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, Conduits, and Rights-of-Way Provided by Public Utilities.	))))	Case No. 13-579-AU-ORD

INITIAL COMMENTS OF THE AT&T ENTITIES

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Introduction

The AT&T Entities[1] ("AT&T"), by their attorney, submit these initial comments in response to the Entry adopted on May 15, 2013 in the referenced case. In this case, the Commission is considering adopting a new chapter of the Ohio Administrative Code in order to update the rules on access to poles, ducts, conduits, and rights-of-way provided by public utilities in Ohio. Entry, p. 1.

In its Business Impact Analysis released with the Entry, the Commission explained that the proposed rules generally follow the similar rules adopted by the FCC. Entry, Attachment B, p. 2. AT&T recognizes that the proposed rules generally follow the FCC's rules, but urges the Commission to adopt the FCC rules without the changes Staff has proposed. While Staff's proposed changes may appear minor and textual in nature, they are substantive in several respects and contravene the letter or intent of the FCC's rules, resulting in regulatory uncertainty.

The Business Impact Analysis underscores two noteworthy exceptions. First, the state-specific mediation provisions have been added. Entry, Attachment B, p. 2. AT&T has no qualms with the implementation of the state-specific mediation provisions in this context. Mediation has worked well at the Commission over the years and has led to the informal resolution of many disputes, including end-user customer complaints and those involving two or more public utilities. Second, the Analysis notes that the rules apply equally to attachments to

[1] The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Corp., Teleport Communications America, LLC, and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

poles and to conduit occupancy. Id. The expansion of the pole attachment rules, processes, and timelines to all conduit occupancy requests is unfounded and would not constitute good public policy, as explained in the Rule 3 discussion below.

Given these circumstances, AT&T proposes, as a better alternative to the draft rules, that the Commission simply incorporate the FCC's rules adopted in 2011 into its own rules, without restatement or modification. This can be done very easily and consistent with the applicable legal requirements in Ohio, R. C. §§ 121.71 – 121.76. This approach would be much more straightforward than attempting to "rewrite" some of the FCC rules, deleting from some and adding to others. This approach would also comport with the policy underlying the provision in state law that addresses federal obligations under the Telecommunications Act of 1996:

> 4927.16 Unbundling, resale or network interconnection.
>
> (A) The public utilities commission shall not establish any requirements for the unbundling of network elements, for the resale of telecommunications service, or for network interconnection that exceed or are inconsistent with or prohibited by federal law, including federal regulations.
>
> (B) The commission shall not establish pricing for such unbundled elements, resale, or interconnection that is inconsistent with or prohibited by federal law, including federal regulations, and shall comply with federal law, including federal regulations, in establishing such pricing.

R. C. § 4927.16. Following the policy underlying this provision, the Commission should refrain from establishing any requirements for pole attachments or conduit occupancy, or for the rates charged for that occupancy, that exceed or are inconsistent with those in federal law or the FCC's rules.

In following this recommendation, the Commission could still adopt its own mediation process, as has been proposed, in addition to the adoption, in whole, of the FCC's substantive rules. If the Commission chooses not to follow this course, and instead insists on its own state-specific set of rules, the following comments address several provisions of the draft rules.

Definitions

The definition of "attaching entity" in proposed Rule 1(A) must be reviewed and revised because it omits an essential element from the underlying state law, R. C. § 4905.71. That section provides, in pertinent part, as follows:

> 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.

R. C. § 4905.71(A) (emphasis added). An attaching party must be "authorized" to attach by obtaining, under law, any necessary public or private authorization and permission to construct and maintain the attachment. When this section was first enacted, the intent was that cable television systems must provide a local franchise agreement in order to qualify as an attaching entity. It would be improper for the Commission to adopt a rule that omits the important requirement of any necessary public or private authorization that is set forth in the enabling Ohio statute.

In addition, the proposed definition contains language defining an attaching entity as including "other entities with either a physical attachment or a request for attachments". Proposed Rule 1(A). The Commission needs to clarify this language to ensure the other provisions of R. C. § 4905.51, where applicable in the utility-to-utility attachment setting, are met before other entities can be considered an attaching entity. Specifically, under that statute, a determination needs to be made "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."

Lastly, the definition of an "attaching entity" also states that it "does not include governmental entities with only *seasonal attachments* to the pole." Proposed Rule 1(A) (emphasis added). AT&T assumes that "seasonal attachments" excludes telephone and electric facilities, and are limited to seasonal decorations and adornments that do not impede access to the pole or adversely affect any existing attachments, such as flower baskets, U.S. flags, wreaths, banners, and the like. AT&T suggests that "seasonal attachments" be appropriately and specifically defined to avoid future conflicts. Such seasonal attachments should be removed by attacher within 30 calendar days of event for which the attachments were placed. A failure to do so should result in the pole owner having the right to remove the attachments at the attacher's expense.

