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

INITIAL COMMENTS OF DATA RECOVERY SERVICES, LLC

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I. INTRODUCTION

On April 3, 2013, the Public Utilities Commission of Ohio ("Commission") issued an Entry by which it gave notice that it was considering adopting a new chapter of rules in the Ohio Administrative Code specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities. This Entry further gave notice that Commission Staff would hold a workshop on April 17, 2013 to consider the proposed rules. Subsequently, on May 15, 2013, the Commission issued another Entry releasing the proposed rules of Chapter 4901:1-3 of the Ohio Administrative Code and inviting comments on said rules by June 14, 2013. This deadline was later amended to July 12, 2013. It is pursuant to this invitation that Data Recovery Services, LLC ("DRS") now submits the following comments in response to the proposed rules of Chapter 4901:1-3 of the Ohio Administrative Code.

II. DATA RECOVERY SERVICES, LLC IS AN INTERESTED PARTY

Data Recovery Services ("DRS") is an information technology firm specializing in network infrastructure including local area networks, wide area networks, and connectivity. The company's focus areas include fiber connectivity, infrastructure as a service, cloud computing, professional services, managing services, and data center services. The company manages and maintains networks in 31 states and six countries from its corporation headquarters in Youngstown, Ohio with additional offices located in Akron, Ohio and Pittsburgh, Pennsylvania. DRS owns and operates over 800 miles of fiber optics.

One of the principal lines of business of DRS is selling connectivity (and attendant cloud and data center services) to businesses in Ohio. Often, to provide these services, DRS must build fiber optic lines to connect the prospective customer to previously built DRS backbone fiber. In most cases, to build these lines DRS must contact and attach to utility-owned poles. Timeliness becomes an important factor because if the customer cannot have the service delivered in a

timely manner it will be forced to order the desired connectivity from a provider that has preexisting lines.

From a policy standpoint a number of negative results occur when a broadband provider like DRS is significantly delayed in construction to a new customer.

The first problem is that the prospective customer, when confronted with delays, may be forced to buy connectivity from the existing provider. The existing provider is usually aware of the construction difficulties and is, therefore, able to charge the prospective customer more than the customer expected to pay had DRS been able to provide the services. Further, the prospective customer is often forced into signing a three-year service contract containing significant early termination penalties. The obvious adverse effect here is that businesses in Ohio may be paying more for internet services than they should were broadband more available, and may not be able to connect to a data center such as DRS which could provide sophisticated cloud-type services for the business.

The second policy problem is that if the prospective customer cannot wait for DRS to provide services it may cancel the order and, therefore, DRS would not build the broadband connectivity thereby stifling the policy of the State of Ohio to have more broadband capability. If the customers cannot purchase the services in a timely manner the lines may never be built.

Therefore, it is essential that the Public Utilities Commission of Ohio ("Commission") promulgate rules which will enable aggressive, modern high-tech companies like DRS to provide sophisticated services to customers in a timely manner without having significant delays from the utility pole owners.

III. THE COMMISSION SHOULD ADOPT A SPECIFIC TIMELINE FOR PROCESSING POLE ATTACHMENT REQUESTS AND ENSURING TIMELY COMPLETION OF SUCH REQUESTS.

A. *Excessive Delays & Failure to Timely Process Applications/Requests*

One of the chief concerns surrounding current pole attachment access is that, in the absence of a specific and established timeline, pole attachments may be subject to excessive delays. *See In the Matter of Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, 26 F.C.C. Rcd. 5240 (April 7, 2011) ("Order"). Indeed, the Federal Communications Commission ("FCC") has recognized this problem as stemming from a variety of instances. For example, the FCC has noted that problems were caused by utility lack of timeliness from initial request through completion, pervasive and widespread delays in survey work, delays in make-ready performance, lack of coordination of existing attachers, and other issues generated by overbearing utilities. *See* Order at ¶21.

Data Recovery Services, LLC ("DRS") has encountered many of the same problems when attempting to gain access to utility-owned poles for attachment purposes. At the outset of the pole attachment process, DRS makes written requests to a utility to attach to a certain number of poles. These requests include the payment of the engineering costs associated with the pole attachments. From a timing standpoint, utility companies almost always fail to process DRS's requests in a timely manner.

In many instances, utility companies have taken more than a year to notify DRS (or other similarly situated companies) of the utility's approval of a request or of make-ready requirements. Utilities have often justified this delay as a direct result of being overburdened by applications or a lack of staff to timely process the work. The problem therein, however, lies in the fact that the utility has the applicant's money in its possession, yet the applicant cannot complete the work. Moreover, this delay causes companies like DRS to incur additional costs,

business uncertainty, and prevents the provision of service to customers for an extended period of time.

