

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

Via Email

Southwestern Bell Telephone Company)	Proceeding Number 22-357
d/b/a AT&T Texas,)	Bureau ID Number EB-22-MD-004
)	
Complainant,)	
)	
v.)	
)	
AEP Texas, Inc.)	
)	
Defendant.)	

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By the Chief, Market Disputes Resolution Division, Enforcement Bureau:

Released March 16, 2023

I. Introduction

This Order resolves AEP Texas Inc.'s (AEP) Motion to Allow Additional Discovery filed on February 10, 2023¹ and the briefing schedule addressed in the parties' Joint Statement filed on January 31, 2023.²

II. Motion to Allow Additional Discovery

AEP's Motion for Discovery seeks deposition testimony and the production of documents "confined to the following subject matters: (1) the factual disputes evidenced in Mr. Peters' reply affidavit; (2) the factual disputes evidenced in Mr. Rhinehart's reply affidavit; and (3) the information sought in AEP's first set of interrogatories."³ AT&T opposes AEP's Motion for Discovery. Specifically AT&T argues that the discovery AEP seeks is not necessary to resolve this case because it either concerns interrogatory topics the Enforcement Bureau found irrelevant, confidential settlement negotiations, or material our February 15 *Letter Ruling* required the parties to file.⁴

We deny AEP's Motion for Discovery. AEP largely alleges that its Motion is necessary because AT&T provided no response, or deficient or evasive responses, to AEP's Interrogatories.⁵ Prior to filing its Motion for Discovery, however, AEP moved to compel AT&T to supplement its responses to AEP's interrogatories.⁶ The Division's *Letter Ruling* specifically addressed the Motion to Compel and denied AEP's request to require AT&T to supplement its responses to all but one interrogatory.⁷ Because we

¹ Motion to Allow Additional Discovery, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Feb. 10, 2023) (Motion for Discovery or Motion). *See also* 47 CFR § 1.730(f). Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T) filed an Opposition to AEP's Motion for Discovery on February 17, 2023. AT&T's Opposition to AEP's Motion to Allow Additional Discovery, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Feb. 17, 2023) (Opposition).

² Joint Statement, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 31, 2023).

³ Motion for Discovery at 6-7, para. 7.

⁴ Opposition at 1 (citations omitted); *see* Letter from Rosemary McEnery, Chief, Market Disputes Resolution Division, to Christopher S. Huther, Counsel for Complainant, and Eric B. Langley, Counsel for Defendant, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (Feb. 15, 2023) (*Letter Ruling*). AT&T also asserts that AEP bases its request for depositions on "mischaracterizations of AT&T witnesses' testimony, such that any deposition would not only delay the resolution of this case and increase its cost, but would also necessarily seek information from AT&T's witnesses that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding." Opposition at 1-2.

⁵ Motion for Discovery at 4-6, paras. 5-6. *See also* AEP's First Set of Interrogatories to AT&T, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Dec. 2, 2022); AT&T's Responses to AEP Texas Inc.'s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 20, 2023).

⁶ Motion to Compel Supplemental Responses to AEP Texas Inc.'s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 30, 2023) (Motion to Compel). AT&T opposed AEP's Motion to Compel. AT&T's Opposition to AEP's Motion to Compel, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Feb. 6, 2023).

⁷ *Letter Ruling* at 3-4 (denying request except with regard to Interrogatory No. 3). AT&T subsequently filed a supplemental response to Interrogatory No. 3. AT&T's Supplemental Response to Interrogatory No. 3 in AEP Texas Inc.'s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Mar. 7, 2023).

found that AEP is not entitled to the additional discovery it sought in its Motion to Compel,⁸ we do not find that AEP should “be permitted to use other forms of discovery” for the same purpose.⁹