The definition of "pole attachment" in proposed Rule 1(K) must also be reviewed for consistency with Ohio law. The proposed definition excludes a "public utility" by using the

phrase "other than a public utility." This exclusion is appropriate under R. C. § 4905.71, which addresses attachments by persons or entities "other than a public utility." But the exclusion is not appropriate under R. C. § 4905.51. A public utility can itself be an "attaching entity" entitled to a "pole attachment" on another utility's facilities under current law. R. C. § 4905.51 provides as follows:

> 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.
>
> In case of failure to agree upon such use or joint use, or upon the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission ascertains that the public convenience, welfare, and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service to be rendered by such owner or other users, the commission shall direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use.
>
> Such use or joint use so ordered shall be permitted and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed, and paid, subject to recourse to the courts by any interested party as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code. The commission may revoke or revise any such order.

R. C. § 4905.51 (emphasis added). This section contemplates pole attachments being made by one public utility on the equipment of another public utility. For example, a telephone company has a right to the use of equipment of an electric utility (and vice versa), provided the conditions of the statute are met. For this reason, the phrase "other than a public utility" should be removed from proposed Rule 1(K).

General Applicability

In this proposed section of the rules, the Commission has reopened an old issue that was resolved correctly just last year. Proposed Rule 2(A) keys to provisions of the federal law or rules "as effective on June 1, 2013." This is an unnecessary and cumbersome limitation. In adopting the revised telecommunications "carrier-to-carrier" rules in Case No. 12-922-TP-ORD, effective March 2, 2013, the Commission adopted the suggestion by Verizon and eliminated the "date certain" reference to federal law and rules that had been proposed by the Staff in that case. In its Finding and Order adopted on October 31, 2012, the Commission stated:

> Verizon comments that it is highly problematic and is contrary to Executive Order 2011-01-K to incorporate by reference federal statutes and the code of federal regulation as of a date certain. Verizon's remedy is to simply delete paragraph (A) of Rule 4901:1-7-02, O.A.C, and re-letter the remaining subparagraphs accordingly. Verizon also recommends deleting language throughout the chapter that references deleted paragraph (A). ***The Commission agrees with Verizon's proposal and has modified the chapter accordingly.***

Finding and Order, October 31, 2012, p. 4 (emphasis added). Reference to a date certain in these rules is not necessary because, as Verizon explained in its comments on the proposed revisions to the carrier-to-carrier rules,

> While Verizon does not object to the Commission referring to federal law in its rules (as unnecessary as that may be, given that federal law's applicability is not contingent upon state administrative rules incorporating it), it is highly problematic to incorporate that law by reference as of a "frozen" date. If the cited federal statutes and regulations are subsequently amended, the Commission would be in the untenable position of attempting to enforce superseded federal laws that have been incorporated into its rules. This is particularly inappropriate given that in the carrier-to-carrier realm, the Commission generally acts under authority delegated to it by federal law, to enforce federal law – not to enforce outdated federal law.

Verizon Initial Comments, Case No. 12-922-TP-ORD, April 13, 2012, pp. 1-2 (footnote omitted).

The AT&T Entities supported Verizon's comments, stating as follows:

> Verizon makes an excellent point in its analysis of division (A) of this rule. Verizon, pp. 1-4. Verizon is correct that, where the Commission is not incorporating the text of a federal law or rule into its rules, it need not follow R. C. § 121.75. Verizon, p. 2, fn. 2. R. C. § 121.72 provides in part that "[a]n agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule." Here, the Commission is simply referencing federal laws and rules in appropriate places, and is not incorporating them into its rules such that compliance with R. C. § 121.75 would be necessary. Thus, the Commission need not specify the date of a specific reference to the Code of Federal Regulations in its rules. This will avoid the issues that Verizon appropriately recognizes.

AT&T Entities Reply Comments, Case No. 12-922-TP-ORD, April 27, 2012, p. 3. For all of the same reasons put forward by the commenting parties, and accepted by the Commission, in the carrier-to-carrier rules docket, the Commission should eliminate the "date certain" reference in the proposed rules here.[2]

Access to poles, ducts, conduits, and rights-of-way

In proposed rule 4901:1-3-03(A)(1), it is specified that only the electric companies have the ability to deny an attaching entity access to its poles, ducts, and conduits where there is insufficient capacity or for reasons of safety, reliability, and generally accepted engineering purposes. While the similar exceptions in 47 USC § 224(f)(2) are limited to electric utilities, the FCC has broadened the exceptions to also apply to local exchange carriers. *See* 47 CFR § 1.1403(a). This proposed rule should be amended to reflect the fact that the capacity and engineering exceptions are equally applicable to the local exchange telephone companies.

