

STATE OF NORTH CAROLINA
ROWAN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 1172

TIME WARNER ENTERTAINMENT
ADVANCE/NEWHOUSE PARTNERSHIP,

Plaintiff,

v.

TOWN OF LANDIS, NORTH CAROLINA,

Defendant.

ORDER

BACKGROUND

Plaintiff's Verified Complaint in this case seeks to resolve a dispute with Defendant over the contractual rates, terms, and conditions Defendant has offered for access to its utility poles that Plaintiff uses to deliver cable services. Pursuant to legislation enacted by the General Assembly in 2009, the North Carolina Business Court is vested with exclusive jurisdiction over this action. *See* N.C. Gen. Stat. § 62-350(c) (2009).

Before the Court is a motion filed by non-party the North Carolina Association of Electric Cooperatives (the "NCAEC") seeking to intervene in this litigation pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. Also filed with the Motion to Intervene is the NCAEC's proposed Answer and Counterclaim.

The NCAEC's members are twenty-six electric membership corporations that provide retail electric services to consumers within North Carolina. (Mot. ¶ 1.) All of NCAEC's members own utility poles that either are or can be licensed for use by Plaintiff (or similar entities) to deliver cable services. (*See* Mot. ¶ 1.)

NCAEC’s moving papers concede that it has no direct interest in the specific rates, terms, and conditions governing the contractual relationship between the parties to this case. (Reply Br. 5.) NCAEC’s broader concern is that a decision by this Court establishing a methodology for determining pole attachment rates could, as a practical matter, bind its members in any future negotiations or disputes with Plaintiff regarding such rates. (Mot. ¶ 4; Reply Br. 5.)

In particular, NCAEC vehemently opposes Plaintiff’s attempt to engraft principles established by the Federal Communication Commission (“FCC”) in resolving similar rate disputes between cable operators (like Plaintiff) and so-called investor-owned utilities. (Mot. ¶¶ 6(b)-(c); Reply Br. 4, 6–7.)¹ According to Plaintiff’s Verified Complaint, the FCC’s rate methodology generally seeks to “regulate charges for pole attachments based on the costs of the pole owner in providing service to the attacher [, in this case the Plaintiff].” (Complaint ¶ 26.)

NCAEC (joined by Defendant) contends that it should be allowed to intervene in this case (either as of right or by permission) because the FCC rate methodologies and principles advocated by Plaintiff ignore “fundamental operational and financial differences among various types of electric utility operators” that might justify a different result in a rate dispute between Plaintiff and one of NCAEC’s members. (Mot. ¶ 6(c).)

Plaintiff responds that NCAEC has no right to intervene because it has no stake in this proceeding and seeks no more than an advisory opinion from the Court on a non-existent dispute. (Opp. Br. 4–5, 8.) Plaintiff also contends that allowing NCAEC to intervene would unduly delay what the General Assembly intended to be a streamlined proceeding and thus prejudice the parties currently before the Court. (Opp. Br. 9.)

¹ Federal law grants the FCC regulatory oversight of pole attachment issues involving investor-owned utilities, unless a state acts affirmatively to displace FCC jurisdiction with its own regulatory scheme. (Verified Complaint ¶¶ 24–30 (describing structure of federal and state regulation pole attachment issues).) Relevant federal law, however, also exempts municipal and cooperatively-organized utilities (such as electric membership corporations) from the reach of FCC regulation. (Verified Complaint ¶ 30.)

RULING

After considering the Motion, the Court file, the briefs of the parties, and the arguments of counsel at a hearing held on 16 August 2010, the Court rules as follows:

1. The Court **DENIES** NCAEC's request to intervene as of right.
2. The Court concludes that NCAEC has no statutory right to intervene in this case, nor does it have any interest relating to the "property or transaction which is the subject of the action," (N.C.R. Civ. P. 24(a)(2)), which is a dispute as to what Defendant may charge Plaintiff for access to its utility poles.
3. Instead, NCAEC has at best a general interest in the precedent that may be set in this case regarding the methodology for calculating pole attachment rates, terms, and conditions, which the Court concludes is insufficient to allow intervention as of right pursuant to Rule 24.
4. The Court also **DENIES** NCAEC's request for permissive intervention.
5. Rule 24(b)(2) of the North Carolina Rules of Civil Procedure allows a Court to grant (in its discretion) permission to intervene "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C.R. Civ. P. 24(b)(2).
6. Here, however, NCAEC has failed to assert a legitimate claim that can be reviewed to determine whether it and the action before the Court have a question of law or fact in common.
7. To the contrary, NCAEC's proposed counterclaim fails to allege any threat of a lawsuit, let alone any particular dispute over pole attachment rates, terms, and conditions between Plaintiff and any of NCAEC's members.
8. What NCAEC proposes is an invitation for the Court to issue "an advisory opinion on the rights of its members before any actual dispute [regarding pole attachment rates,

terms, and conditions] has materialized” (Opp. Br. 8.), which, if accepted, would upend the General Assembly’s statutory scheme for considering such issues. *See* N.C. Gen. Stat. § 62-350 (2009).

9. The Court holds that granting permissive intervention to NCAEC is unwarranted given the NCAEC’s generalized and abstract interest in this litigation, and would be inconsistent with the legislative mandate to resolve such rate disputes expeditiously. *See* N.C. Gen. Stat. § 62-350(c) (requiring that, unless the parties agree otherwise, the Court shall set a procedural schedule that resolves litigation brought under this section within 180 days of the commencement of action).

10. Instead, NCAEC’s interests can be adequately protected by allowing it to participate as *amicus curiae* in any future proceedings addressing the appropriate rate methodology to be applied by the Court in this case.

CONCLUSION

The Court **DENIES** the Motion to Intervene, but NCAEC shall be allowed to participate in this case as *amicus curiae*.

SO ORDERED, this the 17th day of August, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge