

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

In the Matter of )
)
Cable Telecommunications Association of Maryland, )
Delaware and District of Columbia, et al. )
Complainant ) File No. PA 00-001
v. )
)
Baltimore Gas & Electric Company and )
Bell Atlantic-Maryland )
Respondents )

ORDER

Adopted: March 12, 2001

Released: March 13, 2001

By the Deputy Chief, Cable Services Bureau:

1. In this Order, we address a pole attachment complaint ("Complaint") filed on February 2, 2000, by the Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, Prestige Cable TV of Maryland, Millennium Digital Media, Jones Intercable, Inc., Comcast Cablevision of Maryland, LP, Comcast Cablevision of Howard County, Inc., Comcast Cablevision of Harford County and Prime Communications-Potomac, LLC t/a Cable TV Montgomery (together, "Complainant") against Baltimore Gas & Electric Company ("BGE") and Bell Atlantic-Maryland ("BAM") (together, "Respondents") pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")<sup>1</sup> and Subpart J of the Commission's Rules.<sup>2</sup> On February 25, 2000, BGE filed a motion for an extension of time, which was denied.<sup>3</sup> BGE filed a response ("BGE Response") to the Complaint on March 6, 2000. BAM filed a response ("BAM Response") on March 3, 2000. The Complainant filed a reply ("Reply") to the responses on March 27, 2000. BGE subsequently filed a motion for leave to submit a surreply on May 18, 2000. The Complainants and BAM filed oppositions to BGE's motion. The Commission's rules allow for a response to a complaint and a reply to that response.<sup>4</sup> "[N]o other filings and no motions other than for extension of time will be considered unless authorized by the Commission."<sup>5</sup> BGE presents no compelling arguments that would warrant an exception to our rules in this instance. Therefore, BGE's motion will be denied.

<sup>1</sup> 47 U.S.C. §224.

<sup>2</sup> 47 C.F.R. §§1.1401-1.1418.

<sup>3</sup> In the Matter of Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, et al, v. Baltimore Gas and Electric Company and Bell Atlantic-Maryland, Inc., File No. PA 00-001, DA 00-482, 15 FCC Rcd 4656 (2000).

<sup>4</sup> 47 C.F.R. § 1.1407 (a).

<sup>5</sup> Id.

2. Our rules require that the parties first seek to resolve their differences by negotiation.<sup>6</sup> In this case, the parties notified the Commission that they attempted to negotiate this matter but were not successful. Based on our review of the record, we believe that further negotiations between the parties are likely to be fruitless without direction from the Commission. Both Respondents filed motions to dismiss the Complaint. BAM argues that the Complainant's claim is against BGE only. Because the Complaint involves poles jointly owned by both Respondents, we will deny BAM's motion. BGE argues that the Commission lacks jurisdiction over this matter because it involves a breach of contract or unjust enrichment claim. We disagree. Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments.<sup>7</sup> Because the Complaint directly raises issues within the Commission's jurisdiction, we will deny BGE's motion.<sup>8</sup>

3. The Complainant consists of both a trade association representing cable television operators in the state of Maryland and individual companies engaged in the provision of cable television and telecommunications services in Maryland. BGE provides electricity and energy services in the State of Maryland and owns or controls utility poles for the purposes of transmitting electricity. BAM is engaged in the provision of local telephone services in the state of Maryland and owns or controls utility poles in the State of Maryland for the purpose of providing telephone service. The Complainant has attachments on utility poles belonging solely to BGE pursuant to contracts with BGE. The Complainant also has attachments on utility poles solely owned by BAM or jointly owned by BGE and BAM pursuant to contracts with BAM. This proceeding concerns the attachments to poles jointly owned by BGE and BAM.

4. The Complaint arises from BGE's efforts to charge cable operators in Maryland rent for attachments to poles jointly owned by BGE and BAM. The Complainant alleges that BGE is attempting to collect rent for jointly owned poles that has already been paid to BAM in the full amount that can be recovered pursuant to statutory formulas.<sup>9</sup> BGE maintains that it is merely attempting to collect rents based on its ownership interest in jointly owned poles. Complainant alleges that the only pole attachment agreements with BGE cover attachments on poles solely owned by BGE<sup>10</sup> and attached copies of these agreements to its Complaint. The agreements define pole as a pole solely owned by BGE. Complainant alleges that the pole attachment agreements with BAM cover attachments to poles that are solely owned by BAM and those that are jointly owned by BAM and BGE.<sup>11</sup> Complainant submitted copies of these agreements with the complaint. Complainant argues that, pursuant to its agreements, Complainant submitted payment to BAM for attachments to poles jointly owned by BAM and BGE.<sup>12</sup>

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<sup>6</sup> 47 C.F.R. § 1.1404 (l) (1999).

