



**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission’s Review of Ohio Adm.    )**  
**Code Chapter 4901:1-3, Concerning Access to Poles,        )**   **Case No. 19-0834-AU-ORD**  
**Ducts, Conduits, and Right-of Way                            )**

---

**MEMORANDUM IN SUPPORT OF  
AT&T OHIO’S APPLICATION FOR REHEARING**

---

A significant issue in this case is whether the two “rebuttable presumptions” in joint-use complaint cases, extended to the ILECs in the FCC’s rule, should be incorporated into the Commission’s rule. The Staff, in proposing the language in section 4901:1-3-05(B), believed that they should. In the Entry seeking comments adopted on July 17, 2019 the Staff’s proposal was summarized as follows:

Ohio Adm. Code 4901:1-3-05 – Staff recommends that in joint use agreement complaint proceedings challenging pole attachment or conduit occupancy rates, terms, and conditions, a rebuttable presumption exists that an incumbent local exchange carrier should be treated as a non-utility attaching entity.

Entry, July 17, 2019, pp. 3-4. The Staff’s proposed rule language follows:

(B) In complaint proceedings challenging pole attachment or conduit occupancy rates established in joint use agreements, there is a presumption that an incumbent local exchange carrier (ILEC) is similarly situated to an attaching entity that is not a public utility for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that ILECs may be charged no higher than the rate determined in accordance with paragraph (D) of rule 4901:1-3-04 of the Administrative Code. A public utility can rebut either or both of the two presumptions in this paragraph with clear and convincing evidence that the ILEC receives benefits under its joint use agreement with a public utility that materially advantages the ILEC over an attaching entity that is not a public utility on the same pole.

Entry, July 19, 2019, Attachment A, p. 13.

The Staff’s proposal fairly tracked the current FCC rule, which provides as follows:

§1.1413 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with §1.1406(d)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

83 FR 46840, Sept. 14, 2018, as amended at 85 FR 64061, Oct. 9, 2020.

What is key here is that the electric utilities do not like the FCC rule, have challenged it, and sought to have this Commission reject its principles. Remarkably, they succeeded at this juncture.

The Commission failed to adopt its Staff's recommendation that it follow the FCC's lead on this issue, while it agreed to follow the FCC's lead on most others. In its Order, the Commission adopted eight specific provisions of the FCC's rules. Order, ¶ 49. Why it did not adopt section 1.1413(b) of the FCC's rules is not adequately explained or justified. See, R. C. § 4903.09. This is not rational decision-making. The Order is unreasonable in this regard. The Commission can remedy this clear error by adopting the language proposed below.

In its application for rehearing, the Ohio Telecom Association proposes adoption of a new division (C) in section 4901:1-03-05:

(C) In complaint proceedings challenging pole attachment or conduit occupancy rates established in joint use agreements that are entered into or renewed after the effective date of this division, there is a presumption that an incumbent local exchange carrier (ILEC) is similarly situated to an attaching entity that is not a public utility for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that ILECs may be charged no higher than the rate determined in accordance with paragraph (D) of rule 4901:1-3-04 of the Administrative Code. A public utility can rebut either or both of the two presumptions in this paragraph with clear and convincing evidence that the ILEC receives benefits under its joint use agreement with a public utility that materially advantages the ILEC over an attaching entity that is not a public utility on the same pole.

AT&T supports this approach, which would properly incorporate the FCC's policy in the Ohio rule.

AT&T Ohio directs the Commission to the Company's Reply Comments, filed on September 9, 2019 in which it discussed this issue at length. AT&T Ohio Reply Comments, pp. 10-14. Rather than repeat those Reply Comments, except to summarize a few points here, the Company incorporates them by reference.

Great weight should be accorded the FCC's conclusions in this regard; the Commission failed to do so – and acted unreasonably – here. In 2018, the FCC, relying on a voluminous record, amended its rules to establish a rebuttable presumption, applicable in complaint proceedings over pole attachment or conduit occupancy rates in joint use agreements, that an ILEC is similarly situated to nonpublic utility attachers. Accordingly, the FCC's rule also established a presumption, rebuttable by clear and convincing evidence, that the ILEC may be charged a rate no higher than the rate determined under its rule 1.1406(e)(2). 47 C.F.R. §

1.1413(b). Adoption of the FCC policy will, as the FCC noted, promote broadband deployment. *FCC 18-111*, ¶ 126.<sup>1</sup>

The FCC’s dual presumptions do not unduly harm the electric utilities. If an electric company can show that a particular ILEC does, in fact, receive distinct net benefits under a particular joint use agreement, it can rebut the presumption. And if the electric company cannot prove that, then the presumption will – and should – apply. But the electric utilities’ broad, unsupported general claims of net benefits to ILECs in no way support departing from the FCC’s rule (which, again, was based on a nationwide proceeding with a large record). Here, the Commission accepted those broad, unsupported general claims, ignoring the FCC’s rule, and creating a state-specific anomaly.

