

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter)	
4901:1-3, Ohio Administrative Code,)	
Concerning Access to Poles, Ducts,)	Case No. 13-579-AU-ORD
Conduits and Rights-of-Way by)	
Public Utilities.)	

COMMENTS OF THE OHIO TELECOM ASSOCIATION

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JULY 12, 2013

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Pursuant to the Public Utilities Commission of Ohio's ("Commission") May 15, 2013 Entry, the Ohio Telecom Association ("OTA") files its Comments on the Commission's consideration of the newly proposed rules contained in Chapter 4901:1-3 of the Ohio Administrative Code ("O.A.C."), which addresses access to poles, ducts, conduits, and rights-of-way provided by public utilities.

I. INTRODUCTION

The Commission Staff's ("Staff") Business Impact Analysis report attached to the Commission's May 15, 2013 Entry in this proceeding, notes that its proposed revisions to the rules generally follow the rules adopted by the Federal Communications Commission ("FCC") on the same subject matter, with certain exceptions.¹ The OTA is generally supportive of the proposed rules, and the proposed deviations from the FCC rules are, on the whole, reflective of the Commission's support and understanding of the valuable investment and impact that the telecommunications industry has on Ohio's economy. However, the OTA respectfully requests that the Commission review the

¹ Entry, Attachment B at 2 (May 15, 2013).

recommendations contained herein which are necessary to better align the Commission's rules with the relevant Sections of the Ohio Revised Code (specifically, Sections 4905.51 and 4905.71) and the FCC's rules.

Ensuring greater consistency between the Commission's rules and the FCC's rules will achieve several benefits. First, the Commission's authority to regulate access to poles, ducts, conduits, and rights-of-way provided by public utilities is delegated authority pursuant to 47 U.S.C. 224(c).² Since the FCC authorized state commissions to assist in regulating this subject matter, it makes sense that state regulations mirror federal regulations to the extent practicable. Second, by aligning state and federal regulations on this subject matter, local exchange carriers will be able to ensure that they are appropriately complying with federal regulations; an issue that can become complicated and burdensome when state and federal regulations vary. Third, aligning the Commission's and the FCC's regulations will reduce confusion and the administrative burden on businesses operating in Ohio, consistent with the Common Sense Initiative established by Executive Order 2011-01K. Staff's decision to model its proposed revisions after the FCC's rules implicitly recognizes the benefits that can be achieved by uniform and consistent sets of rules.

The OTA respectfully requests that the Commission review and adopt the following changes to Chapter 4901:1-3, O.A.C.

² "The rules in this chapter exercise state regulatory authority over rates, terms, and conditions, of pole attachments, ducts, conduits, and rights-of-way as authorized under federal law in 47 USC 224(c)." *Id.*

II. COMMENTS ON PROPOSED NEW CHAPTER 4901:1-3 OF THE OHIO ADMINISTRATIVE CODE

A. Rule 4901:1-3-01(A), O.A.C.

The Commission should revise the definition of “attaching entity” in Rule 4901:1-3-01(A), O.A.C., to incorporate the limitations on attaching entities codified in Sections 4905.51 and 4905.71, Revised Code. First, the Commission should revise the definition of “attaching entity” to include the limitation in Section 4905.51, Revised Code, which requires that a determination regarding public convenience, welfare and necessity be made before a public utility can qualify as an attaching entity:

Every public utility having any equipment on, over, or under any street or highway shall, subject to section 4951.04 of the Revised Code, for a reasonable compensation, permit the use of such equipment by any other public utility whenever the public utilities commission determines, as provided in section 4905.51 of the Revised Code, that public convenience, welfare, and necessity require such use or joint use, and that such use or joint use will not result in irreparable injury to the owner or other users of such equipment or any substantial detriment to the service to be rendered by such owners or other users (emphasis added).

Additionally, the Commission should revise the definition of “attaching entity” to include the limitation in Section 4905.71(A), Revised Code, which requires that an attaching entity be authorized to attach by obtaining, under law, any necessary public or private authorization and permission to construct and maintain the attachment:

Every telephone or electric light company that is a public utility as defined by section 4905.02 of the Revised Code shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or placement of same in conduit duct space, by any person or entity other than a public utility that is authorized and has obtained, under law, any necessary public or private authorization and permission to construct and maintain the attachment, so long as the attachment does not interfere, obstruct, or delay the service and operation of the telephone or electric light

company, or create a hazard to safety. Every such telephone or electric light company shall file tariffs with the public utilities commission containing the charges, terms, and conditions established for such use (emphasis added).

Finally, the Commission should specifically include a definition of “seasonal attachments” as that term is used in Rule 4901:1-3-01(A), O.A.C. The OTA assumes that this reference does not include telephone and electric facilities, but rather, would be limited to seasonable decorations and adornments that do not impede access to the pole or adversely affect any existing attachments, but without a definition, the term is unclear.

