

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
)
Amendment of Procedural Rules Governing) EB Docket No. 17-245
Formal Complaint Proceedings Delegated to)
the Enforcement Bureau)

**REPLY COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON THE NOTICE OF PROPOSED RULEMAKING**



INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”)¹ hereby submits reply comments on the Notice of Proposed Rulemaking (“*NPRM*”) in the above-referenced proceeding, which seeks to streamline the rules governing formal complaint proceedings, including complaints related to pole attachments.² ACA joins other commenters in supporting streamlined formal complaint rules “to promptly and efficiently address alleged violations of the Act and the Commission’s rules.”³ In particular, the pole attachment complaint rules impose significant procedural hurdles

¹ ACA represents approximately 750 small and mid-sized cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers.

² *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Notice of Proposed Rulemaking, 32 FCC Rcd 7155 (2017) (“*NPRM*”).

³ *Id.* at 7155, para. 2. See e.g., Comments of NCTA – The Internet & Television Association, EB Docket No. 17-245, at 1 (Oct. 26, 2017) (“It is a laudable goal for the Commission to eliminate confusing and unnecessary discrepancies in its formal complaint procedures.”) (“NCTA Comments”); Comments of Verizon, EB Docket No. 17-245, at 1 (Oct. 26, 2017) (stating reforms

and costs on smaller providers challenging unjust and unreasonable rates, terms, and conditions. As ACA explained, the pole attachment complaint process is too costly, especially for smaller providers, and it fails to produce results in a commercially reasonable timeframe, impeding broadband deployment to close the “digital divide” in rural areas served by ACA members.⁴ The Commission therefore should streamline the pole attachment complaint process as described below.

1. The Commission Should Implement a 180-Day Shot Clock on All Pole Attachment Complaints

In response to the *Wireline Broadband NPRM*,⁵ ACA recommended that the Commission adopt a 180-day shot clock on the resolution of all pole attachment complaints.⁶ ACA argued that a shot clock provides attachers with greater certainty about when their complaints will be resolved and, just as importantly, when deployments will resume.⁷ ACA further recommended that the shot clock start when the complaint is filed and be paused only in

will improve enforcement) (“Verizon Comments”); Comments of CenturyLink, EB Docket No. 17-245, at 1 (Oct. 26, 2017) (supporting streamlining of complaint processes); Initial Comments Regarding the Commission’s Notice of Proposed Rulemaking Regarding Amendment of Procedural Rules Governing Formal Complaint Proceedings, EB Docket No. 17-245, at 3 (Oct. 26, 2017) (arguing reforms will make pole attachment disputes “more efficient, more fair, [and] more likely to produce a just result”) (“Electric Utilities Comments”); Comments of the Edison Electric Institute, EB Docket No. 17-245, at 2 (Oct. 26, 2017) (supporting Commission action to make pole attachment dispute resolution more efficient) (“EEI Comments”).

⁴ Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 27 (June 15, 2017) (“ACA Wireline Broadband NPRM Comments”); Reply Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 42 (July 17, 2017) (“ACA Wireline Broadband NPRM Reply Comments”).

⁵ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (“*Wireline Broadband NPRM*”).

⁶ ACA Wireline Broadband NPRM Comments at 51-53; ACA Wireline Broadband NPRM Reply Comments at 43-51.

⁷ ACA Wireline Broadband NPRM Comments at 53; ACA Wireline Broadband NPRM Reply Comments at 43.

limited circumstances to facilitate settlement or gather necessary information.⁸ ACA appreciates that the Commission will consider implementing a shot clock where a requesting attacher is denied pole access in the *Wireline Broadband Order/FNPRM*.⁹ However, as ACA explained in its comments on the *Wireline Broadband NPRM*, just having a shot clock for complaints where access is denied ignores the fact that most pole attachment problems involve a wide variety of other important attachment issues.¹⁰ These more common problems can be just as harmful as a denial of access and complaints filed to address them also warrant the imposition of the shot clock.

In the *Wireline Broadband Order/FNPRM*, the Commission seeks to resolve denial of pole access complaints “in a quicker fashion” because they are “more urgent than complaints alleging unreasonable rates, terms, and conditions” and thus the only “meaningful remedy” for a

⁸ ACA Wireline Broadband NPRM Comments at 52-53; ACA Wireline Broadband NPRM Reply Comments at 45-47.

