

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of AT&T)	
Ohio to Update Its Pole Attachment and)	Case No. 16-2117-TP-ATA
Conduit Rates.)	

**OBJECTIONS OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

November 21, 2016

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I. INTRODUCTION

The Ohio Cable Telecommunications Association (“OCTA”) objects to the proposed tariff filed by AT&T Ohio (“AT&T”) on November 1, 2016. Members of the OCTA will be subject to these proposed changes and, therefore, the OCTA has a direct interest in this proceeding.¹ The OCTA objects to AT&T’s proposal to charge “an ‘Incremental Foot Rate’ for each additional foot or fraction thereof occupied.”

AT&T proposes an additional pole attachment rate – the “incremental foot” rate – in this ATA filing. AT&T’s proposal ignores that the Commission’s rules are based on a presumption that attachments use one-foot of space, even though most attachments actually use far less space. To the extent that AT&T wishes to rebut the presumption that attachments use one foot of space, it must do so in a complaint case based on evidence presented. AT&T cannot use the one-foot presumption where the attachment actually uses less space, but then disregard the presumption for any attachment it deems to be occupying more space than that. Further, AT&T’s bare-bones description in the application is woefully inadequate to support the proposal; it has provided no supporting justification or rationale for an additional fee. And the fee proposal would be an administrative nightmare and thus is not just or reasonable and must be rejected.

¹ The OCTA’s motion to intervene was filed November 15, 2016, and remains pending.

II. THE INCREMENTAL FOOT PROPOSAL

In its application, AT&T introduced a new incremental foot rate as follows:²

Pole Attachment Fee – Initial

- Per pole, per year for each initial one foot of usable space occupied. \$2.44

Pole Attachment Fee – Incremental

- Per pole, per year for each incremental one foot of usable space occupied. \$2.44

. . .

In addition to the rate changes, this filing also introduces an “Incremental Foot” rate element to the pole attachment rate structure.

An attacher will be charged for each foot of space it occupies on the usable portion of the pole (e.g., typically above the 18 foot level) through the assessment of an “Initial Foot Rate” for the first foot or fraction thereof, and an “Incremental Foot Rate” for each additional foot or fraction thereof occupied. There is no charge for attachment of ancillary equipment in the “unusable” space on the pole.

A. The Commission’s rules do not permit incremental pole attachment rates.

The Commission has spent more than a year implementing new pole attachment rates for all of the public utility pole owners in Ohio pursuant to new rules adopted in Chapter 4901:1-3, Ohio Administrative Code. In all of those proceedings, the applicants proposed a single annual per-pole attachment rate and the Commission approved a single annual per-pole attachment rate per utility. In fact, the Commission approved just last month the final tariff for AT&T’s annual per-pole attachment rate under the new rules.³ All of the rates approved by the Commission, including the AT&T rate, are based on a presumption that attachments use one foot of usable space.⁴ Nothing in the Commission’s rules suggests that any utility may charge a rate based on

² AT&T Application Exhibits B and C.

³ *In the Matter of the Application of AT&T Ohio to Update its Pole Attachment Provisions*, Case No. 15-920-TP-ATA, Entry (October 12, 2016).

⁴ Rule 4901:1-3-04(D)(4), Ohio Administrative Code.

some incremental use of more than one foot of space without factually rebutting the one-foot presumption.

The Commission's rule states in pertinent part:

The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(1) . . . for determining *a maximum* just and reasonable rate for pole attachments. (Emphasis added).⁵

This language reflects the Commission's policy of a fully loaded pole attachment rate calculated based upon certain presumptions, including average pole height, and usable space and occupied space.⁶ The pole attachment rate, calculated based upon these presumptions, is the maximum rate that can be charged for a cable attachment. AT&T's Commission-approved pole attachment rate was derived from the approved formula. Establishing an incremental rate *in addition to* the Commission-approved pole attachment rate renders the one-foot presumption meaningless, and the resulting rates charged would exceed the maximum just and reasonable rate allowed under the Commission's rules.

B. AT&T has failed to justify the proposed incremental foot rate or rebut the one-foot-per-attachment presumption to justify the proposed addition.

As the applicant in this proceeding, AT&T carries the burden of proof,⁷ and must prove the reasonableness of its proposal. Here, AT&T has not and cannot meet that burden. According

⁵ Rule 4901:1-3-04(D)(2), Ohio Administrative Code. (Emphasis added.)

⁶ *In the Matter of 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, Finding and Order at ¶ 46 (Jul. 30, 2014).

