**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review )

Of Chapter 4901:1-3, of the Ohio ) Case No. 19-834-AU-ORD

Administrative Code, Concerning )

Access to Poles, Ducts, Conduits, )

And Right-Way. )

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**INITIAL COMMENTS OF OHIO TELECOM ASSOCIATION**

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**August 15, 2019** **Attorneys for the Ohio Telecom Association**

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1. **Introduction**

On July 17, 2019, the Public Utilities Commission of Ohio (“Commission”) issued an entry with proposed amendments to Chapter 4901:1-3 of the Ohio Administrative Code, the chapter that addresses terms and conditions of access to poles, conduit, and rights of way by both utilities and others under R.C. 4905.51 and R.C. 4905.71. In part, the rules appear to be an effort to align Chapter 4901:1-3 with amendments to rules adopted by the Federal Communications Commission (“FCC”), particularly those regarding overlashing. However, the proposed rules retain some timing differences and do not address the availability of a one-touch make-ready (“OTMR”) process for simple attachments provided by FCC rules. Ohio Telecom Association supports the efforts of the Commission to align its rules with those of the FCC and urges the Commission to incorporate additional changes to its rules that would incorporate provisions similar to federal timelines, expand the resources needed to make attachments, and establish an OTMR process identical to the one adopted by the FCC.

1. **Overlashing**

Overlashing, the attachment of additional cable to an existing facility, is an efficient way to build out facilities using existing access. In this proceeding, one of the significant changes the Commission has proposed is the incorporation of a rule regarding overlashing that largely parallels the federal rule. Compare Proposed Rule 4901:1-3-03(A)(7) with 47 C.F.R. § 1.1415. OTA supports the Commission’s recommended inclusion of the new provision.

1. **OTMR**

In the order adopting modifications of its rules, the FCC adopted a streamlined process for simple make-ready work “to facilitate faster, more efficient broadband deployment.” *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Declaratory Ruling ¶ 13 (Aug. 2, 2018) (“FCC Third Report”). For those attachments that can be moved without a reasonable expectation of an outage or damage to facilities and do not require the splicing of any existing communication attachment or relocation of an existing wireless attachment, the new attacher can resort to the OTMR process. *Id*., ¶¶ 16-76; 47 C.F.R. 1.1411(j). The FCC’s OTMR rule is limited to simple make-ready work, places the burden on the new attacher to complete the survey of poles, shortens the timeline for make-ready work, provides for pre-construction and post-construction notification, and sets out other rights and responsibilities between the parties. *Id*. The FCC adopted this approach because it allows the party seeking access to move forward and recognizes that the new attacher will seek to operate safely and efficiently. FCC Third Report ¶¶ 25-26.

For similar reasons, the Commission should incorporate by reference the procedures set out in the FCC rule. To accomplish this outcome, Proposed Rule 4901:1-3-03 should be amended to include a new subsection (G) that states, “Notwithstanding any other provision in this rule, a public utility shall provide an attaching entity with nondiscriminatory access to any pole, conduit, or right of way owned or controlled by it under the procedures set out in Section 1.1411(j) of Title 47 of the Code of Federal Regulations.”

1. **Aligning the Time Periods under Federal and State Rules**

Although the time periods to complete steps for gaining access under state and federal rules generally are the same, there are two notable exceptions.

One significant difference from the federal timelines is contained in Rule 4901:1-3-03(B)(3)(a)(ii). This subdivision permits the utility to set the date for the completion of the make-ready process within 60 days (or 105 days for larger orders) of the proposed make-ready notification. The applicable federal rule provides for a completion within 30 or 75 days. 47 C.F.R. §1.1411(e)(1)(ii). To expedite the make-ready process, the Commission should amend Rule 4901:1-3-03(B)(3)(a)(ii) so that it is consistent with the shorter federal timeline.

Shortening the time period should not present a problem for the utility. Like the comparable federal rule, the Ohio rule already recognizes that the utility may seek relief from the rule’s completion date requirement. Rule 4901:1-3-03(B)(7) and 47 C.F.R. § 1.1411(h). Thus, an adequate remedy is available in what are likely rare instances in which meeting the proposed timeline proves too difficult.

A second area in which state and federal timelines could be aligned is the process for approving an application. The application process under the current Ohio rule provides that the utility notify the attaching entity in a timely manner if an application to attach facilities is deemed incomplete. Rule 4901:1-3-03(A)(4). “Timely” is not defined. The federal rule constrains the process by requiring notification of an incomplete application within ten days of receipt of the application. This denial then triggers shorter review periods for consideration of the refiled application. 47 C.F.R. § 1.411(c). To encourage “timely” determinations whether an application is complete, the Commission should conform Rule 4901:1-3-03(A)(4) to the FCC practice. The first sentence of Rule 4901:1-3-03(A)(4) should be removed and the following inserted:

A public utility shall notify the attaching entity within ten days if the application to attach facilities to its poles is deemed incomplete. A resubmitted application need only address the public utility’s reasons for finding the application incomplete and shall be deemed complete within five business days after its resubmission unless the public utility specifies to the attaching entity which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The attaching entity may follow the resubmission procedure as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the public utility, and in each case the deadline set forth in this paragraph shall apply to the public utility’s review.

The remainder of the subdivision would remain unchanged.

