

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.)	

REPLY COMMENTS OF FRONTIER NORTH INC.

I. Introduction

Numerous commenters in this proceeding, including Frontier North Inc. (“Frontier”), have recognized that, unlike the federal Pole Attachment Act, nothing in the text of Ohio Code §§ 4905.51 or 4905.71 requires the Commission to utilize different formulae based upon an attaching entity’s regulatory status to calculate a reasonable pole attachment rate. Those commentators generally agree that the Commission has the authority to adopt a single, “uniform” rate formula and that doing so would promote the deployment of advanced communications services and help ensure competitive neutrality for providers of video, internet, and telecommunications services.

However, some commenters urge the Commission to establish a “uniform” pole attachment rate that would apply only to non-utility attachers, such as cable television systems (“CATVs”) and competitive local exchange carriers (“CLECs”), but not utility attachers, such as incumbent local exchange carriers (“ILECs”). A single pole attachment rate applicable to only some attaching entities but not others would be neither “uniform” nor reasonable. Rather, such an approach would only advance the narrow interests of investor-owned electric utilities (“ELCOs”), which seek to continue using pole attachment revenues as a line of

business. The Commission should see through such a self-serving ploy.

The Commission also should see through the erroneous arguments of some commenters that ILECs are not entitled to access and reasonable pole attachment rates under Ohio Code § 4905.51. These arguments ignore the plain language of that statute's very first sentence. They also disregard the Commission's authority to establish a default rate formula that would apply for setting a reasonable pole attachment rate when ILECs and ELCOs cannot reach a negotiated agreement.

Finally, the Commission should reject the ELCOs' proposed pole attachment formula. This proposal represents nothing more than a transparent attempt by ELCOs to impose unreasonable rate increases on attaching entities, and it is premised upon flawed and self-serving assumptions. Although the Commission should unify rates for pole attachments regardless of an attacher's regulatory status, it simply would not promote the deployment of advanced communications services by implementing the unjustified and unwarranted pole attachment increases sought by the ELCOs.

II. Discussion

A. The Commission Should Establish a Uniform Rate Formula for Pole Attachments

Numerous commenters have recognized that the language of Ohio Code §§ 4905.51 and 4905.71 does not support the Commission's tentative decision to adopt the FCC's pole attachment rate formulae and calculations, which are based upon the regulatory status of the attaching entity. Instead, the commenters, which include ILECs,¹ ELCOs,² CLECs,³ and CATVs,⁴ have recommended that the Commission adopt a single, uniform rate formula. As one

¹ Initial Comments of Frontier at 7-11.

² Joint Comments of Ohio Pwr. Co., Ohio Edison Co., The Cleveland Elec. Illuminating Co., The Toledo Edison Co., the Dayton Pwr. and Light Co., and Duke Energy Ohio, Inc. (the "Joint ELCO Comments") at 7, 18-22.

³ Initial Comments of OneCommunity at 6.

⁴ Comments of the Ohio Cable Telecommunications Association at 12-16.

commenter correctly noted, “[p]ole attachment rules should be agnostic regarding the type or format of data, video or voice being transmitted via the line attached to the pole.”⁵ These commenters generally agree that a single, uniform pole attachment rate would promote the deployment of advanced communications services by discouraging discrimination between different platforms.

Some commenters have stated their agreement with the Commission’s tentative decision to adopt the FCC’s pole attachment rate formulae.⁶ But in doing so, none of those commenters have addressed the critical differences between the federal Pole Attachment Act and Ohio Code §§ 4905.51 and 4905.71. Specifically, the federal Pole Attachment Act sets forth separate rate formulae for CATVs⁷ and CLECs⁸ and a generalized provision requiring just and reasonable rates for all other pole attachments.⁹ Consequently, current federal law precludes the FCC from developing a single, uniform pole attachment rate formula even though it recognizes that applying different rate formulae to the various regulatory classes of attachers is inefficient and convoluted and results in unnecessary litigation.¹⁰

The Commission faces no similar statutory impairment to developing a uniform rate formula. While its authority to regulate pole attachment rates comes from two different statutes, Ohio Code § 4905.51 and Ohio Code § 4905.71, these statutes contain no language that requires the Commission to apply a specific rate formula based upon an attaching entity’s regulatory status. Ohio Code § 4905.51 simply requires that the Commission “prescribe reasonable conditions and compensation” for joint use between two public utilities when those

⁵ Initial Comments of OneCommunity at 6.

⁶ Comments of Zayo Group, LLC at 1-3.

⁷ 47 U.S.C. § 224(d)(3).

⁸ 47 U.S.C. § 224(e)(1).

⁹ 47 U.S.C. § 224(b)(1).