⁹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC-CIRC1711-04, paras. 9-14 (Oct. 26, 2017) (“*Wireline Broadband Order/FNPRM*”). Only CenterPoint Energy opposed the shot clock, arguing it would unnecessarily limit case development. Comments of CenterPoint Energy Houston Electric, LLC, EB Docket No. 17-245, at 1-2 (Oct. 26, 2017) (“CenterPoint Comments”). The Commission already indicated that a 180-day shot clock provides sufficient time to fully evaluate complaints. *Wireline Broadband Order/FNPRM* at para. 10. Even if a complaint presents complex issues requiring further fact-gathering, the Commission’s proposal allows the shot clock to be paused to obtain such evidence. *Id.* at para. 12. See Verizon Comments at 2-3 (recognizing unforeseen circumstances may warrant a pause to the shot clock, although such action “should be the exception”); Electric Utilities Comments at 8 (stating Commission should pause the shot clock “for good cause”). In addition, while supporting the shot clock, EEI argued that it should not start until the parties submit all responsive pleadings. EEI Comments at 6. However, the Commission indicated that starting the shot clock upon the complaint filing will afford parties sufficient time to develop their cases and is consistent with federal law and the regulations adopted in many “reverse preemption” states. *Wireline Broadband Order/FNPRM* at para. 11. ACA agrees that parties will submit “legal analyses and material facts in plenty of time to issue an order within the shot clock’s deadline.” Verizon Comments at 3. By contrast, starting the shot clock based on something other than the complaint’s filing would open the process to gamesmanship by pole owners through motions designed to postpone responsive pleadings.

¹⁰ ACA Wireline Broadband NPRM Reply Comments at 50-51.

denial of access complaint is a grant of immediate access.¹¹ Yet, this conclusion ignores the reality that when requesting attachers are presented with unreasonable rates, terms, and conditions, they often delay their attachments – or may even give up entirely and choose to use other, less optimal means of deployment. In this instance, an inability to obtain reasonable rates, terms, and conditions is tantamount to denial, and there would be substantial benefit in having a complaint process that can result in a prompt decision. A prompt remedy also is important where a utility fails to comply with other attachment requirements – such as when a utility fails to deem an application to be complete or exceeds the prescribed survey, make-ready, or other timeframes. In each of these instances, delay can be tantamount to denial. In sum, while ACA agrees that it is critical to resolve promptly complaints alleging a denial of access, the need to resolve such complaints in a timely manner applies equally to disputes over unjust and unreasonable pole attachment rates, terms, and conditions and compliance with deadlines in the timeline or other Commission pole attachment requirements.¹²

ACA's view that the Commission should adopt a shot clock for all pole attachment complaints was shared by many commenters.¹³ Verizon, for instance, expressed concern that complaints can languish for years under Commission consideration without firm deadlines.¹⁴ It further noted that pole owners possess a “perverse incentive” to continue unjust and

¹¹ *Wireline Broadband Order/FNPRM* at para. 9.

¹² In addition, some complaints may involve both denials of pole access and challenges to unreasonable pole attachment rates, terms, and conditions. Attachers should not have to bifurcate their pole access complaints from other claims in order to take advantage of the shot clock. Such a process would be administratively inefficient and relegate non-pole access complaints to “second-tier” status.

¹³ See, e.g., NCTA Comments at 4 (stating shot clock should “uniformly” apply to all formal complaints); Verizon Comments at 2 (recommending shot clock apply to “all formal complaints not currently under a deadline”); Electric Utilities Comments at 9 (supporting a 180-day shot clock in all pole attachment disputes “given the right parameters”).

¹⁴ Verizon Comments at 2.

unreasonable practices when they know complaints will not be resolved in a timely manner.¹⁵ The Electric Utilities commenters also highlighted the benefits of a shot clock to “provide incentives for settlement and give the parties certainty regarding the timeline for resolution.”¹⁶ ACA further notes that the Broadband Development Advisory Committee (“BDAC”) agrees not only that pole access complaints should be subject to a 180-day shot clock, but that disputes related to pole attachment fees, rates, and other conditions “can languish for a protracted amount of time at the FCC, which impedes broadband deployment,” and should also be subject to a 180-day shot clock.¹⁷ For all these reasons, the Commission should impose a uniform 180-day shot clock on all pole attachment complaints.¹⁸

2. The Commission Should Allow Accelerated Docket Treatment of Pole Attachment Complaints and Automatic Rule Waivers for Smaller Providers

ACA supports the Commission's proposal to allow pole attachment complaints to be eligible for Accelerated Docket treatment, which when granted to a requesting party, would significantly shorten pleading cycles and waive unnecessary procedural rules.¹⁹ The Commission already requires attachers to provide detailed information in support of their

¹⁵ *Id.*

¹⁶ Electric Utilities Comments at 8.

