Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Texas Cable and Telecommunications Association, Complainant	)	
	)	
v.	)	File No. PA 96-006
	)	
GTE Southwest Inc., Respondent	)	
	)	
	)	
Application for Review	)	

ORDER

Adopted: March 25, 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 99-348 ("Bureau Order"),[1] released under delegated authority. The Bureau Order granted a pole attachment complaint filed by Texas Cable and Telecommunications Association ("Complainant") against GTE Southwest 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] Neither Respondent nor Complainant sought review of the Bureau Order. The Application was filed by Commonwealth Edison Company and Duke Energy Corporation, two non-parties that were denied permission to intervene by the Bureau Order.[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 telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.[5]

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[1] *In the Matter of Texas Cable and Telecommunications Association v. GTE Southwest Incorporated*, 14 FCC Rcd 2975 (1999).

[2] 47 U.S.C. § 224.

[3] 47 C.F.R. §§ 1.1401–1.1418.

[4] Complainant filed an opposition to the Application.

[5] 47 U.S.C. § 224 (b) (1).

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] The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[7] A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the formula developed by the Commission to ensure that rates are just and reasonable. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[8]

III. BUREAU ORDER

3. The Bureau Order resolved a dispute between Complainant and Respondent concerning the maximum permitted annual pole attachment rate allowable under the Pole Attachment Act. It also concluded that Respondent unilaterally imposed upon Complainant three separate fees, a "billing event" fee; a "CATV pole license agreement" fee; and an "assignment agreement fee," without providing any explanation for the fees. Generally, administrative costs are included in the calculation of the annual pole attachment rental fee. To the extent such costs represent actual costs incurred, and are not included in the accounts used to calculate the annual rate, they may be recoverable. The Bureau Order concluded that the specific fees presented did not reflect actual costs related to any particular agreement and were an attempt to obtain reimbursement of portions of administrative accounts already included in the annual rate.

4. The Bureau Order also denied a motion to intervene by three electric utilities that were neither parties to the pole attachment agreements nor owners of the poles in question. The Bureau Order concluded that the decision to allow intervention in a pole attachment matter is a discretionary one and should be exercised sparingly, under limited circumstances. Because the electric utilities made no claim of direct financial interest in the proceeding, nor any direct adversarial interest in the proceeding, and did not show how their participation would assist in the resolution of the issues, their motion to intervene was denied. The Bureau Order concluded that the parties involved fully informed the Commission of the relevant facts and arguments, and that intervention by the electric utilities would unnecessarily complicate the process without facilitating resolution of the complaint.

IV. APPLICATION FOR REVIEW

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[6] 47 U.S.C. § 224(b) and (c).

[7] 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C.2d 1585 (1978); *Second Report and Order*, 72 F.C.C.2d 59 (1979); *Memorandum and Order*, 77 F.C.C.2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987). *See also, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000), *pet. for recon. denied in part, Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 FCC Rcd 12103 (2001).

[8] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration*, 4 FCC Rcd 468, 471 at ¶ 26 (1989).

5. In their Application, Commonwealth Edison Company and Duke Energy Corporation (together "Applicant") argue that the Bureau should be required to permit any interested electric utility company to intervene in any pole attachment complaint that addresses issues of general applicability to the industry because such decisions are treated as precedent in future adjudication and rulemaking proceedings. Applicant argues that notions of due process and fundamental fairness as well as the Commission's decision in *Heritage Cablevision*[9] dictate this result. Applicant asserts first that the Bureau's decision is in conflict with the Commission's rule on intervention, 47 C.F.R. § 1.223, and Section 555 (b) of the Administrative Procedures Act. Second, Applicant argues that pole attachment complaint decisions create *de facto* rules because they are relied upon as precedent in future proceedings. Third, Applicant posits that this widespread reliance on pole attachment complaint decisions as precedent gives Applicant a direct financial and adversarial interest in every pole attachment decision and Applicant should not have to rely on Respondent to defend Applicant's interests. Fourth, Applicant suggests that it has material information which should be considered in any pole attachment complaint decision. Specifically, in this case, Applicant offers an explanation of the expenses underlying application fees and why they are not regularly found in the accounts included in the annual pole rental fee calculation.

6. Fifth, Applicant asserts that it has more of an interest in the outcome of a pole attachment complaint decision than the complainant itself, if the complainant is a trade association without direct privity of contract with a respondent. Applicant claims that it has just as much information to offer as a trade association. Sixth, Applicant argues that the Bureau Order is in conflict with *Heritage Cablevision*, in which the Commission concluded that the United States Telephone Association ("USTA") could not file a petition for reconsideration of an order in a complaint proceeding in which it had not sought intervention at an earlier stage. Applicant concludes that this decision requires that intervention in pole attachment complaint proceedings be permitted using a more liberal standard than that used in the Bureau Order. Finally, Applicant concludes that its intervention in pole attachment complaint proceedings would not be counterproductive to the settlement of complaints, and requests that the Commission establish a liberal intervention policy in pole attachment complaint proceedings.

