demand, according to the North American Electric Reliability Council (NERC). Oncor's current service area includes the Dallas-Fort Worth metro area, as well as Midland/Odessa, North Austin, Round Rock, Killeen, Waco, Wichita Falls and Tyler. Oncor operates the largest distribution and transmission system in Texas, providing power to approximately 10 million end use customers and more than 3.3 million electric delivery points over more than 121,000 miles of distribution and transmission lines.

Southern Company ("Southern") is one of the largest generators of electricity in the nation, serving both regulated and competitive markets across the southeastern United States. Southern, through four retail operating companies—Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company—supplies energy to approximately 4.2

million customers in a 120,000 square-mile service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida.

COMMENTS

The Electric Utilities commend the Commission for proposing rules in the NPRM to “streamline and consolidate the procedural rules governing formal complaints” filed under Section 208 of the Communications Act of 1934, pole attachment complaints filed under Section 224 of the Act, and disability access complaints filed under Sections 255, 716, and 718 of the Act. The Electric Utilities agree that certain rules applicable to pole attachment complaints have worked well—for example, the requirement of a pre-complaint, executive-level negotiations—and would likely work well in the context of other types of complaint proceedings. Likewise, certain procedures that currently apply in the context of Section 208 and disability access complaint proceedings—such as information designations and limited discovery—would be very useful in the pole attachment complaint process. The Electric Utilities believe that the effect of the rules proposed in the NPRM on the pole attachment complaint process would be to make it more efficient, more fair, more likely to produce a just result, and more likely to result in voluntary settlements without the need for a formal disposition by the Commission.

A. Filing Deadlines

The Electric Utilities support the Commission’s proposal that “the deadline for answering any formal complaint be 30 days from service of the complaint, except as otherwise ordered by the Commission staff,” and that “replies be due within 10 days of service of the answer.” (NPRM at ¶¶ 8-9). In the Electric Utilities’ experience, 30 days has been a fair length of time to answer a pole attachment complaint. In the past, the Commission has, however, granted extensions of that

deadline where warranted, and the Electric Utilities request that the Commission continue to do so where appropriate.

The Electric Utilities also believe that a 10-day deadline for replies is appropriate. (NPRM, ¶ 9). While the current pole attachment complaint rules allow 20 days for reply, the Electric Utilities believe 10 days is a sufficient time period within which to file a reply brief, given that a reply filing is meant to be limited in nature and address items raised in the answer that were not adequately addressed in the complaint.

B. Information Designations

The Electric Utilities also support the Commission's proposal to apply to pole attachment complaint proceedings the rules already applicable to Section 208 and disability access complaint proceedings requiring parties to include in the complaint, answer, and reply an "information designation" describing individuals with firsthand knowledge of facts alleged in the pleadings, and to identify or produce documents relevant to those facts. (NPRM, ¶ 10; proposed Rule 1.726(f); proposed Rule 1.722). The Electric Utilities also support the Commission's proposal to "streamline and more closely align the Commission's information designation requirements with Federal Rule of Civil Procedure 26." (NPRM, ¶ 10). Information designations will allow for subsequent discovery requests to be more specific and efficient, as the party propounding such discovery will have a clearer idea of what to request. Further, information designations will allow for a more in-depth development of the facts in dispute in pole attachment complaint proceedings, as well as greater symmetry in the knowledge each party has regarding those facts. This will likely lead to a narrowing of the issues in dispute, an increase in settlements, and an increase in the factual information available to Commission staff where formal disposition is required.

To make the information designations even more effective, the Electric Utilities propose that the Commission consider adopting rules that would allow for requests for mini-trials or further pleadings beyond the complaint, answer, and reply based on information obtained through such information designations. Otherwise, the parties may not be able to use the information gleaned from such designations to full effect. For example, if the complainant issues new information designations with its reply, the defendant would not have an opportunity to use that information in the proceeding unless further briefing or a mini-trial were permitted. Rules allowing for limited depositions of key witnesses might also be helpful. Otherwise, if individuals are named as having knowledge of the issues in dispute in an information designation, the only way for the adverse party to discover the information that witness has would be through its use of its limited number of interrogatories (proposed Rule 1.730) or live on the witness stand at a mini-trial.

C. Discovery

The Electric Utilities also support the Commission's proposed adoption of rules allowing for the propounding of interrogatories in pole attachment complaint proceedings. (NPRM, ¶ 12). Proposed Rule 1.730, which would be applicable to pole attachment complaint proceedings (as well as Section 208 and Disability Access complaints) provides:

(1) a complainant may file and serve up to 10 written interrogatories with its complaint; (2) a defendant may file and serve up to 10 written interrogatories with its answer; and (3) a complainant may file and serve up to five additional written interrogatories with its reply.

The Electric Utilities view the proposal as a welcome addition to the pole attachment complaint procedures. As the Commission notes, in the current pole attachment complaint rules, "The Commission may also request that one or more of the parties make additional filings or provide additional information" (47 C.F.R. § 1.1409(a)). However, there is no specific provision made, as of right or otherwise, for discovery requests of any kind. As the Electric Utilities stated

above with respect to information designations *supra*, the Electric Utilities believe that a greater exchange of information between the parties can only have a positive effect on their ability to resolve disputes on their own, and on the Commission's ability to resolve disputes where necessary.

