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, Conduits, and Rights-of-Way by Public Utilities.	))))	Case No. 13-579-AU-ORD

THE AT&T ENTITIES' MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING

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THE APPLICATIONS FOR REHEARING

Introduction

The AT&T Entities[1] ("AT&T"), by their attorney and pursuant to O. A. C. § 4901-1-35(B), generally oppose the applications for rehearing in the captioned case that were filed by the Electric utilities[2] and Fiber Technologies Networks, L.L.C. ("Fibertech") on August 29, 2014. As noted herein, AT&T supports several of the suggestions of the Electric utilities

The Electrics' Application For Rehearing

The Electrics raise seven grounds for rehearing, as follow:

Issue 1

Rules 4901:1-3-01 through 4901:1-3-06 are unlawful because the Commission lacks the statutory authority to promulgate them.

The Electrics repeat their bold claim that the Commission has no jurisdiction to adopt pole attachment rules that affect them. Electrics, p. 1-4. The Commission properly rejected this claim in its July 30, 2014 Finding and Order ("Order"). The Electrics rely on the *Akron & Barberton* case, 165 Ohio St. 316 (1956), a half-century old case which, on its face, appears to limit the Commission's rulemaking power to procedural rules. Electrics, p. 4. The *Akron & Barberton* case is focused more on the lack of evidence supporting the order in question rather than the Commission's jurisdiction to adopt it: "In the present cause the commission presented no evidence in support of its proposed order and took the position that it was not

[1] The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Corp., Teleport Communications America, LLC, and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.
[2] The Electric utilities ("the Electrics") are Ohio Power Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, The Dayton Power and Light Company, and Duke Energy Ohio, Inc.

bound to do so." *Akron & Barberton*, 165 Ohio St. at 320. Even if pertinent here, that old precedent has surely been eclipsed by the scope and shape of modern government, which includes extensive agency rules codified in the Ohio Administrative Code. Many of the rules promulgated by the Commission, in fact, spring from its general supervisory authority over public utilities and not from specific grants of rulemaking power by the General Assembly. The Commission often cites and relies on, among other statutes, R. C. § 4905.04 as the statutory authority for its rules. *See, e.g.*, O.A.C. Chapters 4901:1-10, 4901:1-13, and 4901:1-23.

There can be no debate that the Commission has broad statutory jurisdiction over the Electrics, as evidenced by several excerpts from the Ohio Revised Code:

> The public utilities commission is hereby vested with the ***power and jurisdiction to supervise and regulate public utilities*** and railroads, ***to require all public utilities to furnish their products and render all services exacted by the commission or by law***, and ***to promulgate and enforce all orders relating to the protection, welfare, and safety of*** railroad employees and ***the traveling public***, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

R. C. § 4905.04 (emphasis added).

> The jurisdiction, supervision, powers, and duties of the public utilities commission extend to ***every public utility*** and railroad . . . .

R. C. § 4905.05 (emphasis added).

> The public utilities commission has ***general supervision*** over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code . . . .
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> The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. ***The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety***.

* * *

R. C. § 4905.06 (emphasis added). In connection with its general supervisory power over the regulated public utilities, then, the Commission has the specific power to inspect their lines and other facilities and to prescribe ***any rule or order*** that the Commission finds necessary for the protection of the public safety. The proposed rules governing pole attachments and conduit occupancy, when applied to the electric utilities, clearly fit within that statutory authority. The Electrics read a few selected statutes in a vacuum and ignore the other broad jurisdictional provisions that apply to them and govern the Commission's power relative to their operations.

Issue 2

Rule 4901:1-3-03, subparts (A) & (B), are unlawful and unreasonable because:
a) when read in conjunction with Ohio Rev. Code § 4905.54, they could subject public utilities to penalties of up to $10,000 per violation; and
b) they are not supported by record evidence in this proceeding.