¹⁰ The National Broadband Plan, at 111-12.

utilities are unable to agree on such terms, and Ohio Code § 4905.71 requires the Commission to “regulate the justness and reasonableness of the charges, terms and conditions” for non-utility attachments on poles owned by public utilities.

Because Ohio’s pole attachment statutes do not contain the same constraints as the federal Pole Attachment Act, the Commission should develop a single, unified rate formula that applies to all attachments placed on utility poles, regardless of the attacher’s regulatory classification. Establishing a uniform pole attachment rate formula applicable to all attachments on poles owned by public utilities would remove distortions in the communications market by ensuring consistent regulatory treatment of competing platforms.¹¹ It also would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachment as a revenue stream that artificially inflates the cost of communications services.¹² Thus, by establishing a uniform pole attachment rate formula, the Commission would help secure lower prices and higher quality services for Ohio consumers and encourage increased deployment of new telecommunications technologies.

B. A Rate Formula That Does Not Apply to Utility Attachments Is Unreasonable

While ostensibly supporting a uniform pole attachment rate, ELCOs urge the Commission to only apply this new rate to CLECs and CATVs¹³. In a classic case of doublespeak, ELCOs praise the benefits of a “unified” pole attachment regime but at the same time desire the perpetuation of the current system under which ILECs generally pay higher pole attachment rates than other broadband providers—a system that serves these commenters’ financial self-interests.

ELCOs attempt to carve out ILECs from the benefit of a “uniform” pole attachment

¹¹ National Broadband Plan, at 110-11.

¹² Id.

¹³ Joint ELCO Comments at 12-17.

rate by pointing to the joint use agreements to which they are parties.¹⁴ The ELCOs' motivation in doing so is clear-they seek to preserve the lucrative rental rates paid by ILECs pursuant to obsolete rate arrangements in these decades-old joint use agreements. While joint use agreements are important in facilitating the provision of electrical and communications services, the conceptual underpinnings of the pole attachment rate provisions of those agreements have long since disappeared. As Frontier explained in its comments, as a result of fundamental change in the space requirements of the electric and telephone industries, the significant increase in the number of attaching parties on utility poles, and, as described below, the dramatic disparity in ELCO-owned joint use poles, the assumptions underlying pole attachment rates in existing joint use agreements are no longer valid.¹⁵

While ELCOs claim that ILECs enjoy equal bargaining power because they own poles of their own, their assertion is not borne out by the facts. ELCOs own 75 to 80 percent of the utility poles in the country, with ILECs currently owning the remainder. This hardly places ILECs on level footing with the electric utilities. That ILECs enjoy little or no bargaining power when it comes to pole attachment rates is evidenced by the fact that: (1) ILECs such as Frontier routinely face ELCO demands for ever increasing pole attachment rates- not because the costs of poles are increasing exponentially, but rather because pole ownership and pole usage have changed in ways that favor the ELCOs; and (2) ELCOs adamantly refuse to update their joint use agreements with the ILECs to reflect these changed conditions.

The ELCO's argument that joint use agreements have been in effect for many years proves nothing.¹⁶ First, they have presented no evidence that ILECs have suddenly abandoned their pole ownership responsibilities in those states, such as Oregon, that have adopted uniform

¹⁴ Id. at 12-13.

¹⁵ Initial Comments of Frontier at 2-6.

¹⁶ Joint ELCO Comments at 13.

pole attachment rate formulas for both utility and non-utility attachers.¹⁷ Second, it is beyond dispute that the rate provisions in joint use agreements executed years ago reflect assumptions that no longer hold true, and the equal or joint arrangement that once existed between local telephone and electric companies is a thing of the past. In the face of the number of additional users in the space the ILECs' 40-50 percent cost allocation percentage once bought, it is unreasonable for ELCOs to continue to insist that ILECs continue paying close to 50 percent of ELCOs' pole costs.

Notwithstanding the ELCOs' claim to the contrary, ILECs are not seeking to avoid their fair share of costs.¹⁸ Rather, they are seeking to pay their equitable, reasonable and consistent allocation of the cost of a standard pole. The loss by the ILECs of their historical reserved space as a joint user, the corresponding escalation of electric utility revenue from sublease of that space, the proliferation of competitors currently enjoying the same pole usage benefit for much less cost, and the ownership of the vast majority of poles by the nation's electric utilities, all dictate this result.

C. The ELCOs Erroneously Claim that the Commission Lacks Authority to Regulate Utility Pole Attachments.

The ELCOs claim that the Commission's proposed rules would grant ILECs greater access rights than under federal law and that the Commission lacks the authority to issue regulations governing utility pole attachments.¹⁹ These assertions simply ignore Ohio law. Indeed, the first sentence of Ohio Code § 4905.51 expressly grants attaching utilities (whether

¹⁷ Id.

