

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Frontier)	
North Inc.)	
)	
Complainant,)	
)	
v.)	Case No. 14-759-AU-CSS
)	
Ohio Power Company,)	
)	
Respondent.)	

ENTRY

The attorney examiner finds:

- (1) On April 23, 2014, Frontier North Inc. (Frontier or Complainant) filed a complaint against Ohio Power Company (AEP-Ohio). Frontier alleges that AEP-Ohio has charged unjust and unreasonable rates for attachments to its utility poles. Frontier relies upon Ohio Adm.Code 4901:1-7-23(B), which incorporates federal standards for pole attachment rates, to conclude that AEP-Ohio's pole attachment rates are unreasonably high and that Frontier is entitled to rate relief. Moreover, Frontier alleges that AEP-Ohio continues to invoice Frontier at a rate that is over three times the rate charged to Frontier's competitors.
- (2) Frontier explains that it entered into a Joint Use Agreement with AEP-Ohio for the respective use of utility poles. The agreement became effective on January 1, 1996. In October 2011, Frontier provided AEP-Ohio one year's notice of termination. Frontier expected that the parties would negotiate a new agreement. The agreement terminated on October 18, 2012, without a successor agreement in place.
- (3) Frontier states that when the parties' agreement expired AEP-Ohio began to invoice Frontier at higher rates, eventually billing Frontier at a rate of \$19.12 per pole for its 2012 attachments. Because Frontier believed that \$6.07 was just and reasonable, Frontier adjusted the 2012 invoices to the undisputed rate of \$6.07 for Frontier's attachments to AEP-

Ohio's poles and a proportionate rate of \$12.28 for AEP-Ohio's attachments to Frontier's poles. AEP-Ohio responded by sending Frontier a default notice for failure to pay the full invoiced amount. AEP-Ohio, nevertheless, expressed a willingness to negotiate a new agreement. After initiating discussions on March 14, 2014, the parties have confronted an impasse in efforts to negotiate a new agreement.

- (4) Frontier seeks a new agreement with reasonable terms and conditions. As a basis for reasonable terms and conditions, Frontier supports the use of the *Pole Attachment Order* issued by the Federal Communications Commission (FCC).¹ Relying on the FCC's *Pole Attachment Order*, Frontier recommends that if Frontier's terms and conditions are on terms comparable to other AEP-Ohio attachers, Frontier recommends that the Commission allow AEP-Ohio to charge, at most, the new federal formula for 2012. Frontier calculates that the rate would be \$6.61 for Frontier's attachments to AEP-Ohio's poles. The rate for AEP-Ohio's attachment to Frontier's poles would be \$13.39. On the other hand, if Frontier's terms and conditions for attachment materially advantage Frontier, as compared to AEP-Ohio's other attachers, Frontier recommends that the Commission allow AEP-Ohio to charge, at most, the pre-existing federal formula for 2012. Frontier calculates the rates to be \$15.03 for Frontier's attachments to AEP-Ohio's poles and \$30.44 for AEP-Ohio's attachments to Frontier's poles.
- (5) Frontier requests that the Commission order AEP-Ohio to file a copy of its existing pole attachment agreements with telecommunications carriers and cable companies so that Frontier can assess whether the terms and conditions of the parties' now terminated agreement were comparable with other attached utilities and to determine whether it will seek attachment under comparable terms and conditions in the future. As an exhibit attached to its complaint, Frontier has proposed terms and conditions that it believes are reasonable.
- (6) For relief, Frontier requests that the Commission order AEP-Ohio to file a copy of all its existing pole attachment

¹ *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, Report and Order and Order on Reconsideration (2011), *affirmed*, *American Electric Power Service Corp. v. FCC*, 708 F3d 183 (2013), *cert. denied*, 134 S.Ct. 118 (2013).

agreements, that the Commission order AEP-Ohio to provide Frontier reasonable terms and conditions for attachment to its poles, and that the Commission order AEP-Ohio to refund amounts paid by Frontier in excess of just and reasonable rates.