¹⁷ See, e.g., BDAC, Competitive Access to Broadband Infrastructure Working Group Vote Recommendations, at 1-2 (Nov. 9, 2017).

¹⁸ ACA also supports the Commission's proposals to encourage settlement discussions and mediation. *NPRM*, 32 FCC Rcd at 7159, paras. 15-17. ACA agrees with Verizon that such alternatives are important “to avoid unnecessary filings and litigation and promote a more efficient dispute resolution process.” Verizon Comments at 7. See Comments of Consumer Groups and RERC, EB Docket No. 17-245, at 4 (Oct. 26, 2017) (“[M]ediation is usually the fastest and cheapest way for all parties to get relief.”) (“Consumer Groups/RERC Comments”); Electric Utilities Comments at 6-7 (supporting codification of existing mediation procedures). The Commission therefore should explicitly allow parties to request mediation at any time prior to a final decision and permit status conferences.

¹⁹ *NPRM*, 32 FCC Rcd at 7159, para. 18. The Commission does not specify which types of pole attachment complaints would be eligible for Accelerated Docket treatment. Consistent with its shot clock recommendation, ACA recommends that the Commission allow all pole attachment complaints to be eligible for Accelerated Docket treatment, not just complaints related to denials of pole access.

complaints and conduct “executive-level” settlement discussions with opposing parties prior to filing.²⁰ Thus, these complaints are good candidates for Accelerated Docket treatment as there already is no need for extensive pleading cycles or discovery to identify the issues in dispute and many complaints would benefit from its “greater flexibility” and “tailored” procedures.²¹

Commenters supported making pole attachment complaints eligible for Accelerated Docket treatment,²² but the Electric Utilities commenters argued that such streamlined treatment should only apply when a party can show that “the ends of justice” require it.²³ EEI and CenterPoint Energy also questioned whether Accelerated Docket treatment would prevent defendant pole owners from fully developing their cases.²⁴ These concerns are overblown. Whenever a party seeks to put a complaint on the Accelerated Docket, the Enforcement Bureau considers multiple factors before doing so, including whether the complaint claims a violation of federal law, involves complex issues, or would advance competition.²⁵ The Enforcement Bureau also may remove a complaint from the Accelerated Docket at any time if such streamlined treatment has become unfair to one party or is no longer appropriate.²⁶ The Commission’s existing rules therefore ensure that appropriate complaints receive Accelerated

²⁰ ACA Wireline Broadband NPRM Reply Comments at 45 (citing 47 C.F.R. § 1.1404).

²¹ *NPRM*, 32 FCC Rcd at 7159-60, para. 18.

²² See, e.g., Electric Utilities Comments at 8 (“The Electric Utilities support the Commission’s proposal to extend the option of requesting inclusion on the Accelerated Docket to Section 224 complaints.”) (internal quotations omitted); Verizon Comments at 4 (stating Accelerated Docket treatment makes sense from an administrative standpoint); EEI Comments at 7 (arguing that “an accelerated docket may be beneficial in certain pole attachment complaint cases”).

²³ Electric Utilities Comments at 7.

²⁴ EEI Comments at 7; CenterPoint Energy Comments at 2.

²⁵ 47 C.F.R. § 1.730.

²⁶ *Id.*

Docket treatment, consistent with the “ends of justice” and defendant pole owners’ ability to develop their cases.²⁷

In addition to making all pole attachment complaints eligible for Accelerated Docket treatment, the Commission should automatically waive compliant filing fees and other burdensome aspects of the complaint process for smaller providers.²⁸ The Commission requires pole attachment complainants to pay filing fees and satisfy complex pleading requirements.²⁹ Consequently, an attacher incurs substantial costs when filing a complaint, from the use of in-house personnel to retaining outside legal counsel. These costs disproportionately impact smaller providers. While a smaller provider may seek waiver of a rule, a waiver request comes with its own pleading requirements and preparation costs. The automatic waiver process will ensure that provider resources go to broadband deployment and not to complaint costs.³⁰