Here, the Electrics raise the specter that missing a single deadline in a pole attachment work effort will result in a $10,000 forfeiture. Nothing supports this claim. The forfeiture statute is permissive ("the . . . commission *may* . . . ."), and $10,000 per violation is the maximum allowable forfeiture ("may assess a forfeiture of not more than ten thousand dollars . . . ."). Following the Electrics' logic, the forfeiture provision could be said to apply to the failure to sign a pleading filed with the Commission under O.A.C. § 4901-1-04 and to result in an automatic $10,000 forfeiture for doing so. The forfeiture provision applies to any violation of the Commission's rules, but the Commission has shown it can exercise reasonable discretion in the application of that provision, depending on the seriousness of the offense and the circumstances surrounding it.

As to the issue of record evidence to support its conclusions, the Commission properly relied on the existing record, as well as the conclusions reached by the FCC in crafting its rules, which are national in scope. While AT&T supported the incorporation of the FCC's rules into the Ohio rules with no changes (other than the addition of the mediation provision), AT&T also recognized that the Commission might see fit to tweak the FCC rules to reflect local circumstances. The end result of that process was the adoption of rules that closely follow those of the FCC's. The record supports that action.

Issue 3

Rule 4901:1-3-03(A)(4) is unreasonable to the extent it provides that a request for access "shall be deemed to be granted" if not denied in writing within 45 days because the rule would allow attaching entities to overload poles and create safety violations, thus compromising the safety and reliability of the electric distribution system.

AT&T shares the Electrics' concern about the 45-day automatic approval process. In its application for rehearing, AT&T suggested a solution to this issue: allow the parties to mutually agree to longer time frames, on a case-by-case basis. Like the Commission's own automatic approval process, the one adopted here requires the public utilities to create and adhere to internal timelines and to take timely action on a request; otherwise, it will be automatically approved. With the added flexibility provided by agreed-to extensions of time, though, in addition to the other specified exceptions, this should be a manageable process. In response to the Electrics' concern, the Commission should adopt AT&T's suggestion in this regard.

Issue 4

Rule 4901:1-3-03(A)(5)(a) is unlawful and unreasonable because it conflicts with Ohio Admin. Code 4901:1-10-17 regarding disconnection of services for nonpayment.

AT&T agrees that the clarification requested by the Electrics here would be appropriate. Electrics, pp. 8-10. The disconnection of electric power to an attaching parties' facilities should be governed by the disconnection rule and its timeframes, as reflected in the Electrics' tariffs. The removal of any facilities, in contrast, should be governed by the rules adopted here.

Issue 5

Rule 4901:1-3-03(B)(7) is unlawful and unreasonable to the extent it does not allow electric utilities to deviate from make-ready deadlines due to weather or other force majeure events because it imposes on electric utilities stricter standards in the commercial pole attachment context than are imposed upon them by the Commission under Ohio Admin. Code 4901:1-10-10(B)(4)(c) in the electric distribution reliability context.

AT&T agrees that the rule should be revised to reflect broader exceptions to the make-ready deadlines that include "major events," as cited by the Electrics and other force majeure events. Electrics, p. 11. And, as noted above, the rules should also contemplate the extension of the various deadlines by mutual agreement of the parties.

Issue 6

Rule 4901:1-3-03(B)(8) is unreasonable because it makes pole owners responsible for correcting the safety violations of third-party attachers.

AT&T agrees with the concern expressed by the Electrics in this regard. Electrics, pp. 12-13. In the first instance, the responsibility for correcting a safety violation resulting from an attachment should lie with the attaching party responsible for the violation.

Only if that party does not correct the violation within a reasonable timeframe should responsibility shift to the pole owner to correct the violation at the attaching party's expense.

Issue 7

Rule 4901:1-3-04(d) is unreasonable because:
a) it results in under-recovery of pole costs by electric utilities, thus resulting in higher electric rates; and
b) it results in electric customers being forced to cross-subsidize the operations of attaching entities.