1. **Self-help**

Ohio and FCC rules provide that an attaching party may engage in “self-help” if the pole owner does not provide timely completion of the survey and make-ready work. The FCC rule, however, provides more detailed explanation of the right of the pole owner and parties with existing attachments to be present and the requirements for notification to affected parties. Compare Rule 4901:1-3-03(B)(4) with 47 C.F.R. § 1.1411(i). To fully detail the responsibilities of the attaching entity, the Commission should revise Rule 4901:1-3-03(B)(4) to read:

If a public utility fails to respond as specified in paragraph (B)(1) of this rule, an attaching entity requesting attachment in the communications space may, as specified in paragraph (C) of this rule, hire at its own expense a contractor to complete a survey. If a public utility fails to provide an estimate pursuant to paragraph (B)(2) of this rule or does not complete make ready pursuant to paragraph (B)(3)(a)(ii) of this rule, the attaching entity requesting attachment in the communications space may, as specified in paragraph (C) of this rule, hire a contractor at its own expense to complete the make-ready. An attaching entity seeking to complete a survey or make-ready under this division shall comply with the requirements of 47 C.F.R. § 1.1411(i).[[1]](#footnote-1)

1. **Clarification of Proposed Rule 4901:1-3-02(H)**

Proposed Rule 4901:1-3-02(H) provides, “A full or partial suspension of tariffed pole, duct, conduit, and rights-of-way access may also be imposed, after an application is approved under the automatic approval process, if an ex post facto determination is made that the tariff is in violation of law or commission rules.” This proposed rule is both confusing and may incorrectly assign a loss to the non-offending party and its customers.

Initially, the proposed rule is confusing since it does not identify which “tariff” is relevant to the suspension. It might be presumed that it is the tariff under which the application was approved by the automatic approval process, but that is unclear.

More fundamentally, however, the brunt of this provision may fall on the wrong party. The party with the unlawful tariff is the party providing access. Although the draft rule indicates that the suspension is conditional, the non-offending party could be denied access even though it may be providing services to third parties based on a prior approval under a now unlawful tariff. Thus, the weight of the violation is not on the party that advanced the now unlawful tariff, but on the party and customers that may be reluctantly relying on it.

To address the lack of clarity and potential to harm the non-offending party, the rule should be amended to state: “A full or partial suspension of tariffed pole, duct, conduit, and rights-of-way access may also be imposed, after an application is approved under the automatic approval process, if an ex post facto determination is made that the tariff upon which the application was made is in violation of law or commission rules. The Commission may also direct the utility to provide access under such terms and conditions as the Commission may order until such time as it approves a tariff to replace the one found to be unlawful or in violation of commission rules.”

1. **Addition of Contractors to the Approved Contractor List**

Rule 4901:1-3-03(C) provides that a public utility must make available and keep up-to-date a sufficient list of contractors it authorizes to perform surveys and make-ready work in the communications space on its poles. It also requires that an attaching entity hire a contractor from that list if the attaching entity elects to perform due to the failure of the public utility to perform the survey or make-ready work. *Id*. The Ohio rule does not permit an attaching entity to submit the names of additional qualified contractors for inclusion in the list of approved contractors.

Recognizing that contractor selection was a bottleneck in the rollout of facilities, the FCC adopted rules that have the potential to expand the pool of contractors that can perform the survey or make-ready work. FCC Third Report ¶¶ 36-51. Under section 1.1412(a) of Title 47 of the Code of Federal Regulations, the utility is required to maintain a list of qualified contractors for complex work, self-help remedies, and work above the utility space, and new and existing attachers may request additions to the list of qualified contractors. The utility is not required to maintain a contractor list for surveys and simple work, but a “new attacher may choose its own qualified contractor” that satisfies requirements as to qualifications set out in the rule. 47 C.F.R. § 1.1412(b). If the utility does not maintain a list or no contractor is available, the attacher may choose its own qualified contractor. 47 C.F.R. § 1.1412(b)(1). The utility may disqualify a contractor chosen by the attacher only “based on reasonable safety or reliability concerns related to the contractor’s failure to meet any of the minimum qualifications or available and commercially reasonable safety or reliability standards.” 47 C.F.R. § 1.1412(b)(2).

It is state policy to “[p]rovide incentives for competing providers of telecommunications service to provide advanced, high-quality telecommunications service to citizens throughout the state” and “[e]ncourage … deployment of advanced telecommunications services.” R.C. 4927.02(A)(2) and (4). To advance those policies, the Commission should include a provision in Rule 4901:1-3-03(C) similar to the federal rule in section 1.1412 of Title 47 of the Code of Federal Regulations that permits an attacher to provide qualified contractors to be added to the list of contractors authorized to perform surveys and make-ready work in the communications space under both the existing self-help provision and the proposed OTMR rule.

1. **Conclusion**

The amendments proposed in the July 17, 2019 Entry substantially improve Chapter 4901:1-03. More, however, can and should be done to revise the rules so that companies seeking to expand facilities do not face unwarranted delays or limitations on access to poles, ducts, and rights of way. The additional recommendations set out in these Comments seek to accomplish that worthwhile outcome.

Respectfully submitted,

*/s/ Frank P. Darr*

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**Certificate of Service**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission’s e-filing system will electronically serve notice of the filing of this document upon the interested parties. I hereby certify that a copy of the foregoing *Initial Comments of Ohio Telecom Association,* was served upon the following parties of record this fifteenth day of August 2019, *via* electronic transmission, hand-delivery, or first class U.S. mail, postage prepaid.

*/s/ Frank P. Darr*

Frank Darr (Reg. No. 0025469)

1. To prevent a redundancy, Rule 4901:1-3-03(C)(3) could also be deleted. [↑](#footnote-ref-1)