⁷ *In the Matter of the Ottoville Mut. Tel. Co. for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16, Revised Code*, Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3 at *4 (“* * * the applicant must shoulder the burden of proof in every application proceeding before the Commission * * *”). See also, *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-RDR, 2009 Ohio PUC LEXIS 1170 *23 (“DEO did not meet its burden of proof to establish that its proposed incremental [operation and maintenance] costs were actually incremental to DEO's base rates”); See also, *In the Matter of the Ohio Bell Tel. Co. for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations and Practices Affecting the Same*, Case No. 84-1435-TP-AIR, 1985 Ohio PUCO LEXIS 7 at *79 (“The applicant has the burden of establishing the reasonableness of its proposals.”).

to the Commission's rule, the space occupied by an attachment is presumed to be one foot.⁸ The Commission specifically provided AT&T with an opportunity to file a complaint case if it seeks to rebut the one foot presumption, but it has not done so.⁹ AT&T cannot use the ATA process to sidestep mechanisms in place to challenge the Commission-established presumption for space occupied by a pole attachment.

Even if AT&T could properly seek to overcome the one-foot presumption in this proceeding, it has failed, because it has failed to justify or explain the need for its proposed incremental foot rate. The one-foot presumption was originally adopted by the Federal Communications Commission ("FCC") in its earliest decisions setting pole rates under 47 U.S.C. § 224.¹⁰ The FCC recognized that the space occupied by an average cable attachment is actually much less than a foot – closer to an inch.¹¹ Nevertheless, the FCC adopted the presumption that the average attachment occupies one foot in light of the "uniform practice throughout the United States[,] cable television is assigned 1 foot [of the] usable space."¹² The presumption stands even where the attachment has been overlashed.¹³ The one-foot presumption has been repeatedly affirmed in the last forty years since its original adoption, and there are no instances that the

⁸ Rule 4901:1-3-04(D)(4), Ohio Administrative Code. Although the language of that rule specifically refers to the calculation of the rate, the presumption would be meaningless if attachments presumed to occupy one foot are treated as occupying more than one foot.

⁹ See *In re 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, Finding and Order at 41 (Jul. 30, 2014) ("[T]hese presumptions are rebuttable and . . . parties may challenge these presumptions in the future on a case-by-case basis through the filing of a complaint case.").

¹⁰ See *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Mem. Opinion & Second Rep. & Order, 72 F.C.C.2d 59, ¶ 24 (rel. May 23, 1979) ("1979 Order").

¹¹ 1979 Order, ¶ 22 & n. 26.

¹² *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Mem. Opinion & Order, 45 F.R. 17009, ¶ 8 (rel. Mar. 10, 1980) ("1980 Order"), quoting Sen. Rep. No. 95-580, 95th Cong., 1st Sess. at 20 (second bracket inserted by FCC).

¹³ *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report & Order, CS Docket No. 97-151, FCC 98-20 ¶ 92 (rel. Feb. 6, 1998); *In re Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Recon., 16 FCC Rcd 12103, ¶ 49 (rel. May 25, 2001).

OCTA has found in which it has been rebutted.¹⁴ In the absence of evidence that the average attachment occupies more than one foot, the one-foot presumption continues to apply.

To rebut the presumption, AT&T would need to demonstrate (in a complaint case) that the average amount of space occupied by a party's attachment is greater than one foot. AT&T failed to provide any evidence or argument to rebut the presumption and justify its proposed incremental foot rate.

C. An incremental foot rate is impractical and administratively infeasible.

AT&T's proposed incremental foot rate introduces numerous uncertainties that the Commission's rules and the one-foot presumption help to avoid.¹⁵ It would raise questions about how to determine when more than one foot is occupied, and could require attachment-by-attachment investigation and measurement. Moreover, as attachments are rearranged and removed, the occupied space would have to be reevaluated to determine if any fraction beyond an initial foot of usable space was used. Ignoring the one-foot presumption in favor of an incremental foot rate would create an administrative nightmare for pole owners and attachers alike. An incremental foot rate would introduce complexity to the calculation that is contrary to the Commission's underlying rationale for the rules. There is no reason to implement such a novel rate structure.

III. CONCLUSION

The Commission must reject AT&T's proposed incremental foot rate. The Commission's rules do not permit multiple or incremental pole attachment rates. AT&T's application lacks any justification or rationale and it has, therefore, failed to establish that this

¹⁴ *In re Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Recon., 16 FCC Rcd 12103 ¶ 48 (rel. May 25, 2001).

¹⁵ *In the Matter of 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, Finding and Order at ¶ 46 (Jul. 30, 2014).

proposal is just and reasonable. The Commission has already established the amount of space presumed occupied by a pole attachment, and AT&T has failed to rebut that presumption. Nor has AT&T followed the complaint procedure, which is the proper manner to address the Commission-established presumption for space occupied by a pole attachment. Because AT&T's incremental rate application effectively seeks to do that, AT&T's application should be rejected on that ground as well. Finally, the incremental rate proposal would be administratively impractical and thus is not just or reasonable. For the foregoing reasons, AT&T's proposed incremental foot rate should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 21st day of November 2016 upon the persons listed below.

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Summary: Objection Objections of the Ohio Cable Telecommunications Association electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association