Here, the Commission was faced with a number of policy options. It did not adopt the recommendation of the Electrics. Nor did it adopt the recommendations of AT&T or several other parties. But by adopting the single rate formula, consistent with the FCC's CATV rate formula, the Commission did not act unreasonably. It examined the various policy options, chose an appropriate one, and justified its action. The Electrics' criticism should be rejected.

Fibertech's Application For Rehearing and Request for Clarification

Fibertech raises five grounds for rehearing and requests clarification on two aspects of the adopted rules, as follow:

Issue 1

The July 30 Order is unlawful and unreasonable in that it establishes timelines for access to public utility poles for survey, estimate, and make-ready under Rules 4901:1-3-03(B)(1) through (3), O.A.C., which are too lengthy to encourage the continued success of competitive facilities-based telecommunications providers in Ohio and the rapid deployment of high-capacity broadband services in violation of Sections 4905.71 and 4927.02, Revised Code.

While acknowledging that the adopted time frames are largely reflective of those adopted by the FCC, Fibertech asks the Commission to condense the time frames. Fibertech, though, does not consider the significant burdens on the pole owners of shorter time frames for survey, estimate, and make-ready work. The FCC appropriately balanced the competing

interests in this regard, and the Commission properly followed the FCC's model in this regard. Fibertech's request should not be adopted.

Issue 2

The July 30 Order is unlawful and unreasonable in that it fails to establish a rule permitting competitive telecommunications providers to utilize temporary attachments to utility poles prior to the completion of make-ready work in violation of Sections 4905.71 and 4927.02, Revised Code.

The Commission properly rejected Fibertech's request for a rule allowing temporary attachments in adopting its Order. Order, pp. 29-30. Temporary attachments create significant administrative and operational problems, not just for the pole owner, but for subsequent attachers as well.

It is important to realize that temporary attachments, by their very nature of being temporary, are typically not as reliable and stable as a permanent attachment. In addition, guy wires for added pole stability are typically not necessary, as the attachment is only temporary. But far too often, the attaching party fails to remove the attachment, or appropriately convert the temporary attachment to a permanent attachment. This can damage the pole and decrease its life expectancy. Moreover, temporary attachments can quickly become unsafe. For example, it is common to use a metal "band" to attach facilities to the pole in a temporary situation, as opposed to drilling through the pole and using a bolt. But, Ohio's all too common freeze and thaw cycles in the winter can result in the "band" sliding down the pole and interfering with lower permanent attachments or even sliding to the ground. Either case presents a safety hazard. And, as the pole owner cannot police all the poles to ensure that attachments were property installed, temporary attachments often remain in place.

Temporary attachments can create conflicts with subsequent attaching parties who go through the permanent attachment process. If a temporary attachment is not removed at the appropriate time, subsequent attachers may be denied access to the pole, or may bear the cost for a new and larger pole, if the existing pole does not have adequate space for the additional attachment.

Given all of these issues, the Commission should not authorize temporary attachments, as requested by Fibertech, but should allow pole owners to address the terms and conditions for making temporary attachments, if they are allowed at all, in their reasonable and non-discriminatory pole attachment practices.

Issue 3

The July 30 Order is unlawful and unreasonable in that it permits a utility-approved contractor to complete make-ready only in the "communications space" in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.

The limitation set forth in the adopted rule reasonably and properly follows the limitation adopted by the FCC in 2011. The FCC summarized the remedy available to an attaching party if the make-ready work is not timely completed as follows:

> 22. Remedy: Utility-Approved Contractors. Requesters need a way to obtain access to poles if a utility does not meet the deadlines we impose. We adopt the proposal in the FNPRM and hold that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work ***in the communications space***. We require each utility to make available a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, and require that the attacher must use contractors from this list. We also seek to ensure that safety and network integrity are preserved at all costs. Thus, we require attachers that hire contractors to perform survey and make-ready work to provide a utility with an opportunity for a utility representative to accompany and consult with the attacher and its contractor prior to commencement of any make-ready work by the

> contractor. Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.

