

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

FRONTIER NORTH INC.’S RESPONSE TO THE APPLICATION FOR REHEARING OF 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.

I. Introduction

Pursuant to the Public Utilities Commission of Ohio’s Entry dated September 4, 2014, Frontier North Inc. (“Frontier”) respectfully submits its Response to the Application for Rehearing of 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. (collectively, the “ELCOs”). While Frontier believes that the ELCOs’ entire Application lacks merit, this Response only specifically addresses the ELCOs’ erroneous assertions that the Commission lacks the statutory authority to promulgate the regulations set forth in Rules 4901:1-3-01 through 4901:1-3-06 and that the adoption of the FCC’s cable pole attachment rate formula in Rule 4901:1-3-04(D) is unreasonable. The ELCOs raised both of these issues previously, and, therefore, they are not the proper subject of an application for rehearing. Even if these issues were properly before the Commission, its actions in adopting the Rules were within its statutory authority and reasonable.

II. The Commission Correctly Determined That It Has Authority to Promulgate Rules 4901:1-3-01 Through 4901:1-3-06.

The ELCOs' Application rotely repeats their previously rejected assertion that the Commission lacks the legal authority to adopt Rules 4901:1-3-01 through 1901:1-3-06.¹ Because the ELCOs previously presented this claim to the Commission, it cannot serve as grounds for a rehearing.²

However, even if it was properly before the Commission, the ELCOs' argument would still fail. Their claim was and is essentially that while the Commission has the power to set forth what constitutes just and reasonable rates, terms, and conditions for pole attachments for non-utility attachers in tariff proceedings under Ohio Rev. Code § 4905.71 and for utility attachers in complaint proceedings under Ohio Rev. Code § 4905.51, it has no authority to articulate the standards by which it will determine whether those rates, terms, and conditions are just and reasonable.³ As the Commission correctly concluded in its July 30, 2014 Finding and Order, these assertions have no merit under Ohio law.⁴

Ohio Rev. Code § 4905.4 expressly vests the Commission "with the power and jurisdiction to supervise and regulate public utilities, to require all public utilities to furnish their products and render all services exacted by the commission or by law." In addition, Ohio Rev. Code § 4905.51 explicitly requires the Commission to "prescribe reasonable conditions and compensation" for joint pole use between two public utilities when those utilities are unable to agree on such terms, and Ohio Rev. Code § 4905.71 requires the Commission to "regulate the

¹ Compare Application for Rehearing of ELCOs at 1-4 and Joint Comments of ELCOs at 9-12.

² See In the Matter of the Application of United Telephone Co., No. 07-760, 2008 Ohio PUC LEXIS 106 *5 (PUCO Feb. 13, 2008) ("We find that the OCC, in its application for rehearing, has raised no new arguments for the Commission's consideration. Therefore, the OCC's application for rehearing . . . is denied.")

³ Application for Rehearing of ELCOs at 1-4; Joint Comments of ELCOs at 9-12.

⁴ *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, Finding and Order at 3-4 (July 30, 2014) (the "Order").

justness and reasonableness of the charges, terms and conditions” for non-utility attachments on poles owned by public utilities. Thus, the General Assembly has specifically delegated authority to the Commission to determine the bounds for just and reasonable charges, terms, and conditions for both utility and non-utility attachments on public utility-owned poles. And the Commission correctly held that it has the authority to prescribe mechanisms to determine those matters.

In fact, the ELCOs’ erroneous suggestion that the Commission lacks statutory authority to promulgate the Rules is belied by the Commission’s own precedent. In 2006, the Commission addressed whether it had authority to establish minimum service standards for natural gas companies.⁵ Much like the ELCOs, the Ohio Gas Association and several gas suppliers and distributors objected to the Commission’s promulgation of minimum service standards on grounds that it lacked statutory authority to do so.⁶ Rejecting their arguments, the Commission held that “courts have recognized that an administrative agency may promulgate regulations that are consistent with and predicated upon an expressed or implied statutory grant of authority.”⁷ Simply put, the Commission has properly adopted the Rules in this present proceeding as they are consistent with and predicated upon its express authority to prescribe just and reasonable charges, terms, and conditions for pole attachments under Ohio Rev. Code §§ 4905.51 and 4905.71.

