Memorandum

To: NRECA Voting Members

From: Tyrus H. Thompson

Vice President and Deputy General Counsel

Director and Member Legal Services, Office of General Counsel

National Rural Electric Cooperative Association

Subject: Letter Alleging Website Violates Americans with Disabilities Act

Date: January 20, 2016

Introduction

Recently, many National Rural Electric Cooperative Association voting members received an unusual letter from two law firms. The law firms allege that an electric cooperative’s website violates the Americans with Disabilities Act of 1990 (“ADA”) and similar acts. The law firms threaten litigation and offer a monetary settlement. To assist its members and their attorneys, NRECA retained outside legal counsel experienced in this area of law and prepared this memorandum.[[1]](#footnote-1) The below discussion addresses this complex and evolving area of law.

Because this area of law is unsettled, it is difficult to predict with certainty whether a court or agency would determine that an electric cooperative’s website violates the ADA or a similar act. Because there are risks, a cooperative should consult with its attorney when analyzing and addressing the letter. NRECA hopes the general, but technical, discussion below will help. Depending upon its insurance policy, a cooperative may need to notify its insurance carrier.

Summary of Legal Issues

As discussed below, it is unclear whether an electric cooperative, and specifically the cooperative’s website, are subject to the relevant ADA requirements. If they are subject to the requirements, and if the cooperative has not met the requirements, then the cooperative is not subject to monetary damages, unless sued by the United States Department of Justice (“DoJ”). Further, it is unclear whether the law firms represent cooperative members with disabilities. If they do not, then they have no right to sue a cooperative.

Discussion of Legal Issues

In the letters, the law firms suggest that a website may be inaccessible to individuals with sight disabilities because it is incompatible with screen reader software, does not permit resizing text, or includes insufficient light contrast between foreground and background images. Likewise, the website may be inaccessible to individuals with hearing disabilities because it does not provide closed captioning. Allegedly, this website inaccessibility limits a disabled individual’s ability to, among other things, read and consent to the website’s privacy and other legal terms and conditions. Instead of suing, the law firms offer to resolve claims by entering a settlement agreement.

ADA. The letters cite and rely extensively on Title III of the ADA. In general, Title III states that a person owning, leasing, or operating a “place of public accommodation” may not discriminate against an individual with a disability regarding the “full and equal enjoyment” of goods and services.[[2]](#footnote-2)

Discrimination includes not providing an “auxiliary aid or service” that could assist the individual, unless providing the aid or service would: (1) fundamentally alter the good or service provided or (2) result in an undue burden, or significant difficulty or expense.[[3]](#footnote-3) An auxiliary aid or service includes “accessible electronic and information technology,”[[4]](#footnote-4) which may include a website.

A public accommodation must provide an auxiliary aid or service that ensures “effective communication” with disabled individuals.[[5]](#footnote-5) An effective communication is provided in an accessible format, a timely manner, and a way that protects an individual’s privacy and independence.[[6]](#footnote-6)

Current regulations do not reference “websites” or include technical standards defining an accessible website. In the July 26, 2010 *Federal Register*, however, DoJ published an advance notice of proposed rulemaking.[[7]](#footnote-7) DoJ indicated it was considering promulgating regulations making goods and services offered by public accommodations through the Internet, and specifically through a website, accessible to individuals with disabilities. DoJ hopes to propose the regulations in 2018.

Public Accommodation. Under the ADA, a “public accommodation” is a private entity listed in one of twelve categories. Neither a utility, electric cooperative, nor similar term is listed in a category. One category, however, includes “other sales or rental establishment.” Another category includes “other service establishment.”[[8]](#footnote-8) It is unclear whether an electric cooperative is a public accommodation under ADA Title III.

In nonbinding 1994[[9]](#footnote-9) and 1996[[10]](#footnote-10) letters, DoJ indicated that a utility is not “generally” a public accommodation under ADA Title III. If, however, the utility maintains a customer service office or retail establishment, then these locations would be places of public accommodation under ADA Title III.

Place of Public Accommodation. It is also unclear whether an electric cooperative’s website is a “place” of public accommodation under ADA Title III. Some federal courts have held that a place of public accommodation must be, or have a connection or link with, a physical place.[[11]](#footnote-11) Other federal courts have held that a place of public accommodation does not need to be, or be connected or linked with, a physical place.[[12]](#footnote-12) DoJ opines that a website may be a place of public accommodation.[[13]](#footnote-13) To prove that an electric cooperative’s website violates ADA Title III, the law firms must prove that the website is a place of public accommodation.

Monetary Damages. If an electric cooperative’s website is a place of public accommodation, then a potential, current, or former member with a disability may sue the cooperative. If the individual proves that the cooperative’s website violates ADA Title III, then a court may order the cooperative to correct the violation. It may also award attorney fees and costs. The court, however, may not award monetary damages.[[14]](#footnote-14)

DoJ must investigate alleged violations of ADA Title III. If DoJ reasonably believes that an electric cooperative is engaged in a pattern or practice of discrimination, or that a cooperative has discriminated and the discrimination raises an issue of general public importance, then DoJ may sue the cooperative. If DoJ proves that the cooperative’s website violates ADA Title III, then a court may: (1) order the cooperative to correct the violation; (2) award compensatory, but not punitive, monetary damages to aggrieved persons; and (3) assess a civil penalty to vindicate the public interest, with the penalty not exceeding $75,000 for the first violation. A determination in a single judgment or settlement that the cooperative engaged in more than one discriminatory act is a single violation.[[15]](#footnote-15)

Accordingly, if an individual successfully sues an electric cooperative, then the cooperative is not subject to monetary damages. If DoJ successfully sues the cooperative, then the cooperative may be subject to compensatory damages and a penalty.

