

Before the
Federal Communications Commission
Washington, DC 20554

TCI Cablevision of Montana, Inc.)	
d/b/a AT&T Cable Services)	
Complainant/Applicant,)	
)	File No. PA 00-002
v.)	
)	
Energy Northwest, Inc.)	
Respondent.)	

ORDER**Adopted: March 19, 2002****Released: March 28, 2002**

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application for review ("Application") of a Cable Services Bureau ("Bureau") Order, DA 00-1901 ("Bureau Order")¹ released under delegated authority. The Bureau Order dismissed a pole attachment complaint filed by TCI Cablevision of Montana, Inc. d/b/a AT&T Cable Services ("Complainant") against Energy Northwest, Inc. ("Respondent"), pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")² and Subpart J of Part 1 of the Commission's Rules.³ The Bureau Order concluded that Respondent is a "person who is cooperatively organized" within the meaning of the Pole Attachment Act, and dismissed the complaint for lack of jurisdiction over Respondent. In its Application, Complainant challenges the Bureau's decision to dismiss the Complaint.⁴ In this order we deny the Application and affirm the Bureau Order.

II. BACKGROUND

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of

¹ *In the Matter of TCI Cablevision of Montana, Inc. d/b/a AT&T Cable Services v. Energy Northwest, Inc.*, 15 FCC Rcd 15130 (2000).

² 47 U.S.C. § 224.

³ 47 C.F.R. §§ 1.1401–1.1418.

⁴ Respondent filed an opposition to the Application and Complainant filed a reply. Complainant also filed a subsequent history supplement to the record, updating a previously filed exhibit.

telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.⁵ The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.⁶ However, by definition, the Commission does not have jurisdiction to regulate attachments to poles owned or controlled by a utility that is cooperatively organized.⁷

III. BUREAU ORDER

3. According to the Bureau Order, the record in this matter revealed that, in November 1998, Flathead Electric Cooperative acquired an investor-owned utility's service area that included the cities of Columbia Falls, Whitefish, and Kalispell, Montana. Because, pursuant to Montana law, these areas were too populated to be served directly by Flathead Electric Cooperative, Flathead Electric Cooperative created a wholly-owned subsidiary, Energy Northwest, Inc. (the Respondent), to service these areas.⁸ Respondent is incorporated as a for profit corporation under Montana law because it is ineligible to incorporate as a rural electric cooperative due to the size of its service areas. However, Respondent's articles of incorporation and bylaws specifically require Respondent to operate on a non-profit, patronage basis for the mutual benefit of its patrons, the users of its services. Respondent's patrons are represented on the board of trustees of Flathead Electric Cooperative; its profits, if any, are allocated to its patrons; its directors are democratically elected by its patrons; and Respondent is classified as a cooperative by the Internal Revenue Service.

4. Because the Bureau Order found that Respondent is "cooperatively organized" as the term is used in the Pole Attachment Act, it concluded that the Commission is without jurisdiction to resolve the Complaint and dismissed it. The Bureau's conclusion that the Commission was without jurisdiction to resolve the Complaint was based on the record evidence and the language of the Pole Attachment Act. The Bureau Order also cited the legislative history of the Pole Attachment Act in support of its conclusion.⁹

⁵ 47 U.S.C. § 224 (b) (1).

⁶ 47 U.S.C. § 224(b) and (c).

⁷ The term "utility", as it is used in the Pole Attachment Act, "does not include . . . any person who is cooperatively organized . . ." 47 U.S.C. § 224 (a) (1). *See also* 47 C.F.R. § 1.1402 (a).

⁸ Respondent honored a settlement agreement, entered into by Complainant and the investor owned utility that had previously served Columbia Falls, Whitefish and Kalispell, until the agreement expired in December 1999. At that point, Respondent increased the annual pole attachment rate from \$3.75 per pole to \$13.84, a rate similar to that being charged by Flathead Electric Cooperative in its service areas outside of Columbia Falls, Whitefish and Kalispell.

⁹ *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) ("pole rates charged by . . . cooperative utilities are already subject to a decision making process based upon constituent needs . . . These rates presumably reflect what . . . managers of customer-owned cooperatives regard as an equitable distribution of pole costs between utilities and cable television systems.").

IV. APPLICATION FOR REVIEW

5. In its Application, Complainant asserts that the Bureau misapplied the Pole Attachment Act by expanding the meaning of cooperatively organized to include Respondent, which only operates like a cooperative but is not cooperatively organized under Montana State law. Complainant argues that this is inconsistent with the plain language of the Pole Attachment Act and its legislative history, which make no mention of any exemption other than for a "person who is cooperatively organized," which Complainant concludes refers only to a person's nominal corporate structure under State law. Complainant argues that Respondent does not fit the cooperative mold envisioned by the Congress. Complainant asserts that the Bureau misinterpreted the record facts concerning the control and management of Respondent. Complainant also asserts that the Internal Revenue Service classification was improperly issued because it is inconsistent with the Internal Revenue Service's own tax code. Complainant asserts that the Bureau Order will create instability as utilities try to adopt cooperative-like policies in order to claim exemption from the Pole Attachment Act.

6. In opposition, Respondent defends the Bureau's conclusions, arguing that, based on its corporate structure, Respondent is, in fact, cooperatively organized. Respondent agrees that it does not meet the definition of a *rural* cooperative as that term is used in Montana State law. Respondent explains that, because there is no other separate category under which cooperatives may organize if they exceed the size limitation for rural electric cooperatives, Respondent was required to incorporate under the general business laws of Montana. However, Respondent's articles of incorporation and bylaws require Respondent to operate on a non-profit, patronage basis for the mutual benefit of its patrons, the users of its services. Respondent points out that any revenues generated by higher pole rates can only be used to meet Respondent's expenses or be returned to Respondent's patrons.

V. DISCUSSION

7. We find the Bureau's conclusion concerning Respondent's status as an exempt entity under the "cooperatively organized" exemption contained in the Pole Attachment Act to be fully supported by the record. Further, the legal conclusions in the Bureau Order are consistent with the plain language and legislative history of the Pole Attachment Act. The Complainant has raised no new argument in its Application that would call the Bureau's reasoning into question. Therefore, we affirm the Bureau's conclusion that Respondent is "cooperatively organized" as that term is used in the Pole Attachment Act.¹⁰

¹⁰ On March 11, 2002, Complainant informed the Commission by letter of recent changes in Montana law concerning cooperatively structured utilities and pole attachments. Although late-filed, this material was reviewed by the Commission in its deliberation of this item. We conclude that the changes in Montana law do not affect our jurisdiction in this matter.

VI. CONCLUSION AND ORDERING CLAUSE

8. For the reasons discussed above, we conclude that Applicant's application for review should be denied.

9. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of In the Matter of TCI Cablevision of Montana, Inc. d/b/a AT&T Cable Services v. Energy Northwest, Inc., File No. PA 00-002, DA 00-1901, 15 FCC Rcd 15130 (2000) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary