

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

LOUISIANA PUBLIC SERVICE COMMISSION,

EX PARTE.

In Re: Docket No. R- 28269. Modification to the May 17, 2004 General Order, regarding the 300-foot rule, in order to add a prescription limitation for 300-foot rule complaints.

(Decided at the September 14, 2005 Business & Executive Session)

A. Overview

At the February 19, 2003 Business and Executive Session, the Commission directed Staff to open a rule-making to determine: (1) whether an economic feasibility standard should be placed into the July 11, 2000 General Order and (2) whether 300-foot measurements should take place only from point of connections. Thereafter, this matter was published in the March 14, 2003 Commission Official Bulletin, with 25 days for intervention and comments.

The 25 day intervention period elapsed with the following parties filing interventions: SLEMCO, SWEPCO, Pointe Coupee Electric Membership Corporation, CLECO, Washington-St. Tammany Electric Cooperative, Inc., Entergy Louisiana, Inc. and Entergy Gulf States, Inc. and the Association of Louisiana Electric Cooperatives. Thereafter, notice was given to the intervenors in order to allow for reply comments. CLECO filed reply comments on May 6, 2003.

B. Economic Feasibility:

Generally all of the intervenors stated that they were not in favor of an economic feasibility standard being included into the 300-foot Rule General Order. The intervenors believed that the implementation of such a standard would result in increased confusion, delay in resolving disputes and litigation. After considering these comments, the Commission Staff agreed with the intervenors recommendations and decided not to include an economic feasibility standard in this Order.

C. Measurements from Point of Connections or Electric Lines:

300-foot measurements from Point of Connections or Electric lines were considered by the Commission as set out below.

D. Intent of Commission:

It is the determination of this Commission that, in order to effect economies in the service of electricity, and thereby maintain reasonable rates, uneconomic and wasteful practices should be prohibited. As a result, the needless paralleling and duplication of existing transmission or distribution lines or the extensions thereof, by electric public utilities in order to serve customers readily accessible to like facilities of an electric public utility already providing service in the immediate area, should be discouraged.

E. Commission Staff's Determination(s) and Conclusion(s):

Article IV, Section 21 (B) of the Louisiana State Constitution provides the following:

“The [public service] commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.”

The Louisiana Supreme Court has repeatedly held that the above-referenced provision gives

the Commission exclusive, plenary power to regulate all common carriers and public utilities. Furthermore, acts or omissions of the Legislature cannot subtract from the Commission's power. Albach and Richard J. Dodson v. Kennedy, 801 So.2d 476, at 483, 2000-0636 (La.App. 1 Cir. 8/6/01); Global Tel Link, Inc. v. Louisiana Public Service Commission, 97-0645, pp. 6-7 (La. 1/21/98), 707 So. 2d 28, 33; Bowie, Jr. v. Louisiana Public Service Commission, 627 So. 2d 164 (La. 1993).

Based on the above, the Commission hereby reasserts its plenary authority and will allow 300-foot measurements to be made from electric lines, as set out below, whether they are owned by utilities or customers.

F. Jurisdiction

The Commission exercises jurisdiction in this proceeding pursuant to Article 4, Section 21 of the Louisiana Constitution, and La. R.S. 45:1163(A)(1).

Louisiana Constitution, Article 4, Section 21 provides in pertinent part:

The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall *adopt and enforce* reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law. [Emphasis added.]

La. R.S. 45:1163 provides in pertinent part:

A. (1) The Commission shall exercise all necessary power and authority over any street, railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

G. Prescriptive Period for 300' Cause of Actions:

On September 24, 2004, Docket No. R-28269 was published for interventions and comments. The purpose of the rule making was to establish a prescriptive period within which 300-foot rule complaints, or 300-foot cause of actions, could be filed by an electric public utility. Interventions were filed by the Association of Louisiana Electric Cooperatives, Entergy Gulf States, Inc. and Entergy Louisiana, Inc., Louisiana Generating, LLC and CLECO Power, LLC.

All of the intervenors agreed that a prescription period was appropriate. However, the parties urged that the prescription period be lengthy enough to allow time for the parties to determine if a violation has occurred, gather of evidence and attempt to resolve the dispute amicably. In addition, all parties agreed that the Commission should specify when the prescription period begins.

LSA C.C. Art. 3499 states, "unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years." Cause of actions relating to 300-foot disputes are not specifically addressed by a statute. Therefore, normally the prescriptive period would be 10-years for 300-foot actions. Some intervenors urged that a 300-foot rule cause of action was a real action and subject to a prescriptive period of 30 years.

However, the Commission believes that a 10-year prescriptive period, and even more so a 30-year prescriptive period, would be unbeneficial for customers. If a utility could bring a 300-foot rule complaint under a 10-year prescription period then a customer would be unable to rely upon one particular electric service provider even after several years of continued service.

Also, the Commission believes that a 10-year prescriptive period could lead to actions being filed based on circumstances that were in existence many years prior. This may require extensive

discovery relating to evidence or documents which may no longer exist. Therefore, a shorter period for prescription is appropriate.