The Commission’s action also negates the FCC’s conclusion on the standard of proof, and the specific language of its rule. The “clear and convincing” standard comes from the FCC rule itself (47 C.F.R. § 1.1413(b)). It should be adopted here, despite the electric utilities’ objections.

During the pendency of this case, the FCC Enforcement Division has decided two pertinent cases that bear on the issues raised here. *Bellsouth v. FPL*, 35 FCC Rcd 5321, 5327 ¶12 (2020); *Verizon v. Potomac Edison*, 35 FCC Rcd 13607, 13616-18 ¶¶23-28 (2020)). These cases demonstrate that even large ILECs are entitled to a presumption for the following reasons:

- Pole ownership disparities (4-to-1 in favor of Potomac Edison, 2-to-1 in favor of FPL) continue and grow even larger, placing ILECs at an inferior bargaining position.
- Electric utilities use this superior bargaining position to prevent ILECs from terminating their Joint Use Agreements and obtain a better negotiated deal.

---

<sup>1</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, ¶ 126 (rel. Aug. 3, 2018) (“*FCC 18-111*”).

- These electric utility actions allow those utilities to charge higher rates and justify rate relief on behalf of the ILEC, as in both cases, the FCC found that the electric utility rates were unjust and unreasonable.

In adopting the Staff's proposed rule on rehearing, the Commission should also include a clarification. The electric utility should be required to demonstrate that the ILEC receives "net benefits," and not just "benefits," from the Joint Use Agreement in order to rebut the presumptions. It would be unfair to penalize an ILEC simply because it receives a "benefit" under the Agreement.

Lastly, the Commission should also correct an error in one of the adopted rules. In Section 4901:1-3-03 (B)(7) the reference to the FCC rule should be to section 1.411(j), not (g).

For all of the foregoing reasons, the Commission should grant rehearing and adopt the rule proposed here regarding complaint proceedings, along with the clarification and the correction noted above.

Dated: May 7, 2021

Respectfully Submitted,

/s/ Mark R. Ortlieb  
Mark R. Ortlieb (0094118)  
AT&T Ohio  
225 West Randolph Street, Floor 25D  
Chicago, IL 60606  
(312) 727-6705  
[mo2753@att.com](mailto:mo2753@att.com)  
(willing to accept e-mail service)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this 7<sup>th</sup> day of May 2021 by U.S. Mail and/or electronic mail on the parties shown below.

/s/ Mark R. Ortlieb

Mark R. Ortlieb

Jay S. Agranoff  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215  
[Jay.agranoff@puco.ohio.gov](mailto:Jay.agranoff@puco.ohio.gov)

Randall V. Griffin  
The Dayton Power and Light Company  
1065 Woodman Drive  
Dayton, OH 45432  
[Randall.Griffin@aes.com](mailto:Randall.Griffin@aes.com)

Diane Browning  
Sprint Communications Company L.P.  
6450 Sprint Parkway  
Overland Park, KS 66251  
[diane.c.browning@sprint.com](mailto:diane.c.browning@sprint.com)

Rebecca L. Hussey  
Crown Castle Fiber LLC  
2 Easton Oval, Suite 425  
Columbus, OH 43219  
[rebecca.hussey@crowncastle.com](mailto:rebecca.hussey@crowncastle.com)

Frank Darr  
McNees Wallace & Nurick LLC  
21 E. State Street, 17th Floor  
Columbus, OH 43215  
[fdarr@mcneelaw.com](mailto:fdarr@mcneelaw.com)

Steven T. Nourse  
Christen M. Blend  
Tanner S. Wolfram  
American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[cblend@aep.com](mailto:cblend@aep.com)  
[tswolfram@aep.com](mailto:tswolfram@aep.com)

Rocco O. D'Ascenzo  
Jeanne W. Kingery  
Duke Energy Business Services LLC  
139 East Fourth Street, 13030-Main  
Cincinnati, OH 45202  
[Rocco.DAscenzo@duke-energy.com](mailto:Rocco.DAscenzo@duke-energy.com)  
[Jeanne.Kingery@duke-energy.com](mailto:Jeanne.Kingery@duke-energy.com)

Gretchen Petrucci  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43215  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

Kristen M. Fling  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
[kfling@firstenergycorp.com](mailto:kfling@firstenergycorp.com)

Mary Fischer  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215  
[Mary.Fischer@puc.state.oh.us](mailto:Mary.Fischer@puc.state.oh.us)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/7/2021 2:41:50 PM**

**in**

**Case No(s). 19-0834-AU-ORD**

Summary: Application AT&T Ohio's Application for Rehearing electronically filed by Mr. Mark R Ortlieb on behalf of Ohio Bell Telephone Company and AT&T Ohio