B. Rule 4901:1-3-01(K), O.A.C.

The Commission should revise the definition of “pole attachment” in Rule 4901:1-3-01(K), O.A.C., to include a reference to a “public utility.” As currently proposed, the definition of “pole attachment” is “any attachment by a cable system, a provider of telecommunications service, or an entity *other than a public utility* to a pole, duct, conduit, or rights-of-way owned or controlled by a public utility” (emphasis added).³ While this definition mirrors the statutory language in Section 4905.71, Revised Code, it fails to acknowledge that, pursuant to Section 4905.51, Revised Code, a public utility can also be an attaching entity.

Additionally, the Commission should clarify the definition of “pole attachment” such that only facilities attached in the usable space on a pole are deemed a pole attachment.

³ Entry, Attachment A at 1 (May 15, 2013).

OTA proposes that the revised rule should read as follows:

(K) "Pole attachment" means any attachment by a cable system, a provider of telecommunications service, or a public utility to the usable space of a pole, duct, conduit, or right-of-way owned or controlled by a public utility (emphasis added).

C. Rule 4901:1-3-02, O.A.C.

Proposed Rule 4901:1-3-02(A), O.A.C. reads:

Each citation contained within this chapter that is made to either a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter as effective on June 1, 2013.

The Commission should follow its own precedent and delete this subsection of proposed Rule 4901:1-3-02(A) in its entirety, re-lettering subsections (B) through (E) of the rule as (A) through (D). The Commission recently addressed the issue of including a date certain reference to federal laws and regulations in Case No. 12-922-TP-ORD, and agreed that it was appropriate to remove the provision in its entirety.⁴ There, Verizon had explained that by including reference to a date certain in the Commission's rules, problems could arise if the referenced federal law or regulation was subsequently revised.⁵ Specifically, Verizon noted that the Commission could be put in the position of attempting to enforce superseded federal laws that had been incorporated into the Commission's rules, and/or needlessly require carriers to expend resources pursuing waivers in order to address conflicts between state and federal law. Verizon stated that this was particularly problematic when, as here, the Commission is acting under

⁴ See *In the Matter of the Commission's Review of Chapter 4901:1-7, of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules*, Case No. 12-922-TP-ORD, Finding and Order at 4, Attachment A at 4 (Oct. 31, 2012).

⁵ *Id.*

authority delegated by federal law. The Commission should delete this subsection of the rule in its entirety, as it did in Case No. 12-922-TP-ORD.

D. Rule 4901:1-3-03(A)(1), O.A.C.

The Commission should revise Rule 4901:1-3-03(A)(1), O.A.C., to allow local exchange carriers to deny an attaching entity access to their poles, ducts, and conduits where there is insufficient capacity or for reasons of safety, reliability, and generally accepted engineering purposes. As currently drafted, only electric utilities may deny access. The reasons for allowing an electric utility to deny access to its poles, ducts, and conduits are equally applicable to the pole owner which is a local exchange carrier. FCC's Rule 47 CFR §1.1403(a), recognizes as much and also allows a local exchange carrier to deny access to poles, ducts, and conduits under such conditions. OTA proposes that the revised rule reads as follows:

A public utility shall provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or rights-of-way owned or controlled by it. Notwithstanding this obligation, a public utility providing electric service or a provider of telecommunications service may deny an attaching entity access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes (emphasis added).

E. Rule 4901:1-3-03(B)(1), O.A.C.

The Commission should modify Rule 4901:1-3-03(B)(1), O.A.C., to mirror the FCC's requirements on this subject.⁶ Specifically, the FCC order includes language that requires the pole owner to notify the attaching entity in a timely manner if the pole owner

⁶ *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, FCC 11-50, ¶19, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration (Apr. 7, 2011).

deems the attaching entity's application to be incomplete. The OTA proposes that the rule be modified as follows:

A public utility shall respond as described in paragraph (A)(2) of this section to an attaching entity within forty-five days of receipt of a complete application to attach facilities to its poles (or within sixty days, in the case of large orders as described in paragraph (B)(5) of this section). This response may be a notification that the public utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the public utility with the information necessary under its procedures to begin to survey the poles. A public utility shall notify the attaching entity in a timely manner if the application to attach facilities to its poles is deemed to be incomplete (emphasis added).

F. Rules 4901:1-3-03(B)(3)(b) and 4901:1-3-03(B)(4), O.A.C.

Rules 4901:1-3-03(B)(3)(b) and 4901:1-3-03(B)(4), O.A.C., address wireless attachments above the communications space. The first rule addresses notice requirements and the second addresses the make-ready timeline. The Commission should revise these rules to specify that wireless attachments are permitted above the communications space and, specifically, on pole tops. This revision would bring the Commission's regulations into alignment with the FCC's regulations.⁷ Accordingly the Commission should include a new provision in the first sentence of each rule to read as follows:

For wireless attachments that are authorized and have obtained, under law, any necessary public or private authorization and permission to construct and maintain the attachment above the communications space, including on pole tops, ...(emphasis added).