⁵ *In the Matter of Amendment of Chapter 4901:1-13*, Case No. 05-602-GA-ORD, 2006 Ohio PUC LEXIS 315 (May 16, 2006).

⁶ *Id.* at *3.

⁷ *Id.* at *12; *see also DDDJ, Inc. v. Ohio Liquor Control Comm’n*, 64 Ohio App.3d 828, 831-32 (1990) (affirming the Ohio Liquor Commission’s authority to regulate liquor prices established by retail businesses as a matter of its expressed or implied statutory grant of authority).

III. The Commission's New Pole Attachment Rate Formula Is Just and Reasonable and Fully Compensatory

The ELCOs also claim the new pole attachment rate formula in Rule 4901:1-3-04,⁸ which adopts the FCC's cable rate formula, is unreasonable because it will somehow result in "cross-subsidization of attaching entities by electric utility customers."⁹ Once again, the ELCOs previously raised this issue in their original comments, and, therefore, it cannot serve as a basis for their Application.¹⁰

Of course, even if it were properly before the Commission, this claim is belied by the ELCOs' own acknowledgment "that courts have found the ... formula to be ... compensatory."¹¹ Indeed, the FCC and United States Supreme Court have both recognized that "[t]he rate formula for cable providers ... has been in place for [over] 31 years and is 'just and reasonable' and fully compensatory for utilities."¹² Moreover, the ELCOs' claim ignores the fact that the Rules authorize them collect up front the costs they incur in the form of "make-ready" work to accommodate a new attacher and when making any modifications to their facilities that directly

⁸ While not central to their Application, the ELCOs erroneously state that the new pole attachment rate formula set forth in Rule 4901:1-3-04(D) does not apply to incumbent local exchange carriers, such as Frontier. *See* Application for Rehearing at 14. In actuality, under the Rules, two public utilities with attachments on each other's poles may *negotiate* a rental rate that deviates from the rate calculated using the FCC's formula. Order at 42. However, where those negotiations are unsuccessful and result in a Complaint before the Commission, "[t]he 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." *Id.* at Attachment A, page 12 (setting forth Rule 4901:1-3-04(D)(2)).

⁹ Application for Rehearing of ELCOs at 14-15.

¹⁰ *See* Joint Comments of ELCOs at 18-19; *In the Matter of the Application of United Telephone Co.*, No. 07-760, 2008 Ohio PUC LEXIS 106 *5 (PUCO Feb. 13, 2008) ("We find that the OCC, in its application for rehearing, has raised no new arguments for the Commission's consideration. Therefore, the OCC's application for rehearing . . . is denied.")

¹¹ *Id.* at 14.

¹² National Broadband Plan, at 110 (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)).

benefit another party.¹³ Thus, the Rules, including the new pole attachment rate formula, fully compensate the ELCOs for the use of their poles by an attacher.

IV. Conclusion

To the extent the Application for Rehearing of the ELCOs simply restates arguments that they previously presented to the Commission, it is improper and may not be considered by the Commission. Even if the Commission considers the arguments set for in the Application, the record reflects that the Commission acted in accordance with its statutory authority in issuing the Order. Consequently, the Application lacks merits and should be denied.

Respectfully submitted,

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¹³ Order at Attachment A, pages 5-6, 11-12 (showing revisions to Ohio Admin. Code §§ 4901:1-3-03(B)(2) and 4901:1-3-04(E)).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Response of Frontier North Inc.* was served upon the following parties of record this 10th day of September 2014, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Cassandra Cole
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On Behalf of the Public Utilities Commission of Ohio

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Summary: Memorandum Contra The Application for Rehearing electronically filed by Ms. Cassandra F Cole on behalf of Frontier North Inc.