In general, prescription runs from the time that the plaintiff has actual or constructive knowledge of the act, which has been defined as "the time at which the plaintiff has information sufficient to excite attention and prompt further inquiry." National Council on Compensation Ins. v. Quixx Temporary Serv., Inc. 95-725, p. 7 (La. App. 4 Cir 11/16/95), 665 So.2d 120, 124. Prescription does not begin to run at the first indication that the plaintiff may have suffered harm, but rather it begins to run "when plaintiff has reasonable basis to pursue claim against a specific defendant." Jordan v. Employee Transfer Corp., 509 So.2d 420, 424 (La. 1987). The heart of the inquiry into constructive knowledge is the reasonableness of plaintiff's inaction. *Id.*

On the other hand, some intervenors have stated that having a less definitive triggering event would result in unnecessary litigation because the parties would be forced to argue when a utility had constructive or actual knowledge of an alleged violation. These intervenors have urged that the event which triggers prescription should be the date when a customer begins taking permanent service from a utility. For preemptive electric line complaints, i.e. complaints that allege that a utility constructed an electric line in order to pre-empt another utility's right to serve, the parties ultimately agreed that no prescriptive period should be implemented.

H. Commission Action:

This matter was considered by the Commission at its September 14, 2005 Business and Executive Session. On motion of Commissioner Field, seconded by Commissioner Sittig, and unanimously adopted, the Commission adopted the proposed general order and implemented the prescriptive period as set out below.

IT IS THEREFORE ORDERED:

1. Notwithstanding the provisions of La. R.S. 45:123, this Order shall apply to all electric public utilities, including cooperatives, as defined herein, that are subject to the jurisdiction of the Louisiana Public Service Commission.
2. For the purposes of this Order, the following Definitions are hereby adopted:
 - a. **Commission:** The Louisiana Public Service Commission (LPSC).
 - b. **Competing Utility:** electric public utility competing to provide service to a customer or customers.
 - c. **Electric Line:** a line owned by an electric public utility constructed and operated for the transmission and/or distribution of electricity or a non residential customer-owned exterior electric line of 440 volts or greater, whether above or below ground, that was not originally constructed, as determined by the Commission, for the principal purpose of preempting territory.
 - d. **Electric Public Utility:** any electric utility furnishing service within the State of Louisiana and subject to the jurisdiction of the Commission.
 - e. **Facility(ies):** All poles, wiring, devices, metering equipment, or apparatus of any kind utilized in the provision of electric service.
 - f. **Interim Service:** service to a customer during the period of time prior to the resolution, by way of final Commission order, of a dispute filed with this Commission. Said period shall not include the time during which an appeal of the order may be taken pursuant to 45:1193.
 - g. **Interim Service Provider ("ISP"):** the provider of Interim Service as defined above.

- h. **Point of Connection:** meter location or point where electric public utility facilities meet the facilities owned by the customer.
 - i. **Pre-emptive Line Complaint:** a complaint in which it is alleged that an Electric Public Utility has constructed an Electric Line for the principal purpose of pre-empting territory.
 - j. **Residential Customer:** a customer, of a single or multi family dwelling, taking electric service.
 - k. **Service Location (Premise):** that portion of the property upon which an electric public utility has extended service, which is located within a 300' radius measured from the point of connection. In addition, that portion of the property located within 300' of an electric line, as defined above, used for the supply of electricity located on said property shall be included in the definition of Aservice location@ or Apremise.@"
3. The following provisions are hereby made effective:
- A. (1) No electric public utility shall construct or extend its facilities or furnish or offer to furnish electric service to any point of connection, which, at the time of the proposed facilities, extension of facilities or furnishing or offer of furnishing service, is being served by another electric public utility, or which is not being served but is located within three hundred feet of a point of connection or an existing electric line of a competing electric public utility, except with the consent in writing of such other competing utility. However, nothing contained herein shall preclude:
 - (a) Any electric public utility from extending service to an applicant for service at an unserved point of connection located within three hundred feet of an existing electric line unless:
 - (i) Such line was not in operation on April 1, 1970 and
 - (ii) The point of connection is located within three hundred feet of an existing electric line of a competing utility, which line was in operation on said date; or,
 - (b) Any electric public utility from extending service to its own property or to another electric public utility for resale.
 - (2) Notwithstanding any other provision in this Order, any municipally-owned or operated utility may furnish or offer to furnish electric service to any point of connection for a retail consumer who is not being served by another utility without the necessity of obtaining the written consent of any other utility if such point of connection is within one mile of such municipality's corporate limits, as such corporate limits of a municipality with more than fifty megawatts of peak load exist on the effective date of this Section and on every third anniversary date of the effective date of this Section, and as such corporate limits of all other municipalities which have fifty megawatts or less of peak load now or in the future exist from time to time.
 - (3) Further, any consumer receiving electric service from an electric public utility which is subject to the jurisdiction of this Commission who feels aggrieved with the reliability of electric service being received by him/her may apply to this Commission for an order directed to his/her present supplier to show cause why the consumer should not be released from said supplier. If the Commission staff finds that the service rendered to such consumer is inadequate, and the service has not been rendered adequate within 90 days of staff's direction (or such other time period as the Commission may deem appropriate), the Secretary shall issue

said Order to show cause and, upon the electric public utility's failure to prove that service has been rendered adequate within the time period specified, said release shall be granted. If the Staff determination is not satisfactory to the consumer or the electric public utility, then the consumer or the electric public utility may initiate a show cause proceeding before the Commission.