76 Fed. Reg. 26623, May 9, 2011 (emphasis added). The FCC also provided a reasonable rationale for the limitation of the "self-help" remedy to activity in the communications space. It said:

> We address those concerns by adopting two modifications to our basic timeline…The second modification to the general timeline is that the remedy for failure to meet the timeline for wireless attachments above the communications space ***is a complaint remedy rather than the self-effectuating contractor remedy*** for failure to perform timely survey and make-ready that applies to requests to attach in the communications space. Based on the record, we find the self-help remedy for survey and make-ready performance ***would not be appropriate for attachments that generally are located in, near, or above the electric space.***[3]

Based on the limitation in the FCC's rule and its clear and reasonable rationale in adopting that limitation, which this Commission reasonably decided to follow, there is no support for expanding the "self-help" remedy described above to anything other than the communications space. Fibertech's request should be rejected.

Issue 4

The July 30 Order is unlawful and unreasonable because it fails to establish timeframes for access to conduit, despite adopting definitions, assumptions, and methodologies for the calculation of conduit occupancy rates in Rule 4901:1-3-04, O.A.C., in violation of Sections 4905.71 and 4927.02, Revised Code.

Fibertech seeks to align the timeframes and requirements for conduit occupancy with those adopted for pole attachments. Fibertech, pp. 11-13. The issue of conduit occupancy was thoroughly addressed in the comments and reply comments. While the Staff's proposal would have extended the time frames and other requirements applicable to poles to conduit

[3] *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order On Reconsideration, Adopted April 7, 2011, Released April 7, 2011, FCC 11-50, ¶42 (footnotes omitted) (emphasis added).

occupancy, the Commission properly rejected this approach. [4] In its Initial and Reply Comments, AT&T addressed and opposed the expansion of the rules to include conduit occupancy.

In its initial comments, AT&T explained that Proposed Rule 3(H) posed significant issues. The FCC did not prescribe time frames applicable to conduit. The FCC closely examined the issue and decided to not prescribe timeframes. It did so for good reason, as it explained in its 2011 order. The FCC specifically sought comment on that issue (FCC 11-50, fn. 132) and declined to adopt timeframes:

> We decline to adopt a timeline for access to section 224 ducts, conduits, and rights-of-way at this time. ***Access to ducts and conduits raises different issues than access to poles, and the record does not demonstrate that attachers are, on a large scale, currently unable to timely or reasonably access ducts, conduits, and rights-of-way controlled by utilities***. We emphasize that the determination we make regarding section 224(a)(1) rights-of-way owned or controlled by a utility has no bearing on any public rights-of-way issues subject to section 253 of the Act.[5]

The FCC noted that "[b]y contrast, the record developed on the issue of timely access to poles evidences problems justifying the adoption of a pole attachment timeline." FCC 11-50, fn. 134. Here, there is simply no credible record evidence to support the application of any timelines - - and especially the same timelines applicable to pole attachments - - to access to ducts and conduit. The Commission properly followed the FCC's lead on this issue and reasonably rejected the Staff's proposed rule in this regard.

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[4] The rule proposed by the Staff provided as follows: "The time frame for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles." Entry, May 15, 2013, Attachment A, p. 9 (proposed rule 3(H)).

[5] *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order On Reconsideration, Adopted April 7, 2011, Released April 7, 2011, FCC 11-50, ¶45 (footnotes omitted) (emphasis added).

As was the case when the FCC adopted its rules in 2011, there is simply no record support for the application of any timelines - - and especially the same timelines applicable to pole attachments - - to access to ducts and conduit. In simplest terms, the reason that timeframes for access to poles cannot be adopted for conduit occupancy is that access to poles is generally identifiable by a "line of sight," i.e., you can generally see from a reasonable distance whether additional facilities may be placed on poles. That is in stark contrast to access to conduit, as the conduit is underground and its entire length cannot be seen. In addition, one must consider whether the conduit is physically capable of accepting a new cable, even assuming the conduit appears to be empty and thus available for use (and is not reserved for a maintenance spare, as allowed by AT&T Ohio's tariff).