- (7) AEP-Ohio filed an answer to the complaint on May 14, 2014. In its answer, AEP-Ohio did not make any admissions that would resolve any material issues raised by the complaint.
- (8) Concurrently, AEP-Ohio filed a motion to dismiss. In its motion, AEP-Ohio seeks to dismiss Count Two of the complaint, in which Frontier requests a refund and an order to modify the reciprocal rental rate set forth in the parties' Joint Use Agreement for the years 2012 and 2013. AEP-Ohio argues that the parties' conduct under the Joint Use Agreement is not a service-related issue but a matter of contract over which the Commission has no jurisdiction. AEP-Ohio claims that the resolution of the issue does not require the Commission's expertise or the review of any statute, regulation, or Commission order to interpret the language of the parties' agreement. Moreover, AEP-Ohio points out that the contractual dispute is currently pending before the United States District Court for the Southern District of Ohio. Consequently, AEP-Ohio urges the Commission to defer matters pertaining to the parties' conduct under the Joint Use Agreement and a refund to the federal court.
- (9) Frontier filed a memorandum contra on May 29, 2014. Frontier asserts that the Commission has exclusive jurisdiction to hear Frontier's complaint. Frontier rejects the notion that its complaint presents a pure contract dispute. It is Frontier's position that the Commission has jurisdiction to prescribe reasonable compensation for joint use pursuant to R.C. 4905.51. To do so, according to Frontier, the Commission must analyze Ohio law and the federal provisions that it incorporates. Frontier points to Commission precedent and its general supervisory powers contained in R.C. 4905.06 and 4905.22 to support its argument that the Commission has exclusive jurisdiction to determine the reasonableness of compensation for joint use. To highlight that the complaint does not involve a contract dispute, Frontier points out that it does not allege in the complaint any breach of the agreement. Because Frontier believes that the Commission has exclusive jurisdiction in these

matters, it has filed a motion to dismiss AEP-Ohio's complaint in the federal court.

- (10) AEP-Ohio filed a reply on May 20, 2014. Although AEP-Ohio does not dispute the Commission's authority to prescribe reasonable compensation for joint use prospectively, AEP-Ohio regards Frontier's complaint as an attempt to abrogate or modify the plain terms of the parties' agreement. AEP-Ohio rejects as disingenuous Frontier's claim that it is not requesting a determination of contractual rights.
- (11) At this time, the attorney examiner finds that this matter should be scheduled for a settlement conference. The purpose of the conference will be to explore the parties' willingness to negotiate a resolution of this complaint in lieu of an evidentiary hearing. In accordance with Ohio Adm.Code 4901-1-26, any statement made in an attempt to settle this matter without the need for an evidentiary hearing will not generally be admissible in future proceedings in this case or be admissible to prove liability or invalidity of a claim. Nothing prohibits any party from initiating settlement negotiations prior to the scheduled settlement conference. An attorney examiner with the Commission's Legal Department will facilitate the settlement process.
- (12) Accordingly, a settlement conference shall be scheduled for August 12, 2014, at 10:00 a.m., in Room 1247, at the offices of the Commission, 12th Floor, 180 East Broad Street, Columbus, Ohio 43215. If a settlement is not reached at the conference, the attorney examiner may conduct a discussion of procedural issues. Procedural issues for discussion may include discovery dates, possible stipulations of facts, and potential hearing dates.
- (13) Pursuant to Ohio Adm.Code 4901-1-26(F), the representatives of the Respondent shall investigate the issues raised in the complaint prior to the settlement conference, and all parties participating in the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues. In addition, parties participating in the settlement conference should have with them all documents relevant to this matter.

- (14) The Commission shall hold in abeyance AEP-Ohio's motion to dismiss the complaint until the conclusion of any negotiations. For the settlement conference, the parties should be prepared to discuss the settlement of all issues raised by the complaint, even if the issues remain pending before the federal court at the time of the conference.
- (15) As is the case in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Public. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

It is, therefore,

ORDERED, That a settlement conference be held on August 12, 2014, at 10:00 a.m. in Room 1247 in the offices of the Commission, 12th Floor, 180 East Broad Street, Columbus, Ohio 43215. It is, further,

ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/ L. Douglas Jennings

By: L. Douglas Jennings
Attorney Examiner

jrj/vrm

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Case No(s). 14-0759-AU-CSS

Summary: Attorney Examiner Entry scheduling August 12, 2014, settlement conference; electronically filed by Vesta R Miller on behalf of L. Douglas Jennings, Attorney Examiner, Public Utilities Commission of Ohio