B. By issuing this Order, the Commission does not intend to either prohibit or mandate the performance by any parish, municipality, political subdivision, or combination thereof, of any agreement for the sale of electric power executed prior to January 1, 1984, or any renewal of such agreement. Nothing in this Order shall prohibit or mandate in the performance of such agreement the furnishing of service to persons and business organizations being served by another electric public utility.

C. Rights to Service Location:

- (1) Unless otherwise stated herein, a point of connection shall be deemed as being "served" by an electric public utility even if the structure served is removed and a new structure built within the service location.
- (2) A point of connection removed at the request of the owner from an abandoned service location shall be served by the original electric public utility if a new structure is built at this service location.
- (3) A competing utility shall not serve the point of connection presently or previously served by another electric public utility by placing a meter or by placing a Point of Connection outside 300 feet of the service location.
- (4) A point of connection and an electric line removed at the serving electric public utility's own motion, unless for reasons of safety or liability, shall constitute abandonment and any new or existing structure shall be served at the customer's choice.

D. Permitted Interim Service:

- (1) In order to avoid inconvenience and/or economic loss to a customer pending the resolution of any dispute filed with the Commission pursuant to this Order, the Commission staff shall designate an ISP to serve the location in question, based on its determination as to which competing utility is able to provide adequate service to the location at the least cost to that utility. The designated ISP shall serve the location until an order, which is made final in accordance with Rule 43 of the Commission's Rules of Practice and Procedures is issued by the Commission or through mutual agreement by the two competing electric utilities.
- (2) The ISP shall have the duty to inform the customer, in writing, of its current rates as compared to the rates of the competing utility, of the fact that this is merely an interim service pending the outcome of the case, and that the customer may be forced to change electric service providers in the event the competing utility is successful.
- (3) The fact that one electric public utility has been designated as the ISP pending the outcome of the dispute shall in no way benefit, either economically or legally, said electric public utility to the detriment of the other competing utility or the consumer. Therefore, the ISP, if unsuccessful, shall dismantle its facilities from the point of connection with the customer, back to the legal facilities in existence

prior to the construction of facilities in order to serve the customer which is the subject of the dispute. It is the Commission's intent that the customer shall pay only those costs of interconnection which the customer otherwise would have incurred if there were no selection of an ISP. An ISP which is not finally selected as the customer's service provider shall not recover costs of interconnection or dismantling from the customer or ratepayers.

- (4) The ISP shall be entitled to retain any margins earned during the ISP period, irrespective of whether the ISP becomes the customer's ultimate service supplier.
 - (5) The fact that one electric public utility was the ISP shall have no probative value whatsoever in any adjudicatory proceeding before the Commission. It shall not be considered as a factor in the determination of the right to serve or point of connection.
- E. The provisions of this Order shall not apply to an area within the corporate limits of any municipality, town or political subdivision when only one competing utility has been granted a franchise right agreement to serve the municipality, town or political subdivision.
- F. Nothing herein shall alter the rights or authority of municipalities with respect to franchises within the corporate limits of a municipality as such limits exist from time to time.
- G. The July 11, 2000, May 17, 2004 (R-27188), May 26, 2004 (R-27188) Corrected, and May 10, 2005 (Second Corrected) General Orders are all hereby rescinded and superceded by this Order.
- H. This Order is to be interpreted and enforced by the Commission in accordance with past Commission decisions and Louisiana jurisprudence.
- I. Where necessary, the Commission shall determine whether the choice of the meter location was intended to circumvent this General Order prohibiting the needless duplication or extension of facilities.
- J. Any electric public utility found to be in willful or intentional violation of this Order shall be fined no less than \$10,000.00 per day for any electric public utility who is found to have willfully violated the provisions of the Order.
- K. Cause of Actions falling under the provisions of this Order are subject to a liberative prescription period of two years:
- (1) The prescription period for all cause of actions or complaints, except as provided in subsections (2) and (3) below, shall commence from the date of institution of permanent electric service.
 - (2) There shall be no prescription period for pre-emptive line complaints.
 - (3) There shall be no prescription period for cause of actions that arise or result from the provision of temporary electric service.
 - (4) This section shall not affect customers who file actions pursuant to Paragraph 3, Section (A)(3) above. This section shall not preclude the Commission from bringing causes of actions on behalf of customers pursuant to Paragraph 3, Section (A)(3).

BY ORDER OF THE COMMISSION

BATON ROUGE, LOUISIANA
October 6, 2005

/S/ C. DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
COMMISSIONER JACK "JAY" A. BLOSSMAN

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