Frequently a conduit run is not available because it has collapsed or is blocked. Whether a conduit is collapsed or blocked cannot be ascertained by a casual site survey or looking at a blueprint of the manhole. Generally, there are two ways to ascertain whether a conduit is not collapsed or blocked. One way is to insert a rod into the conduit and see whether it may traverse to the end of the conduit run. The second way is to try to install the desired cable/facility and see whether it may traverse to the end of the conduit run. If the cable or rod cannot be fed through to the end of the conduit run, the job typically must be reengineered and rerouted to avoid the unusable conduit. Or, construction crews are required to cut and dig up the street in order to place a new conduit run. Obviously, these are unforeseen and unavoidable circumstances which add significant time to the process of placing cable in the underground environment. All of this underscores why proposing, planning, and executing work in underground conduit is much more complicated than proposing, planning, and executing work

on poles. The two structures must be treated differently, and the timelines and rules applicable to poles cannot reasonably be applied to conduit.

None of these significant differences between access to poles versus conduits were thoroughly vetted in the FCC's docket. In this case, AT&T countered many of Fibertech's claims concerning access to conduit. To the FCC's credit, it specifically declined to establish rules with timeframes because not enough empirical data was provided for the record. This Commission followed that lead here and declined to adopt the rule supported by Fibertech. The Commission was correct in not adopting the Staff's proposed rule and it should not grant rehearing or revisit this issue now.

Issue 5

The July 30 Order is unlawful and unreasonable because it adopts a timeframe for the resolution of pole attachment complaints in Rule 4901:1-3-05, O.A.C., which is not reasonably calculated to provide complainants with swift resolution of their complaints and is unnecessarily lengthy, given the other timelines adopted in Chapter 4901:1-3, O.A.C., in violation of Sections 4905.51, 4905.71 and 4927.02, Revised Code.

Here, Fibertech seeks to change a 360-day window for the consideration of a pole-attachment related complaint to a small, 120-day window. Fibertech, pp. 13-15. The Commission properly adopted 360 days as the outer limit for consideration of such a complaint. In practice, some complaints may be resolved sooner. Much depends on the complexity of the issues presented. The 360-day window is clearly not unlawful or unreasonable. Fibertech's request in this regard should be rejected.

Issue 6

Fibertech requests clarification of the requirements in Rule 4901:1-3-03(A)(4), O.A.C., associated with a public utility's denial of a request for access to its poles, ducts, conduit, or rights-of-way based upon engineering standards or purposes, and clarification of the definition of "communications space" in Rule 4901:1-3-0l(F), O.A.C.

AT&T does not agree that that the rule 3(A)(4) provision requires clarification. The rule is very clear that a denial of access must include the evidence and information supporting the denial and how they relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards. Fibertech discounts several factors that may be pertinent to a denial of access, including internal company standards and the need to relocate other attaching parties' facilities that are already on a pole. All of these factors, and more, can form the basis for a denial of access. The request for clarification should be denied.

The Commission should also reject Fibertech's suggestion that the pole top be included in the definition of "communications space." Both the FCC and this Commission were careful to differentiate between the "communications space" and the pole top. Pole top attachments, while allowed, are properly subject to different procedures. These are reflected in adopted Rule 3(B)(3)(a) and (b). The Commission has appropriately distinguished between attachments in the communications space and those on pole tops, and that distinction should be preserved. Fibertech's clarification in this regard should also be rejected.

Conclusion

For all of the foregoing reasons, the Commission should rule on the applications for rehearing discussed above in the manner suggested by AT&T and should grant rehearing and amend the adopted rules in the manner suggested by AT&T on August 29, 2014.

Respectfully submitted,

The AT&T Entities

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 10th day of September, 2014 by e-mail, as noted below, on the parties listed below.

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Summary: Memorandum contra the applications for rehearing electronically filed by Jon F Kelly on behalf of The AT&T Entities