G. Rule 4901:1-3-03(C)(4), O.A.C.

The Commission should expand Rule 4901:1-3-03(C)(4), O.A.C., which presently only references electric utilities, to include all pole owners. Issues surrounding

⁷ FCC Public Notice, DA 04-4046, Attachment 1 (Dec. 23, 2004).

insufficient capacity, safety, and reliability exist for all pole owners, including local exchange carriers, not just for electric utilities. OTA proposes that the revised rule reads as follows:

The consulting representative of an electric light or telephone company that is a public utility as defined by section 4905.02 of the Revised Code may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes (emphasis added).

H. Rule 4901:1-3-03(G), O.A.C.

Proposed Rule 4901:1-3-03(G), O.A.C., currently reads:

The public utility is required to allow attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity to the pole.

Respectfully, the OTA would request that the Commission revise the rule as follows:

The public utility is required to allow attaching entities to use attaching techniques that meet current standards of the public utility or another similarly situated attaching entity to the pole (emphasis added).

The added clarification is helpful in assuring that attaching techniques are safe and meet current industry standards.

I. Rule 4901:1-3-03(H), O.A.C.

The Commission should delete Rule 4901:1-3-03(H), O.A.C., which would establish a timeframe for access to a public utility's conduits. The FCC considered a similar request to establish specific timelines for access to a public utility's conduits and declined to do so:

We decline to adopt a timeline for access to section 224 ducts, conduits, and rights-of-way at this time. Access to ducts and conduits raises different issues than access to poles, and the record does not demonstrate that attachers are, on a large scale,

currently unable to timely or reasonably access to ducts, conduits, and rights-of-way controlled by utilities.⁸

As the FCC found, access to conduits presents different and unique issues than access to poles. Accordingly, the specified timeframes in Rule 4901:1-3-03(H), O.A.C., may not be practicable under all circumstances.

J. Rule 4901:1-3-04(A), O.A.C.

Additional clarification is needed regarding Rule 4901:1-3-04(A), O.A.C. As currently drafted, the rule could be interpreted as requiring public utilities to file revised tariffs incorporating the changes to the Commission's rules in Chapter 4901:1-3, O.A.C. Additionally, requiring new tariffs will generate uncertainty regarding the impact on existing pole attachment agreements.

Finally, Rule 4901:1-3-04, O.A.C., is not as complete as the FCC's rules and should be revised to mirror the level of detail included in the FCC's rules. As currently proposed, Rule 4901:1-3-04, O.A.C., fails to include the FCC's definitions, default values, instructions for net cost of a pole and the treatment of cross arms, the includable expense and investment-related accounts and definitions, and the positive/negative net plant formulae alternatives, which are discussed in the FCC's orders. Sections (D), (E), and (F) of the rule are more general and vague than the FCC's regulations and do not necessarily capture the various cable and telecommunications formulas set forth in the FCC's orders in 01-170 and 11-50.

⁸ *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, FCC 11-50, ¶45, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration at 24-25 (Apr. 7, 2011).

As with the OTA's recommendation regarding the revisions to the Appendix to Chapter 4901:1-3, O.A.C. (see below), rather than attempting to encapsulate in the Commission's rules the various FCC formulas and methodologies, it would be simpler and more efficient to include in the Commission's rules a requirement to follow the FCC's formulas and methodologies.

K. Rule 4901:1-3-05, O.A.C.

In accordance with OTA's recommendation in Rule 4901:1-3-01(A), O.A.C., regarding the definition of an attaching entity as including a public utility, the Commission should similarly revise this rule to remove the reference to a public utility in the first clause of the rule since a public utility falls within OTA's revised definition of an attaching entity. The rule should be revised to read: "Any attaching entity may file a complaint ...".

L. Appendix

Consistent with the recommendations above regarding Rule 4901:1-3-04, O.A.C., the Commission should also revise the Appendix to simply state that pole attachments and conduit rate calculations must mirror the directives, definitions, assumptions, methodologies and the various formulae, as set forth by the FCC in its Pole and Conduit Attachment Rate Orders. As proposed, the current Appendix does not appear to allow or provide for any modifications that the FCC may propose in future orders. This could potentially place the Commission in a regulatory predicament where its rate formula is outdated or inconsistent with FCC guidance on this subject.

Aligning the Commission's rules and regulations on this matter with the FCC's respective orders will ensure compliance with state and federal regulations on this subject matter. This consistent application of state and federal regulations will reduce confusion and ease compliance and enforcement on this issue.

III. CONCLUSION

For these reasons, the OTA respectfully requests that the Commission modify the proposed rules as discussed above.

Respectfully submitted,

OHIO TELECOM ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of the Ohio Telecom Association* was served upon the following parties of record this 12th day of July, 2013, via electronic transmission.

/s/ Scott E. Elisar

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**ON BEHALF OF THE PUBLIC UTILITIES
COMMISSION OF OHIO**

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/12/2013 11:45:32 AM

in

Case No(s). 13-0579-AU-ORD

Summary: Comments of the Ohio Telecom Association electronically filed by Scott E. Elisar on behalf of Ohio Telecom Association