

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) to challenge the pole attachment rates charged by AEP-Ohio.
- (2) On July 17, 2014, AEP-Ohio filed a motion for protective order in response to Frontier's first set of interrogatories and requests for production of documents. AEP-Ohio describes the discovery requests as voluminous, oppressive, unduly burdensome, and expensive. Moreover, AEP-Ohio points out that the agreements that Frontier seeks contain confidential and commercially sensitive information. AEP-Ohio lists several examples of inquiries that it believes go outside the scope of permissible discovery. In its motion, AEP-Ohio relates its unsuccessful efforts to negotiate an agreement with Frontier to postpone discovery until after the settlement conference and how it advocated for a limited exchange of information prior to the settlement conference.
- (3) AEP-Ohio seeks an order from the Commission barring the discovery of information that is not relevant, information that is confidential and competitively sensitive, and information that would be unduly burdensome and expensive to provide. In terms of relevance, AEP-Ohio argues that most of Frontier's requests relate to the parties' previous dealings under the 1996 Joint Use Agreement. Noting that a civil proceeding is

underway in federal court, AEP-Ohio argues that the agreement is not within the Commission's jurisdiction. AEP-Ohio identifies interrogatories 2, 3, 4, 5, 6, 7, 8, 9, and 11 and requests for production 1, 2, 3, 5, 6, 7, 9, 11, 12, 13, 15, 18, 19, 20, 28, and 29 as the discovery requests that merit a protective order. AEP-Ohio believes that these requests relate to the reciprocal rental rates charged under the parties' 1996 Joint Use Agreement, and that they are not relevant to issues that are subject to the Commission's jurisdiction.

In addition to lacking relevance, AEP-Ohio argues that some of the information that Frontier seeks is confidential and competitively sensitive because the contracts contain terms and conditions with companies that are Frontier's competitors. Because AEP-Ohio and Frontier will be negotiating a new contract, AEP-Ohio contends that it is unfair to allow Frontier to have the advantage of information from other contracts. AEP-Ohio fears that Frontier will use the information against AEP-Ohio in negotiations and that Frontier will use the information to obtain an advantage over its competitors. For reasons of confidentiality, AEP-Ohio requests a protective order for requests for production numbered 4, 16, and 17.

To prevent unnecessary burden and expense, AEP-Ohio requests that it be allowed to respond to the remaining discovery requests within 20 days after this Entry.

- (4) On July 31, 2014, Frontier filed a memorandum contra and a motion to compel discovery. Frontier argues that it requires responses to its discovery requests in order to participate meaningfully in a settlement conference. At a minimum, Frontier wants copies of AEP-Ohio's pole attachment agreements with other Ohio companies so that Frontier can determine whether past attachments contain comparable terms and conditions. Moreover, Frontier intends to use the information to evaluate future attachments. Frontier also seeks to discover AEP-Ohio's rate calculations to determine the dollar amounts in dispute between the parties.

According to Frontier, federal and Ohio law entitle incumbent local exchange carriers (ILECs) like Frontier to just and reasonable rates. Just and reasonable rates, Frontier contends, are rates that are charged to other comparable attachers or, at

most, rates that are calculated using the Federal Communications Commission's (FCC) pre-existing telecommunications formula if the ILEC uses the utility poles on terms and conditions that provide it a net material advantage relative to other attachers. Frontier argues that reasonable rates can only be ascertained by knowing the applicable rates or the terms and conditions of other agreements. Frontier states that AEP-Ohio has not only refused to provide rate information and copies of agreements, but Frontier calculates from available data that AEP-Ohio's rates significantly exceed just and reasonable rates. Frontier contends that without rates and copies of agreements, it has no basis for reaching a settlement.

- (5) Frontier rejects the notion that its discovery requests are burdensome. There are only two categories of information that Frontier seeks: rates and agreements. Frontier is certain that AEP-Ohio must have easy access to its rate calculations and inputs because they are needed to invoice third parties. Furthermore, Frontier believes that AEP-Ohio can quickly produce its agreements with third parties because there are not many of them and they are required by AEP-Ohio to administer its pole attachment relationships.

Frontier also rejects AEP-Ohio's claim that its discovery requests seek information that is not relevant. To Frontier, AEP-Ohio takes a position that is inconsistent with the Commission's discovery rules. Frontier emphasizes that it is entitled to any unprivileged matter that is reasonably calculated to lead to the discovery of admissible evidence. With this broad standard, Frontier concludes that AEP-Ohio has no basis for restricting discovery.