7. In its Opposition, Complainant points out that Commonwealth Edison Company operates entirely within the State of Illinois, a state that has certified to regulate pole attachments,[10] and is therefore not subject to the Commission's jurisdiction to regulate pole attachment matters. It also notes that Duke Power Corporation does not operate in Texas and is not a joint pole owner or otherwise connected with the poles at issue in this case. Complainant argues that the pole owner in this proceeding is quite capable of defending itself and that any information Applicant might provide concerning expenses underlying application fees is only relevant to negotiations or complaint proceedings involving Applicant's own licensees.

8. Complainant asserts that intervention is not standard practice in pole attachment complaint proceedings, which are specifically limited in order to effectuate the simple and expeditious process envisioned by Congress. Complainant argues that Applicant presents no exceptional

[9] *Heritage Cablevision Associates of Dallas, LP, et al. v. Texas Utilities Electric Company*, 7 FCC Rcd 4192 (1992).

[10] *See Public Notice*, "*States That Have Certified That They Regulate Pole Attachments*," 7 FCC Rcd 1498 (1992).

circumstances that warrant an enlarged pleading process or a waiver of the rules that established that process. Complainant points out that pole attachment complaint proceedings are not rulemakings and their precedential value is not justification for intervention, just as the precedential value of a court decision does not justify the intervention of any party in every court case. Furthermore, Complainant argues that intervention by the utilities will hamper the settlement of disputes and that it is the complainants in pole attachment complaint proceedings who want to expedite the resolution of complaints. Complainant also notes that attaching parties must certify that a trade association is representing them in a complaint and that allowing a trade association to file a complaint expedites the resolution of disputes that might otherwise be handled individually. The trade association is simply a mechanism for consolidating individual disputes and its participation is not similar to an unrelated utility's intervention. Complainant asserts that, under Applicant's scenario, each individual pole attachment complaint proceeding would become a large, drawn out process bringing pole attachment complaint enforcement to a grinding halt.

V. DISCUSSION

9. We do not find persuasive Applicant's argument that the Bureau should have permitted intervention based on Section 1.223 of the Commission rules,[11] interpreted in light of Section 555 (b) of the Administrative Procedures Act.[12] Section 1.223 is not directly applicable in this case because it applies to cases designated for hearing. Additionally, although Section 555 (b) of the Administrative Procedures Act states in part that "[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function,"[13] the right to appear "is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business."[14] Nor does Section 555 (b) grant a right to appear "without regard to time of appearance, the status of the proceedings, administrative avenues established by other statutes and agency rules for participation, or, most importantly, as 'the orderly conduct of public business permits.'"[15] The "extent to which a party is entitled to participate in [an administrative proceeding] will depend on such factors as the nature of the interests involved and the sanctions to be imposed."[16] In short, persons lacking a sufficient specific interest do not have the right to intervene in administrative proceedings.[17] For the reasons stated in the Bureau Order, including Applicant's lack of financial or adversarial interest in the proceeding and its inability to show how its participation would assist in the resolution of the issues, we agree that Applicant does not have the requisite interest to intervene in this proceeding. In addition, Applicant's

[11] 47 C.F.R. § 1.223.

[12] 5 U.S.C. § 555 (b).

[13] *Id*.

[14] *deVyver v. Warden, U. S. Penitentiary*, 388 F.Supp. 1213, 1222 (M.D. Pa. 1974).

[15] *Easton Utilities Comm'n v. Atomic Energy Comm'n*, 424 F.2d 847, 852 (D.C. Cir. 1970).

[16] *Hartford Consumer Activists Ass'n v. Hausman*, 381 F.Supp. 1275, 1284 (Conn. 1974).

[17] *American Trucking Associations, Inc. v. United States*, 627 F.2d 1313, 1319-1320 (D.C. Cir. 1980).

participation could only slow down a process that is designed to be as efficient as possible in accordance with our statutory mandate, and would thereby disrupt the orderly conduct of public business.