AEP’s final argument, that “there are numerous factual disputes that are essential to resolution of this dispute,” also fails to provide a basis to grant AEP’s request. AEP’s request to depose both Mr. Rhinehart and Mr. Peters focuses on statements each made with regard to pole attachment rate formula inputs—the average number of attaching entities, and space AT&T occupies, on AEP’s poles.¹⁰ Yet, in the *Letter Ruling*, we directed the parties to exchange and file additional information on these very inputs,¹¹ including a stipulation, if possible, as to the “average number of attaching entities on AEP’s poles for each year from 2018 to 2021” and “the amount of space AT&T occupies on AEP’s poles for the same time period.”¹² We further directed, that if the parties could not reach a stipulation, they were to file a supplement to the Joint Statement stating “in detail” how each calculated the average number of attaching entities on AEP’s poles and how each party determined the amount of space AT&T occupies on AEP’s poles.¹³ The parties have provided the additional information that explains their respective positions and underlying analyses,¹⁴ and we do not find it necessary for AEP to be permitted to depose Mr. Rhinehart and Mr. Peters to obtain this information.

III. Supplemental Briefing

In the Joint Statement, AEP proposed supplemental briefing, while AT&T stated that, if the Commission finds supplemental briefing appropriate, it should be limited.¹⁵ Pursuant to our discretion,¹⁶ we will permit the parties to file simultaneous initial briefs and reply briefs, limited to addressing factual material filed in this proceeding after January 13, 2023, the date AT&T filed its Reply.¹⁷ Initial briefs are

⁸ *Letter Ruling* at 3-4.

⁹ Motion for Discovery at 5, para. 5; *see also id.* at 6, para. 6. Note that we denied AEP’s request that AT&T supplement its responses to both Interrogatory questions raised by AEP in para. 6 of the Motion for Discovery. *Letter Ruling* at 4.

¹⁰ Motion for Discovery at 2-4, paras. 3-4 (arguing that Mr. Rhinehart offered statements regarding the appropriate average number of attaching entities on AEP’s poles as well as the appropriate average number of attaching entities on AT&T’s poles, and arguing that Mr. Peters offered statements taking exception to the presumption that 18 feet is the average minimum height necessary for minimum ground clearance, a key variable to determine the amount of AT&T’s space occupancy, as well as the amount of space AEP occupies on poles).

¹¹ *Letter Ruling* at 5 (“[requiring the parties] to confer with one another and ensure that they have exchanged with each other, and filed in the record of this case, all data on which either party relied in calculating the average number of attaching entities on AEP’s poles, as well as data on which either party relied in determining the amount of space AT&T occupies on AEP’s poles. The parties are also encouraged to exchange information with one another about how each party performed its calculations.”).

¹² *Letter Ruling* at 5.

¹³ *Letter Ruling* at 5.

¹⁴ Supplement to Joint Statement, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Mar. 10, 2023). To the extent AEP seeks to depose Mr. Rhinehart and Mr. Peters about statements they made about the average number of attaching entities on AT&T’s poles or the amount of space AEP occupies on AT&T’s poles, we deny the request. We previously found that AEP had not demonstrated that information regarding how AT&T would calculate the rates it should charge AEP for attachments to AT&T poles was “necessary to the resolution of this dispute at this time.” *Letter Ruling* at 3.

¹⁵ Joint Statement at 13-14.

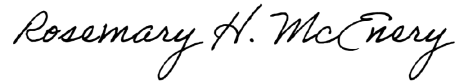
¹⁶ 47 CFR § 1.732(a). We note that, because we limit the scope of the briefs, we waive section 1.732(b). 47 CFR § 1.732(b) (stating that “[c]laims and defenses previously made but not reflected in the briefs will be deemed abandoned”).

¹⁷ AT&T’s Reply to AEP Texas Inc.’s Answer, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 13, 2023); *see also* Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 13, 2023).

due no later than **March 31, 2023 and may not exceed 15 pages**, and reply briefs are due no later than **April 7, 2023, and may not exceed 10 pages**.

We issue this ruling under sections 4(i), 4(j), and 224, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 224, sections 1.3, 1.720-1.740, and 1.1401-1.1415 of the Commission's rules, 47 CFR §§ 1.3, 1.720-1.740, and 1.1401-1.1415 and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 CFR §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION



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