- (6) On August 11, 2014, AEP-Ohio filed a reply in support of its motion for protective order while also opposing Frontier's motion to compel. To support its position that the agreements sought by Frontier are not relevant, AEP-Ohio relies on the Commission's decision in *In re Adoption of Chapter 4901:1-3, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Case No. 13-579-AU-ORD. In disagreement with Frontier, AEP-Ohio does not find in the law a requirement that a respondent in a pole attachment complaint case before the FCC must produce agreements upon request. AEP-Ohio's

reading of the law leads it to conclude that the requirement to produce agreements is only applicable when an incumbent local exchange carrier claims that it is similarly situated to an attacher that is a telecommunications carrier or a cable television system for the purpose of obtaining comparable rates, terms, or conditions. Frontier has not claimed to be similarly situated to any other telecommunications carrier or cable television system; therefore, AEP-Ohio concludes that neither state nor federal law applies to compel the production of agreements.

AEP-Ohio argues that the Commission has a long-standing tradition of establishing its own laws and regulations for pole attachments. To make its point, AEP-Ohio cites examples where the Commission declined to adopt federal regulations into its own regulatory framework. AEP-Ohio believes that Frontier's reliance upon federal regulations is misplaced. More specifically, AEP-Ohio contends that Frontier can not insist upon FCC default rate formulas or assert federal law to obtain confidential and proprietary agreements because the Commission has not adopted the federal regulation cited by Frontier.

AEP-Ohio asserts that agreements that are not joint use agreements differ significantly from joint use agreements. Because agreements that are not for joint use are not comparable to joint use agreements, AEP-Ohio argues that Frontier should not be entitled to them. At a minimum, AEP-Ohio urges the Commission to grant its motion for protective order for requests for production numbered 4, 16, and 17 because these requests seek agreements that are not for joint use.

- (7) On August 18, 2014, Frontier filed a reply in support of its motion to compel discovery. Frontier accuses AEP-Ohio of unilaterally imposing a stay of discovery by refusing to respond to Frontier's discovery requests. In sum, Frontier declares that AEP-Ohio has shown a disregard for the Commission's discovery rules. Frontier continues to reject AEP-Ohio's claim that Frontier's discovery requests are irrelevant or burdensome. Frontier regards AEP-Ohio's refusal to respond to discovery as merely an attempt to preserve its superior bargaining position. Furthermore, Frontier rejects

AEP-Ohio's claim that Frontier has misstated Ohio law. Frontier states that it is entitled to a pole attachment rental rate that is comparable to the rate charged its cable and competitive local exchange carrier (CLEC) competitors if it uses AEP-Ohio's utility poles pursuant to comparable terms and conditions. A review of the agreements, according to Frontier, is the only way to ensure competitive neutrality. Frontier claims that pole attachment agreements, including cable and CLEC agreements, are discoverable in FCC proceedings and should be likewise discoverable in this proceeding. Frontier concedes that Ohio has not adopted the federal statute that would make the agreements discoverable, but Frontier argues nevertheless that the reasons for relevance apply equally in this proceeding. Frontier contends that even those agreements with cable and CLECs are relevant. Without the agreements, Frontier claims that it does not know what terms and conditions apply to AEP-Ohio's cable or CLEC attachers. Frontier believes that information that pre-dates Frontier's complaint is relevant to Frontier's request for just and reasonable rates as of July 2011.

- (8) Frontier's arguments for discovery of information relating to agreements is persuasive. For the purpose of settlement, there must be some basis for determining whether the terms and conditions of its access to AEP-Ohio's poles are just and reasonable. Frontier's efforts to obtain access to other attachment agreements is a reasonable request that addresses whether Frontier is being provided access to poles under terms and conditions that are in line with comparable attachers. On the other hand, AEP-Ohio has proposed no alternative that would lead to a method of determining whether its access to poles is just and reasonable. Accordingly, the attorney examiner shall grant, in part, the order to compel and the motion for protective order such that AEP-Ohio shall produce only copies of currently effective pole attachment agreements. Responses to discovery should be provided by September 5, 2014.

The parties should note that this order is only for the purpose of compelling the production of sufficient information to facilitate settlement discussions. The settlement conference is scheduled for September 10, 2014, at 10:00 a.m. in Room 1247 in the offices of the Commission, 12th Floor, 180 East Broad Street, Columbus, Ohio 43215. This order to compel and protective

order does not reflect how these discovery issues would be ultimately decided for the purpose of admissibility at the time of hearing.

Some of the information sought by Frontier may be confidential, proprietary, and commercially valuable. The parties are, therefore, encouraged to redact agreements, execute confidentiality agreements, and take any other measures that will protect third parties and the competitive environment.

It is, therefore,

ORDERED, That, in accordance with Finding (8), AEP-Ohio produce copies of current pole attachment agreements for Frontier by September 5, 2014. It is, further,

ORDERED, That a settlement conference be held on September 10, 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 the parties and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/ L. Douglas Jennings

By: L. Douglas Jennings
Attorney Examiner

jrj/vrm

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/2/2014 3:17:04 PM

in

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

Summary: Attorney Examiner Entry granting and denying, in part, motion for protective order and motion to compel; electronically filed by Vesta R Miller on behalf of L. Douglas Jennings, Attorney Examiner, Public Utilities Commission of Ohio