

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of AT&T)
Ohio to Update its Pole Attachment Tariffs.) Case No. 15-920-TP-ATA

**APPLICATION FOR REHEARING OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code, the Ohio Cable Telecommunications Association (“OCTA”) hereby files this Application for Rehearing from the May 18, 2016 Finding and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this matter. The OCTA was an active participant in this proceeding and files this application for rehearing because the Commission’s May 18, 2016 Finding and Order is unjust, unreasonable and unlawful in the following respects:

1. The Commission erred in concluding AT&T Ohio’s (“AT&T”) proposed separate administrative fee is just and reasonable when AT&T presented no evidence on the record to support its proposed fee.
2. The Commission erred in finding AT&T’s proposed administrative fee is just and reasonable without evidence in the record to determine if the costs are already recovered as part of the administrative charges portion of the annual rental fee or have been improperly excluded from the carrying charge of the annual rental fee so as to attempt to justify AT&T’s allocation of 100 percent of these costs to third-party attachers.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE
APPLICATION FOR REHEARING OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

I. Introduction

The Ohio Cable Telecommunications Association (“OCTA”) seeks rehearing of the May 18, 2016 Finding and Order (“Finding and Order”) to correct the determination made by the Public Utilities Commission of Ohio (“Commission”) approving the separate administrative fee in the pole attachment tariff proposed by AT&T Ohio (“AT&T”). The Commission found that the costs sought to be recovered through AT&T’s proposed administrative fee “are not included in AT&T Ohio’s pole attachment rate.”¹ The Commission, however, did not have evidence in the record to evaluate the costs included in the administrative fee or details of those included in the pole attachment rate. AT&T neglected to provide any justification or rationale for the proposed separate administrative fee. The only cost data AT&T provided was the required support calculation for the annual pole attachment fee. Importantly, AT&T’s development of that rate included administrative costs as an input in the carrying charge of the rate formula.² As a result, the Commission should have demanded more information from AT&T to determine that any costs recovered directly through the separate administrative fee were not otherwise recovered through the annual pole attachment fee. Alternatively, the Commission should also have considered whether the costs included in the administrative fee have been improperly excluded from the administrative costs that are included in the carrying charge of the annual fee.

¹ Finding and Order at ¶30.

² See, line Q of the pole attachment rental rate development spreadsheet included with AT&T’s May 21, 2015 filing. This is a redacted filing that does not disclose what amount of administrative costs was included in the company’s pole attachment fee because AT&T submitted that information under seal. On May 18, 2016, the Commission denied AT&T’s motion for a protective order as to all cost information filed under seal. That information is not yet part of the public record, however.

Since the administrative element of the carrying charge includes many costs that have nothing to do with pole attachments and do not benefit third-party attachers at all, it would be improper to allocate a share of these costs to cable operators and at the same time allocate 100 percent of the costs that do benefit cable operators to them as a separate charge. In all of the cases where the Federal Communications Commission (“FCC”) has addressed this issue, it has never affirmed a separate administrative charge.³ The Commission should not have done so here either due to the unmitigated and unexamined risk of double recovery.

AT&T failed to meet its burden to justify its administrative fee and neglected to present the necessary evidence for the Commission to determine whether the separate administrative fee is just and reasonable. The Commission’s ruling should be reversed and the administrative fee rejected.

II. Background

This proceeding will establish the inaugural pole attachment tariff for AT&T following the Commission’s adoption of new industry-wide pole attachment rules in Ohio Administrative Code Chapter 4901:1-3.⁴ The new pole attachment rules became effective in January 2015. The Commission required all telephone company and electric distribution utility pole owners to file tariff applications to modify their existing pole attachment tariffs to correspond with the new pole attachment rules.⁵ AT&T filed the instant tariff application in this docket on May 15, 2015.

³ See, e.g., *Texas Cable Telecomm’n Assoc. et al. v. Entergy Servs., Inc., et al.*, 14 FCC Rcd. 9138 (rel. Jun. 9, 1999) (finding that even offsetting amounts collected in separate fees from the administrative accounts used to calculate the carrying charge was insufficient to meet the FCC’s requirements and thus no fee could be levied); *Texas Cable and Telecommunications Association v. GTE Southwest Inc.* 14 FCC Rcd. 2975, 1999 WL 74143, ¶ 33 (Rel. Feb. 18, 1999) (determining that separate fees for non-recurring administrative costs would only be reasonable to the extent they represented *actual costs* for each agreement, and if, *and only if*, the amount reimbursed to the utility is not included in the accounts used to calculate the annual rate).

⁴ The new rules were adopted in *In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD.

⁵ *Adoption, supra*, Entry (February 25, 2015), as modified by Entry (April 22, 2015).

