

WC 10-101

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Federal Communications Commission  
Office of the Secretary

WRITER'S DIRECT DIAL NUMBER

(202) 331-4796

May 9, 1980

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POLE ATTACHMENT  
BRANCH

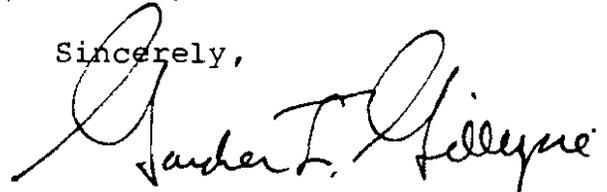
Margaret Wood, Esquire  
Chief, Pole Attachments Branch  
Federal Communications Commission  
1919 M Street N. W.  
Washington, D. C. 20554

Dear Ms. Wood:

For your information, enclosed is an Order of the Montana Public Service Commission, holding that it is without jurisdiction to regulate the rates, terms, and conditions of pole attachments in that State.

As we discussed on the telephone, kindly direct all inquiries and correspondence concerning the pole attachment complaints filed by Hogan and Hartson either to Paul Glist (331-2610) or to me (331-4796).

Sincerely,



Gardner F. Gillespie

GFG:dj  
Enclosure  
cc: Paul Glist, Esquire

Service Date: May 6, 1980

BEFORE THE PUBLIC SERVICE OF THE STATE OF MONTANA  
DEPARTMENT OF PUBLIC SERVICE REGULATION

IN THE MATTER Of The Application )  
For a Declaratory Ruling On The ) DOCKET NO. 6705  
Commission's Jurisdiction Of The )  
Rates, Terms And Conditions For ) ORDER NO. 4642  
The Use Of Public Utility Facil- )  
ities By Cable Television Operators )

On August 10, 1979, the Montana Power Company (MPC) applied to the Commission for a declaratory ruling that the Commission "has jurisdiction of the rates, terms and conditions for the joint use of public utility facilities by non-utility Cable Television operators."

Mountain Bell intervened in support of the petition; Montana-Dakota Utilities, Inc., Tele-Communications, Inc., the Montana Cable Television Association, Inc. and Teleprompter Corporation intervened in opposition to the petition.

A hearing was held on October 23, 1979, and all parties submitted briefs.

DECISION

The petition for declaratory ruling is denied. The Commission finds that the Montana statutes which give the Commission its general authority to regulate the rates and services of public utilities do not give it the authority to regulate rates and conditions for the use of a utility's facilities by cable television operators in the manner described in this Docket.

REASON FOR DECISION

In support of their position, MPC and Mountain Bell place heavy reliance on a number of statutes in Title 69, MCA, which refer to service rendered "in connection with" a public utility, 69-3-201, 69-3-305(1)(a), 69-3-301(1), 69-3-306, MCA.

Should the Commission accept the very broad interpretation of the phrase "in connection with" urged by MPC and Mountain Bell, virtually every activity of a public utility would be subject to this Commission's jurisdiction. Such an interpretation would be contrary to the Montana Supreme Court's decision in State ex rel. Mountain States Telephone & Telegraph Company vs. District Court, 160 Mont. 443, 503 P.2d 526 (1972), which drew a distinction between a utility's "public function" and its private function, noting that "yellow pages advertising is outside Mountain States' area of public service." 160 Mont. at 448.

MPC and Mountain Bell further argue that because the poles are "dedicated to public use," cable television attachments must necessarily be considered a utility service subject to the Commission's ratemaking jurisdiction. The Commission cannot agree with this interpretation. The Montana statute defining public utilities speaks in terms of the kinds of services offered; it is the Commission's interpretation of this statute that whether a utility's activities are subject to Commission jurisdiction depends primarily on whether they are in connection with provision of the enumerated services in 69-3-101; MCA.

MPC alleges that pole attachments are similar to services

previously denoted "utility services" because only utilities have poles available. The Commission agrees with MDU that this factual allegation should not be considered in the absence of supporting evidence. In any case, an affirmative determination would not be dispositive of the issue.

Finally, the Commission agrees with intervenors' point that pole attachments lack an essential element of utility service, which is the requirement to serve. City of Polson vs. Public Service Commission, 155 Mont. 464, 473 P.2d 508 (1970). Utilities are under no legal duty to provide pole attachments for cable television operators; in fact, it is possible that such attachments might be ordered removed should they ever interfere with a utility's ability to provide utility service.

In summary, the Commission finds that neither the statutes which establish its authority nor the court cases interpreting those statutes grant jurisdiction over rates and conditions of service for pole attachments to utility poles by cable television operators.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

*Gordon E. Bollinger*  
GORDON E. BOLLINGER, Chairman

*Clyde Jarvis*  
CLYDE JARVIS, Commissioner

*James R. Shea*  
JAMES R. SHEA, Commissioner

*Thomas J. Schneider*  
THOMAS J. SCHNEIDER, Commissioner  
(Voting to Concur)

*George Turman*  
GEORGE TURMAN, Commissioner  
(Voting to Concur)

ATTEST:

*Madeline L. Cottrill*  
Madeline L. Cottrill  
Secretary

(SEAL)

NOTE: You may be entitled to judicial review of the final decision in this matter. If no Motion for Reconsideration is filed, judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this order. If a Motion for Reconsideration is filed, a Commission order is final for purpose of appeal upon the entry of a ruling on that motion, or upon the passage of ten (10) days following the filing of that motion. cf. the Montana Administrative Procedure Act, esp. Sec. 2-4-702, MCA, and Commission Rules of Practice and Procedure, esp. 38-2.2(64)-P2750, ARM.