<sup>7</sup> *See, for example*, In the Matter of Mile Hi Cable Partners, et al. v. Public Service Company of Colorado, 14 FCC Rcd 3244 (1999) at ¶ 12.

<sup>8</sup> BGE filed various complaints for breach of contract or unjust enrichment with courts in the State of Maryland. Most of those actions have been stayed pending a decision on this complaint. *See* letter to the Cable Services Bureau dated May 25, 2000 from Paul Glist and K.C. Halm, counsel to Complainant.

<sup>9</sup> Complaint at ¶ 27.

<sup>10</sup> Complaint at ¶ 15.

<sup>11</sup> Complaint at ¶ 16.

<sup>12</sup> Reply at p. 2.

5. BGE asserts that in September 1996, it provided written notice to various cable companies indicating that it had changed its arrangements with BAM, and that BGE intended to collect fees for attachments to jointly owned poles.<sup>13</sup> BGE claims that it revised its schedule of charges to include rates for jointly owned poles.<sup>14</sup> BGE argues that Complainant did not terminate its agreements with BGE after this modification.<sup>15</sup> On the other hand, BAM claims that it is entitled to collect the maximum permissible rate on poles that are jointly owned by BGE and BAM.<sup>16</sup> Although Complainant acknowledges that BGE may restructure its joint ownership arrangements with BAM to capture more of the rental revenue BAM receives from licensing joint poles,<sup>17</sup> Complainant argues that BGE may not unilaterally amend the rates and terms of payment of Complainant's agreements with BGE or BAM concerning those jointly owned poles. We agree with the Complainant.

6. 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. The Commission shall provide that such rates, terms and conditions are just and reasonable.<sup>18</sup> The Commission has authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.<sup>19</sup> 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."<sup>20</sup>

7. We conclude that BGE may not unilaterally revise the rates, terms and conditions of its pole attachment agreements with Complainant to charge fees for the use of poles that are jointly owned by BGE and BAM and provided for in agreements between BAM and Complainant. No credible evidence of any agreement to pay BGE directly for jointly owned poles has been presented. In addition, the Complainant has not been unjustly enriched because it has paid BAM for the pole attachments. It is unreasonable to expect attachers to separately negotiate agreements with more than one pole owner for attachment to a single pole that is jointly owned. Complainant does not object to making partial payments to each Respondent so long as the total rate charged does not exceed the maximum rate permitted by the Pole Attachment Act. It is unreasonable to expect Complainant to mediate between the utilities as to the amount each is due. Therefore, we will grant the Complaint in part and order the parties to negotiate an agreement together concerning the jointly owned poles. Pending such agreement, Complainant is not obligated to remit pole attachment fees to BGE for jointly owned poles that are covered by agreements with BAM and for which it has remitted fees to BAM. Complainant's requests for costs and attorneys fees will be denied.

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<sup>13</sup> BGE Response at p. 15.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> BAM Response at p. 4.

<sup>17</sup> Complaint at ¶ 30.

<sup>18</sup> 47 U.S.C. §224 (b) (1).

<sup>19</sup> 47 U.S.C. § 224(b)(1) and (2). Maryland has not certified that it regulates rates, terms and conditions of pole attachments. *See* Public Notice, "States That Have Certified That They Regulate Pole Attachments," DA 92-201, 7 FCC Rcd 1498 (1992).

<sup>20</sup> 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 at ¶ 25 (1989).

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the referenced complaint IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

9. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the Respondents' motions ARE DENIED.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondents and Complainant SHALL NEGOTIATE IN GOOD FAITH agreements concerning the amount and methodology of payment of pole attachment fees for poles jointly owned by the Respondents, such rates, terms and conditions to be just and reasonable in accordance with the Commission's rules and this Order.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that pending such agreements, Complainant is not obligated to remit pole attachment fees to Respondent Baltimore Gas & Electric Company for jointly owned poles that are covered by agreements with Respondent Bell Atlantic-Maryland and for which Complainant has remitted fees to Bell Atlantic-Maryland.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief  
Cable Services Bureau