Automatic approval of the application was suspended. AT&T's tariff proposal included a new pole attachment fee, a worksheet for the development of the pole attachment fee, and also included other terms and conditions. The tariff application included the following as well:

Administrative Fees

Administrative Fees cover the cost of establishing records, databases and systems, and similar administrative procedures to accommodate an Attaching Party's requests for access to the Company's Structure. Administrative Fees are payable with Attaching Party's initial request for access. Administrative Fees are not refundable.⁶

AT&T's tariff proposed a separate administrative fee on top of the annual pole attachment rate, in the form of a nonrecurring charge of \$200 per pole attachment request or assignment.⁷ AT&T's application did not include any cost data supporting the separate administrative fee.

The OCTA, representing the cable television and telecommunications industry in Ohio, raised targeted objections to select portions of AT&T's tariff amendment application, including the separate administrative fee. The OCTA's members have existing and potential business interests in the State and in AT&T's service territory, which will be directly and substantially affected by the outcome of this proceeding. Access to the poles, conduits and rights-of-way of Ohio's public utilities is a vitally important aspect of the OCTA's members' provision of services in Ohio. That access is essential for the OCTA's members to provide a variety of communications services, including video, voice, and Internet access services, in AT&T's service territory. OCTA members are subject to AT&T's proposed administrative fee.

Ignoring the dearth of evidence to support the separate administrative fee, the Commission agreed with AT&T "that there is no improper cost recovery of an administrative fee

⁶ AT&T Tariff Proposal, Sheet 22.

⁷ *Id.* at Sheet 28.

inasmuch as these costs are not included in AT&T Ohio's pole attachment rate. Therefore, the separate administrative fee is just and reasonable."⁸ The Commission's May 18, 2016 decision results in an unmitigated and unexamined risk that AT&T's administrative fee will result in double recovery.

III. Standard of Review

Ohio Revised Code Sections ("R.C.") 4905.51 and 4905.71 authorize the Commission to determine reasonable terms, conditions, and charges for attaching any wire, cable, facility, or apparatus to poles of public utilities.

Additionally, the Commission, in adopting the new rules in Chapter 4901:1-3 stated that it is "in the public interest to ensure that not only do all attachers have nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but that all attachers are afforded such access on terms and conditions that are just and reasonable."⁹

IV. Argument

A. The Commission erred in concluding AT&T's proposed separate administrative fee is just and reasonable because AT&T presented no evidence on the record to support its proposed fee.

AT&T failed to provide any evidence or justification for its proposed \$200 separate administrative fee. Under R.C. 4903.09, the Commission is required, in all contested cases, to set forth its findings of fact and the reasons prompting the decisions reached.¹⁰ The Commission's decision to accept AT&T's proposed \$200 administrative fee as just and reasonable without any explanation or evidence is contrary to its own rules. The Commission

⁸ Finding and Order at ¶30.

⁹ *Adoption, supra*, Finding and Order at 10 (July 30, 2014).

¹⁰ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio 1608 at ¶66 (remanding an issue after finding that the Commission "never offered a response to AEP's claims and thus failed to explain its decision. This was error.").

should not have concluded, without review and analysis of the basis for the charge, whether the administrative fee could possibly be just and reasonable. And the record lacked any evidence at all from which the Commission could have determined as much.

The only evidence AT&T has ostensibly used to justify its administrative fee is an old cost study that relies upon data from last century. This study was not even presented in the case, and therefore could not have been reviewed and analyzed by the Commission. Record evidence was necessary for the Commission to conclude that the administrative fee is just and reasonable. Given the lack of evidence, the Commission's determination should be reversed.

Moreover, that alone is insufficient to establish that the administrative fee is just and reasonable on a going-forward basis. AT&T claimed that the administrative fee was developed years ago, based on a cost study that was done long before the instant pole attachment formula was adopted. It has not been presented as evidence here and has no bearing at all on what AT&T's costs are today or will be in the near future, nor does it account for how costs are allocated in the pole attachment rental formula as discussed below.

The OCTA members are negatively affected by this ruling – they will be required to pay the \$200 administrative fee every time they submit a pole attachment request to AT&T and every time there is an assignment. The Commission erred in finding the fee to be just and reasonable when AT&T failed to provide record evidence and the Commission did not present a rationale for its ruling.

B. The Commission erred in finding AT&T's proposed separate administrative fee is just and reasonable without examining whether those expenses will be recovered twice.

The Commission concluded, without explanation, that there is no improper double cost recovery with AT&T's administrative fee simply because AT&T stated those costs are not included in its pole attachment fee. But AT&T did not present any evidence to support that

assertion, or describe how those costs are accounted for in their books or explain why these costs are not properly part of the carrying charge of the annual fee where – like all other costs in the carrying charge – the fees are allocated to all customers. AT&T cannot simply pick and choose what costs it recovers directly as an “administrative fee” when it already requires each attacher to pay a proportional share of the total plant administrative costs as part of the annual pole attachment fee. There is no evidence in the record of which costs AT&T has included in the administrative fee, and whether and how it deducts those costs from the accounts it uses to calculate its pole attachment fee. Without this information, the Commission could not even begin to analyze the costs included by AT&T in each of those fees. All that was presented by AT&T were *claims* (not evidence and not cost data)¹¹ that the administrative fees were not otherwise included in the annual pole attachment fee.