Client. Unlike many businesses, only electric cooperative members, or persons located in the cooperative’s service area, may purchase electric energy from the cooperative. It is unclear whether the law firms have clients who are potential, current, or former members with disabilities. Only these individuals may sue the cooperative. Settling protects an electric cooperative from future lawsuits only if the settlement is with a certified class of individuals with disabilities and a court approves the settlement.

Rehabilitation Act. The letters also reference the Rehabilitation Act of 1973. Under section 504 of the act, a program or activity “receiving federal financial assistance” may not, based solely upon an otherwise qualified individual’s disability: (1) exclude the individual from participation; (2) deny the individual benefits; or (3) subject the individual to discrimination.[[16]](#footnote-16) The letters, however, do not reference section 504. Instead, they reference section 508 and its website standards. Under section 508, federal departments and agencies must have electronic and information technology allowing individuals with disabilities to access information and data in a manner comparable to individuals without disabilities.[[17]](#footnote-17) An electric cooperative is not a federal department or agency.

Voluntary Compliance. Regardless of any legal requirement to comply with ADA Title III and similar acts, an electric cooperative may, for member relation, risk mitigation, or other reasons, want to ensure its website is accessible to individuals with disabilities. If so, then version 2.0 of the Web Content Accessibility Guidelines, Levels A and AA, published by the Web Accessibility Initiative of the World Wide Web Consortium, may be helpful.[[18]](#footnote-18) DoJ references these guidelines in its website accessibility agreements.

As a practical matter, providing an alternative, immediate, and easy method of accessing the same goods, services, and information included on your website, whether through a telephone number or otherwise, may limit legal risks under ADA Title III and similar acts.[[19]](#footnote-19) If an electric cooperative provides non-electric goods or services to the public, then it should consider these goods or services when analyzing and addressing the letter.

If you have questions regarding the letters or the above information, then please contact NRECA Assistant General Counsels Nick Pascale, at [nicholas.pascale@nreca.coop](mailto:nicholas.pascale@nreca.coop) or 703-907-5557, or Bill Roche, at [bill.roche@nreca.coop](mailto:bill.roche@nreca.coop) or 703-907-5783.

1. More specifically, NRECA is providing this memorandum in response to requests from NRECA voting members, to assist in analyzing and addressing the letters, and based upon the common interests shared among NRECA voting members regarding the letters. [↑](#footnote-ref-1)
2. 42 U.S.C. § 12182(a) *and* 28 C.F.R. § 36.201(a). [↑](#footnote-ref-2)
3. 42 U.S.C. § 12182(b)(2)(A)(iii) *and* 28 C.F.R. § 36.303(a). [↑](#footnote-ref-3)
4. 28 C.F.R. § 36.303(b)(1). [↑](#footnote-ref-4)
5. 28 C.F.R. § 36.303(c)(1). [↑](#footnote-ref-5)
6. 28 C.F.R. § 36.303(c)(1)(ii). [↑](#footnote-ref-6)
7. <https://www.federalregister.gov/articles/2010/07/26/2010-18334/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-state>. [↑](#footnote-ref-7)
8. 42 U.S.C. § 12181(7) *and* 28 C.F.R. § 36.104. [↑](#footnote-ref-8)
9. <http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal447.txt>. [↑](#footnote-ref-9)
10. <http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/cltr185.txt>. [↑](#footnote-ref-10)
11. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3rd Cir. 1998); *and* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010-14 (6th Cir. 1997). [↑](#footnote-ref-11)
12. *See* Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) *and* Carparts Distribution. Ctr. Inc. v. Automotive Wholesalers Ass’n of New England, Inc., 37 F.3d 12, 19-20 (1st Cir. 1994). [↑](#footnote-ref-12)
13. *See* “Statement of Interest of the United States of America” (June 25, 2015) *at* <http://www.ada.gov/briefs/mit_soi.pdf>. [↑](#footnote-ref-13)
14. 42 U.S.C. § 12188(a)(1) *and* 28 C.F.R. §§ 36.501(a), 36.505. [↑](#footnote-ref-14)
15. 42 U.S.C. § 12188(b) *and* 28 C.F.R. §§ 36.502, 36.503, 36.504. [↑](#footnote-ref-15)
16. 29 U.S.C. § 794(a). [↑](#footnote-ref-16)
17. 29 U.S.C. § 794d. [↑](#footnote-ref-17)
18. <https://www.w3.org/WAI/intro/wcag.php>. [↑](#footnote-ref-18)
19. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56316 (Sept. 15, 2010) (“As [DoJ] stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and range of options and programs available.”), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2010-09-15/pdf/2010-21824.pdf>. [↑](#footnote-ref-19)