Proposed Rules 3(B)(3)(b) and 3(B)(4) address wireless attachments above the communications space. The first rule addresses the notice requirements and the second rule

[2] AT&T recognizes that if the Commission accepts AT&T's recommendation set forth in the Introduction to these comments to simply incorporate the FCC's rules, the "date certain" approach should be retained to comply with Ohio law.

addresses the make-ready timeline. The rules should also specify that wireless attachments are permitted above the communications space and, specifically, on pole tops. This right has been confirmed by the FCC. *See*, FCC Public Notice, DA 04-4046, Released December 23, 2004 (Attachment).

Proposed Rule 3(H) poses significant issues. On the issue of time frames, the Entry notes that one of the April 17, 2013 workshop participants, Fibertech, encouraged the Commission to consider adopting time frames for conduit access which, to date, has not been dealt with by the FCC. Entry, p. 2. Fibertech provided no evidence in support of this request, but the proposed rules adopt the same timeframes for conduit access as are applicable to access to poles. Proposed Rule 4901:1-3-03(H).[3] This proposal has no basis in the record apart from Fibertech's request. It should not be adopted. As noted in the Entry, the FCC has not prescribed time frames applicable to conduit. It is not that the issue has "not been dealt with" by the FCC; to the contrary, the FCC closely examined the issue and decided to not prescribe timeframes. It did so for good reason, as it explained in a 2011 order. The FCC specifically sought comment on that issue (FCC 11-50, fn. 132) and declined to adopt timeframes:

> 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 ducts, conduits, and rights-of-way controlled by utilities***. We emphasize that the determination we make regarding section 224(a)(1) rights-of-way owned or controlled by a utility has no bearing on any public rights-of-way issues subject to section 253 of the Act.[4]

[3] The proposed rule provides as follows: "The time frame for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles."

[4] *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order On Reconsideration, Adopted April 7, 2011, Released April 7, 2011, FCC 11-50, ¶45 (footnotes omitted) (emphasis added).

The FCC noted that "[b]y contrast, the record developed on the issue of timely access to poles evidences problems justifying the adoption of a pole attachment timeline." FCC 11-50, fn. 134. Here, neither the Staff nor the Commission has developed a record of any kind to support the application of any timelines - - and especially the same timelines applicable to pole attachments - - to access to ducts and conduit. Moreover, the Staff did not, in this instance, "pattern the rules after the rules adopted by the FCC," as stated in the Business Impact Analysis, Entry, Attachment B, p. 4. To the contrary, the Staff has ventured into territory where the FCC - - which specifically noted that it had no factual record on which to base such a broad expansion - - chose not to go. And, as explained in the Introduction to these comments, the Commission should refrain from establishing any requirements for pole attachments or conduit occupancy that exceed or are inconsistent with those in federal law or the FCC's rules. For all of these reasons, proposed Rule 3(H) should not be adopted.

Conclusion

For all of the foregoing reasons, the Commission should modify the proposed rules in the manner suggested by AT&T.

Respectfully submitted,

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WIRELESS TELECOMMUNICATIONS BUREAU REMINDS UTILITY POLE OWNERS OF THEIR OBLIGATIONS TO PROVIDE WIRELESS TELECOMMUNICATIONS PROVIDERS WITH ACCESS TO UTILITY POLES AT REASONABLE RATES

The Wireless Telecommunications Bureau reiterates the obligation to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the Communications Act, 47 U.S.C. § 224. In *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998), the Commission determined that wireless telecommunications providers are entitled to the benefits and protections of section 224 for the attachment to utility poles of antennas or antenna clusters and associated equipment. The Supreme Court affirmed this determination in *National Cable Telecommunications Ass'n v. Gulf Power Co*., 534 U.S. 327 (2002). Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets.

Recently, wireless carriers have alleged that they have been denied access to utility poles for the placement of wireless antennas on pole tops. While we take no position on the merits of any individual case, we take this opportunity to reiterate that the Commission declined, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, *Order on Reconsideration*, 14 FCC Rcd 18049, 18074 ¶ 72 (1999), to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only. Thus, the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: "where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

In addition, section 224 and the Commission's rules do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate, which is based on the space occupied by the attachment and the number of attaching entities on the pole, together with reasonable make-ready fees. Such overcharges or denial of access for wireless pole attachments may have serious anticompetitive effects on telecommunications competition. Wireless telecommunications providers are encouraged to bring such matters to the attention of the Commission or the appropriate state regulatory authorities that have asserted jurisdiction over pole attachments.

For further information contact: Wireless Telecommunications Bureau, Aaron Goldschmidt at (202) 418-7146; Media Bureau, Katie Costello at (202) 418-2233; Enforcement Bureau, Jonathan Reel at (202) 418-7330.

Summary: Comments electronically filed by Jon F Kelly on behalf of The AT&T Entities