The evidence presented, however, suggests otherwise. First, on its face, AT&T’s pole attachment fee worksheet includes an administrative cost component, meaning administrative costs are already included in the annual rent calculation. The Commission’s new pole attachment rules do not allow for separate administrative fees.¹² Thus further investigation by the Commission is warranted as there is no way to establish from this record that the costs included in AT&T’s proposed administrative fee are not already included in its pole attachment rate.

Second, AT&T claims that it “has investigated this claim and determined” that the costs in the administrative fee were not included in the pole attachment fee, but has not provided any

¹¹ See, e.g., *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 09-458-GA-GCR, Opinion and Order at 9 (December 16, 2000) (utility applicant seeking tariff approval did not meet its burden of proof).

¹² See, Ohio Administrative Code Chapter 4901:1-3.

evidence to support its “determination.” This claim is self-serving, and importantly provided no data, information, or documentation for the Commission to review and rely upon. AT&T has not presented any factual support for the separate fee, meaning that it has not met its burden to justify the charges.

The Commission implemented a single fee approach for pole attachments, based on the formula adopted by the FCC,¹³ which as the Commission highlighted has been deemed to be fully compensatory by the courts.¹⁴ The formula includes administrative and general expenses in the carrying charges element intended to reflect the costs incurred by the utility in owning and maintaining pole attachment infrastructure.¹⁵ Through the annual rate, derived by the formula, an attacher pays a portion of the total plant administrative costs incurred by a utility. These costs include many that have no conceivable relevance to pole attachments, such as public relations and non-product-related corporate image advertising activities, and employee activity programs.¹⁶ Attaching parties who pay the annual fee are allocated a portion of these costs under the understanding that the administrative component of the carrying charge simply includes all administrative costs, which all customers should fairly share.¹⁷ “A utility would doubly recover

¹³ See, Rule 4901:1-3-04(D).

¹⁴ Entry at 6 (April 22, 2015).

¹⁵ *In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, FCC 01-170 at ¶ 110 (rel. May 25, 2001).

¹⁶ 47 C.F.R. §32.6720.

¹⁷ “Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses.” *Cable Tel. Assoc. of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶18 (rel. Aug. 8, 2003). The FCC chose to use *total* administrative expenses, instead of limiting the carrying charges to include only pole-related administrative expenses, because doing so kept the formula simple and predictable, whereas making additions and deletions or modifications would unnecessarily complicate the methodology. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, ¶ 37 (rel. Jul. 23, 1987). “The potential for inclusion of unrelated expenses in certain accounts must be balanced with the inability to recover other minor expenses that may have a legitimate nexus to pole attachments that are included in unrelated accounts.” *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd. 653, ¶ 12 (rel. Apr. 3, 2000).

if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses.”¹⁸ The new rules in Chapter 4901:1.3 do not provide for any separate or additional fees.

Contrary to the Commission’s endorsement of AT&T’s separate administrative fee, the FCC’s general presumption is that the allocated portion of the administrative expense included in the rate formula “covers any routine administrative costs associated with pole attachments.”¹⁹ The FCC has never affirmed a separate administrative charge. FCC decisions have stricken non-recurring administrative charges, such as application fees, even where a pole owner attests it deducts those charges directly billed to the attacher for non-recurring costs from the accounts included in the pole attachment formula.²⁰ The FCC has not been persuaded by these efforts, and the Commission should not be either. A rehearing is warranted here to reject AT&T’s administrative fee on top of the annual rent.²¹

V. Conclusion

Rehearing should be granted so that AT&T’s new pole attachment tariff will be not only fully compliant with the Commission’s new rules, but also include just and reasonable fees. There is no record support for the Commission’s determinations regarding AT&T’s proposed administrative fee. The OCTA urges the Commission to reverse the rulings related thereto and reject AT&T’s proposed administrative fee.

¹⁸ *Cable Tel. Assoc. of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶18 (rel. Aug. 8, 2003).

¹⁹ *The Cable Tel. Assoc. of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶18 (rel. Aug. 8, 2003).

²⁰ *See In the Matter of Texas Cable & Telecomm Assoc. v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, ¶¶11-14 (rel. June 9, 1999).

²¹ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶37, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶24-25 (lack of record support for portion of order justifies reversal).

Respectfully submitted,

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Summary: App for Rehearing Application for Rehearing electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association