¹⁸ The ELCOs also made much of the fact that the FCC did not adopt a specific rate formula for ILEC pole attachments. Joint ELCO Comments at 17. Of course, they ignored the FCC's conclusion that ILECs are entitled to just and reasonable rates under federal law and that those rates should be calculated under the FCC's new telecom rate formula unless an existing joint use agreement provide them with some material advantage over CLECs and CATVs, in which case their rate would be calculated under the FCC's old telecom rate formula. *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, FCC 11-50, ¶¶ 217-18 (FCC 2011).

¹⁹ Joint ELCO Comments at 6, 11-12.

ILECs or ELCOs) greater access rights than exist under federal law since it requires a pole-owning utility to provide other utilities with access to its poles along public rights-of-way at reasonable rates and terms. Moreover, while an attaching utility may only seek relief from the Commission under this statute when its rate negotiations with pole-owning utilities reach impasse, nothing in the statute precludes the Commission from adopting a pole attachment rate formula that would simply serve as a default rate calculator when the parties cannot agree on a negotiated rate.

D. The Commission Should Reject the ELCOs' Proposed Pole Attachment Rate Formula

Not only do the ELCOs want to preserve their ability to continue exacting unreasonable pole attachment rentals from ILECs, they also advocate various adjustments to the Commission's pole attachment formulas, which, if adopted, would do nothing more than inflate the maximum rates permitted under the Commission's rules. These ELCO proposals can be reduced to four main recommendations: (i) reduce the number of pole users to three in both urban and non-urbanized locations; (ii) reclassify the separation space on every jointly occupied pole as non-usable; (iii) allocate the non-usable space, including the separation space, equally to all pole users; and (iv) eliminate the "subsidies" of other users that ELCOs claim permeate the rental rate methodology. Each of these proposals is without merit and should be rejected by the Commission.

Reducing the number of attachers. The ELCOs dispute the accuracy of the presumptions concerning the number of attachers on a utility pole, recommending that the number of pole users be reduced to three in all locations, both urbanized and non-urbanized, which would have the same effect as the ELCOs' other proposals-namely to increase

maximum pole attachment rates.²⁰ Frontier agrees with the ELCOs that the Commission should abandon its “urbanized” versus “non-urbanized” dichotomy and should establish a single presumption of four attachers on a pole, regardless of location. While the ELCOs recommend that the Commission presume three attachers on a pole, the data offered by the ELCOs do not support this recommendation.

Reclassifying the separation space. ELCOs urge the Commission to reclassify the separation space on a pole as non-usable,²¹ which would have the effect of increasing the pole’s total non-usable space and disproportionately increasing each user’s allocation of that space and thus the pole rental rate. There is no legitimate justification for this proposal, and the ELCOs offer none. Indeed, the FCC has long recognized that ELCOs actually use the separation space for the placement of electric facilities while communications companies do not and has rejected ELCO attempts to designate the separation space as non-usable.²² The Commission likewise should do so here.

Allocating non-usable space. The ELCOs also contend that all of the non-usable space should be divided equally among its users, not just two-thirds of it as is the case under the current telecom rate formula. Again, this recommended ELCO measure is intended to increase each pole user’s share of the pole’s space, and correspondingly, increase the rate each user pays the ELCO pole owner. This proposal is flawed because any approach that allocates the total cost of a joint pole’s non-usable space in any manner other than in direct proportion to the users’ respective allocations of the pole’s useful space is unfair and unreasonable.

²⁰ Joint ELCO Comments at 20.

²¹ *Id.* at 21-22.

²² Memorandum Opinion and Second Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, FCC 79-308, 72 F.C.C.2d, (May 23, 1979)

Eliminating other “subsidies.” The ELCOs claim that their current rates provide non-specific “subsidies” to the attachers on their poles which need to be eliminated.²³ Such claims are impossible to reconcile with the fact that ELCOs typically collect up front the costs they incur in the form of “make-ready” work to accommodate a new attacher, which includes reimbursement of any cost, capital or expense, incurred by the ELCO. Such claims are particularly preposterous given that ILECs continue to reimburse the ELCOs for some 40-50 percent of their costs in the face of, and without offset for, the rental revenue flowing to the ELCOs from third-party attachers, including CATVs and CLECs.

III. Conclusion

The Commission can promote the deployment of advanced telecommunications services by bringing rationality to the current pole attachment regime. The Commission can do so by establishing a uniform pole attachment rate that applies to all entities that seek to attach to utility-owned poles regardless of the attacher’s own regulatory classification.

Respectfully submitted,

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²³ Joint ELCO Comments at 18-19.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of the Frontier North Inc.* was served upon the following parties of record this 29th day of August, 2013, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Cassandra Cole

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On Behalf of the Public Utilities Commission of Ohio

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