3. The Commission Should Expand Discovery in Pole Attachment Complaints Without Increasing Dispute Costs

ACA supports the Commission’s proposals to enhance discovery in pole attachment complaints through information designations and interrogatories, provided such tools are not used to delay complaint resolution or drive up costs for smaller providers.³¹ Information

²⁷ Verizon suggested that the Accelerated docket may no longer be necessary if the Commission adopts a shot clock on pole attachment complaints. Verizon Comments at 5-6. ACA disagrees. The shot clock serves as a backstop preventing indeterminate complaint proceedings, but there is no reason why pole attachment disputes cannot be resolved in a shorter timeframe under the Accelerated Docket where the parties desire a quick solution and the record is not complex.

²⁸ See *NPRM*, 32 FCC Rcd at 7157, para. 7 (seeking comment on “any additional changes in pursuit of our goal of simplifying and clarifying the procedures applicable to formal-complaint proceedings, and whether any additional procedural rules should be included in this proceeding”).

²⁹ See 47 C.F.R. §§ 1.1404 (discussing complaint requirements), 1.1408 (discussing filing fees).

³⁰ If the Commission decides not to automatically waive filing fees and other burdensome formal complaint rules for smaller providers, it should establish a streamlined waiver process to ensure smaller providers can quickly receive regulatory relief.

³¹ *NPRM*, 32 FCC Rcd at 7158, paras. 10-11.

designations allow parties to focus their discovery requests, improving the efficiency of the complaint process. Information designations also “allow for a more in-depth development of the facts in dispute . . . as well as greater symmetry in the knowledge each party has regarding those facts.”³² This speeds complaint resolution and facilitates settlement discussions. Interrogatories similarly offer “a useful tool to quickly get to the heart of the matter in a complaint” by allowing parties to ask targeted questions and receive key information in return.³³

But while ACA agrees with other commenters that a “greater exchange of information between the parties can only have a positive effect on their ability to resolve disputes,” preparing and responding to information designations and interrogatories can add unnecessary costs to the pole attachment complaint process.³⁴ For example, Verizon noted that designating persons having knowledge relevant to a dispute adds little to complaint proceedings because there is no opportunity to depose or otherwise question such potential witnesses.³⁵ ACA therefore recommends that, to the extent the Commission adopts an information designation requirement, it limit the rule to only require identification of relevant documents, which could be obtained in discovery.³⁶ ACA is also concerned that interrogatories will be used by pole owners to unnecessarily delay complaint proceedings or impose significant discovery costs on smaller providers to bleed them into submission. Consequently, if the Commission allows interrogatories in pole attachment disputes, it should retain the prohibition on using them for “the purpose of delay, harassment or obtaining information that is beyond the scope of permissible

³² Electric Utilities Comments at 4.

³³ Consumer Groups/RERC Comments at 3. See NCTA Comments at 4 (supporting use of interrogatories in pole attachment complaints); Verizon Comments at 6 (same); Electric Utilities Comments at 5-6 (same).

³⁴ Electric Utilities Comments at 5-6.

³⁵ Verizon Comments at 5. ACA does not support allowing parties to take depositions in pole attachment complaints.

³⁶ *Id.*

inquiry.”³⁷ This will ensure that discovery does not become another opportunity for pole owners to exercise their outsized leverage over smaller providers to impose unjust or unreasonable rates, terms, or conditions.³⁸

³⁷ 47 C.F.R. § 1.729. Consumer Groups/RERC Comments at 3.

³⁸ ACA agrees with NCTA that the Commission should retain the current obligation on pole owners to provide data relevant to a dispute to the complainant upon request. NCTA Comments at 2 (citing 47 C.F.R. § 1.1404). As NCTA correctly noted, such information is integral to the resolution of pole attachment complaints and is largely within the knowledge and control of the pole owner. *Id.* The Commission therefore should continue to require pole owners to provide disaggregated pole cost and attachment rate data relevant to a complaint.

CONCLUSION

ACA supports the Commission's efforts to streamline the pole attachment complaint process. In doing so, it should ease the burdens on smaller providers by imposing a 180-day shot clock on all pole attachment complaints, make pole attachment complaints eligible for Accelerated Docket treatment, establish an automatic waiver process, and ensure new discovery tools do not result in unnecessary litigation costs.

Respectfully submitted,

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