In addition, the Electric Utilities propose that instead of tying the number of interrogatories to which a party is entitled to whether it is the complainant or defendant, the number of allotted interrogatories should be tied to which party bears the burden of proof. The Electric Utilities do not oppose a rule granting an uneven number of interrogatories to each party, as it is logical and fair for the party that bears the burden of proof to be allotted more interrogatories than the adverse party. However, it is possible in the future that under certain circumstances the defendant could bear the burden of proof, rather than the complainant. Tying the number of interrogatories allotted to the burden of proof would eliminate this potential issue.

In addition, as proposed with respect to information designations, *supra*, the Electric Utilities propose that the Commission adopt a rule allowing parties to request the opportunity for additional briefing or a mini-trial should the information gained in response to interrogatories so merit. Otherwise, the interrogatories served by a defendant with its answer or the interrogatories served by a complainant with its reply may in practical terms be of minimal value, as the parties will have no means of putting to use the information gained from such interrogatories.

D. Settlement Discussions and Mediation/Status Conferences

The Electric Utilities strongly support the Commission's adoption of proposed Rule 1.737 formalizing the Market Disputes Resolution Division's "current practice of providing staff-supervised mediation services to parties wishing to negotiate a resolution of their dispute." (NPRM, ¶ 16). It has been the Electric Utilities' experience that such mediation is usually

helpful—if not in actually settling the dispute, then in narrowing and clarifying the issues to be resolved.

The Electric Utilities believe that proposed Rule 1.737(b)—which would allow parties to request mediation from the time before the complaint is filed until the Commission issues an order resolving the complaint—may be particularly helpful. The flexibility provided by the proposed rule with respect to the timing of requesting mediation will ensure that the parties can request mediation at the time most appropriate given the facts of a particular case and how the complaint process unfolds, in order to provide the maximum opportunity for parties to resolve disputes without the need for a Commission ruling. In addition, the Electric Utilities believe that proposed Rule 1.737(e), stating that “[i]n any proceeding to which no statutory deadline applies, staff may, in its discretion, hold a case in abeyance pending mediation,” could prove to be particularly effective in reducing costs associated with complaint proceedings where there appears to be a high likelihood that the parties can settle their dispute without further briefing or proceedings.

For the same reasons, the Electric Utilities support the adoption of proposed Rule 1.733 giving Commission staff the option of directing a status conference for pole attachment complaints as “an effective venue in which to refine the matters in dispute, address discovery requests, and explore settlement options.” (NPRM, ¶ 17).

E. Accelerated Docket

The Electric Utilities support the Commission’s proposal to “extend the option of requesting inclusion on the Accelerated Docket to Section 224 complaints” (NPRM, ¶ 18). However, the Electric Utilities request that the Commission modify the proposed rule to add the requirement that a party requesting that a case be placed on the accelerated docket show that the ends of justice require placing that matter on the accelerated docket.

F. Shot Clock on Agency Action

In the NPRM, the Commission seeks comment “on whether the FCC should adopt shot clocks for all three types of formal complaint proceedings at issue in this proceeding.” (NPRM, ¶ 19). The Electric Utilities support the adoption of a shot clock for pole attachment complaints, as they believe a shot clock will both provide incentives for settlement and give the parties certainty regarding the timeline for resolution by the Commission, with the caveat that the Commission should be able to pause the shot clock for good cause.

In WC Docket No. 17-84, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, the Electric Utilities commented as follows regarding the adoption of a shot clock:

The Electric Utilities generally support proposed Rule 1.1425 establishing a 180-day shot clock for Commission resolution of pole access complaints. The Electric Utilities further support the proposition that “the Enforcement Bureau should be able to pause the proposed shot clock for a reasonable time in situations where actions outside the Enforcement Bureau’s control are responsible for delaying its review of a pole access complaint.” (NPRM, ¶ 49). Additionally, the Electric Utilities agree that such situations should include “when the parties need additional time to provide key information requested by the Bureau . . . as well as when the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a pole access complaint is filed.” *Id.* The Electric Utilities also view the additional reasons listed in the Commission’s March 30, 2017 version of the NPRM as valid and important reasons for pausing the shot clock:

- when the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; or
- when the complaint involves large pole access requests of a complex nature that necessitate the Enforcement Bureau requests for significant additional information from the parties in order to resolve the complaint.

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Initial Comments in Response to the Commission’s Notice of Proposed Rulemaking on Pole Attachments of Ameren Corporation, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation,

Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company, 58-59 (June 15, 2017). The situations where the Commission should be able to pause the shot clock should also include where a mini-trial has been granted. The Electric Utilities believe they could likely come to support a 180-day shot clock in all pole attachment disputes given the right parameters.

CONCLUSION

The Electric Utilities value the opportunity to comment on these critical issues, and commend the Commission for its efforts to streamline the procedural rules applicable to formal complaint proceedings. The Electric Utilities are confident that the rules proposed by the Commission will increase the number of voluntary settlements, provide the Commission with more information upon which to make decisions, and allow the Commission to make such decisions on a shorter timeline. The Electric Utilities look forward to engaging further with the Commission on these important issues.

Respectfully submitted this 26th day of October, 2017.

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