10. Applicant's argument that pole attachment complaint decisions create *de facto* rules, giving Applicant a direct financial and adversarial interest and a need to defend that interest in every pole attachment decision, is without merit. Although the decision in an individual pole attachment complaint proceeding may have precedential value in a subsequent proceeding, each individual pole attachment complaint proceeding is a fact-intensive application of the rules established by rulemaking. Thus, the mere precedential effect of the agency's rationale in later adjudications does not give rise to a legally cognizable injury and it does not create standing to intervene.[18]

11. This case illustrates this point. The general principle that a utility may not recover the same expenses twice, once as a make-ready charge and again as an allocated portion of an expense account included in the calculation of the annual pole attachment rental fee, is not a new concept being decided in this case for the first time.[19] We thoroughly addressed this issue in *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles.*[20] In that Order, we concluded that a "separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs."[21] The issue to be decided in the instant case was whether Respondent's specific accounting practices led to a double recovery of costs and whether the charges to Complainant were reasonable in light of the costs incurred by Respondent. Applicant has failed to demonstrate that it has any information of probable decisional significance on the issue in question. Applicant's speculation regarding Respondent's specific accounting practices would carry no weight. Additionally, Applicant's accounting policies and procedures regarding the recording of its own expenses are completely irrelevant to the specific accounting policies and procedures used by Respondent in this case.

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[18] *See, e.g., Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 (D.C. Cir. 1989) ("[W]e know of no authority recognizing that the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint."). *See also, Boston Tow Boat Co. v. United States*, 321 U.S. 632, 633 (1944) (interest in precedential effect not sufficient).

[19] *See, e.g., Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 at ¶ 28 (2000) ("Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility."). *See also, Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc. et al.*, 14 FCC Rcd 9138 (1999); and *Teleprompter Corp. v. Houston Lighting and Power Co.*, 49 R.R. 2d 1301 (1981).

[20] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987).

[21] *Id.* ¶ 44 (footnote omitted).

12. Applicant also misinterprets the Commission's policy that allows trade associations to file a complaint on behalf of its members. In *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*,[22] we expanded the definitions of "complaint" and "complainant" to allow a complaint to be filed by a cable television association in order to simplify the process for handling pole attachment complaints.[23] We found that a utility will typically enter into comparable agreements with several cable operators within the utility's service area, and the issues in contention with that utility usually focus on the same or similar contractual provisions.[24] We concluded that allowing cable associations to file complaints facilitates settlement and conserves resources.[25] The Commission's rules now specifically provide that pole attachment complaints may be filed by associations.[26] Applicant's claim that this policy warrants broad intervention rights in any pole attachment proceeding involving an association is baseless. An association files a single complaint raising issues that directly effect particular members. The Commission's policy to allow trade associations to file complaints thus facilitates the efficient resolution of disputes. By its own admission, Applicant's accounting procedures differ from other utilities and from telephone utilities, such as the Respondent in this case. Applicant's suggestion that the Commission permit broad intervention in cases such as this would only complicate and slow the resolution process.

13. Finally, we find Applicant's argument that the Bureau Order is in conflict with *Heritage Cablevision*,[27] to be without merit. In that Order, the Commission dismissed a petition for reconsideration[28] filed by USTA because USTA had not sought intervention at an earlier stage in the proceeding. USTA argued that the public interest would be served by considering its petition. We disagreed because our decision in *Heritage Cablevision* applied to the complainant in that case, "within the specific factual context presented by the complaint."[29] We concluded that, "[w]hile our jurisdictional analysis may serve as precedent for future cases involving other factual situations, USTA or other entities may seek to participate in any such future adjudications in a timely fashion and raise any jurisdictional

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[22] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987).

[23] *Id*. ¶¶ 78-80.

[24] *Id.*

[25] *Id.*

[26] 47 C.F.R. § 1.1402. We also required complaints filed by associations to identify each member party and include a document from each identified member party certifying that the complaint is being filed on its behalf. *See* 47 C.F.R. § 1.1404 (a).

[27] *Heritage Cablevision Associates of Dallas, LP, et al. v. Texas Utilities Electric Company*, 7 FCC Rcd 4192 (1992) ("*Heritage Cablevision*").

[28] The petition for reconsideration was filed against *Heritage Cablevision Associates of Dallas, LP, et al. v. Texas Utilities Electric Company*, 6 FCC Rcd 7099 (1991); *affirmed sub nom. Texas Utilities Electric Company v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[29] *Heritage Cablevision* ¶ 8 (1992).

arguments at that time."[30] Applicant argues that our dismissal of USTA's petition implies that intervention at an earlier stage in pole attachment proceedings always is permissible or at least should be determined using a lenient standard. We disagree. USTA's petition was dismissed because it was procedurally defective. There was no discussion on the merits as to whether USTA had the requisite interest to intervene in the proceeding. The holding in *Heritage Cablevision* does not constitute a determination as to the standard under which a petitioner's right to intervene in pole attachment matters will be judged. Thus, Applicant's reliance on *Heritage Cablevision* is misplaced.

VI. CONCLUSION AND ORDERING CLAUSE

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

15. 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 Texas Cable and Telecommunications Association v. GTE Southwest Incorporated, PA 96-006, DA 99-348, 14 FCC Rcd 2975 (1999) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[30] *Id.*