Another issue manifests itself when utility companies fail to process pole attachment applications and request in a timely manner. Utility companies generally process these requests in the order by which they are received, regardless of the size of the request. For obvious reasons, large requests require more time to process than smaller, more normal sized requests. When a company applies to attach to a quantity of poles that cannot be handled by the utility in a timely manner, the utility allows the requesting company to install their facilities on the requested poles before the utility reviews and fully processes the application. While the utility company reviews the application, which may take six months to over a year, the applying company installs their facilities wherever there is adequate space open on the pole. This results in the pole being out of compliance with National Electric Safety Code ("NESC") space requirements.

Meanwhile, when a second company, such as DRS, then requests to attach to poles on the same line, a problem develops because the pole requires make-ready performance for the second company to access the poles. The problem is that because the utility failed to review and process the first company's application in a timely manner, the first company did not follow the NESC space requirements and now the second company is billed for all of the make-ready work, which may include pole replacement. This places an immense and undue burden on the second company that is a direct result of the utility's failure to manage the work properly. This failure by the pole owner also creates safety issues with the non-NESC compliant attachments.

B. *Proposed Solutions*

As the foregoing demonstrates, a time requirement for each stage of the pole attachment process must be established at a minimum. The proposed rules of Chapter 4901:1-3 of the Ohio Administrative Code seek to establish a time requirement for normal and large sized requests as well as a slightly different time requirement for requests located within the communications space and above the communications space. While these requirements closely resemble those adopted by the FCC and represent a starting point, the Commission must go further to remedy the problems associated with excessive delays.

For example, proposed rule 4901:1-3-03 prescribes the aforementioned time requirement that begins when an attaching entity files a complete application to attach to a utility's poles. The rule establishes time requirements for survey periods, estimate periods and time for acceptance of the estimate, make-ready periods, and gives the utility an optional extensions to the make-ready period based on the size of the request. However, the rule also permits a public utility to deviate from the time requirements specified in certain vague instances when there is "good and sufficient cause," which could effectively allow public utilities to circumvent the time requirements as they currently do. If a deviation provision is to be included in the proposed rules, it must articulate and identify specific instances in which a public utility may deviate from the prescribed time requirements, and provide a defined period of time in which a public utility may so deviate.

While DRS recognizes that the "deviation" provision of proposed rule 4901:1-3-03(B)(6) mirrors the standard adopted by the FCC, it should be noted that the FCC clarified that "good and sufficient cause" may exist in certain instances to allow utlities "to cope with an emergency that requires federal disaster relief" but not for "routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up

to code; alleged lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments." *See* Order at ¶68. No such clarification or intention exists in the proposed rules as written.

Moreover, even if time requirements are established, it is important to implement an enforcement mechanism to ensure compliance with the applicable time requirements. The proposed rules would allow an attaching entity to hire a utility-approved contractor if the utility fails to comply with the proposed timeline. *See* 4901:1-3-03(B)(7) & (C). This, however, effectively does nothing to ensure that a public utility adheres to the prescribed timeline. Rather, an attaching entity must wait until the time period runs its course, and only then may an attaching entity take control of the process.

Accordingly, the Commission should consider establishing a penalty per day for each day the utility fails to adhere to the established timeline. The penalty would function like a liquidated damages provision in a contract where a set amount of "damages" would be assessed for each day the work is not completed after the expiration of the timeline. The instituion of such a penalty clause for all pole owners will provide incentive for these owners to process pole attachment requests in a timely manner, which will allow attaching entities such as DRS to effectively meet their own customer demands.

Finally, as discuss above, DRS and other attaching entitites need to have an expectation for data review from the pole owner and work completion time-frames in order to meet their customers's needs. Therefore, DRS proposes that the Commission should consider establishing the following additional standards:

- Requiring pole owners to log application requests by date and time received.

- Establishing a maximum number of poles that an attaching entity may request in one particular request. A 50-pole maximum would be reasonable to allow the pole owners to process requests and complete make-ready performance in a timely manner.
- Set an engineering cost per pole to provide for transparency and allow the pole owner to start the process.
- Establish a 30-day survey period in which the pole owner must notify the attaching entity of approval.
- Establish a 10-day period in which an attaching entity may review and accept the pole owner's estimate, and an additional 10-day period if the attaching entity disagrees with the pole owner's estimate to allow for settlement and engineering adjustments.
- Provide for a 60-day make-ready period at most, which is consistent with the proposed rules. It should be noted that other states, particularly New York and Connecticut, have adopted a 45-day make-ready period.
- Ensure that NESC space requirements are satisfied.
- When an attaching entity completes all work, require a post inspection to ensure the pole owner that all poles meet NESC space requirements.

IV. THE COMMISSION SHOULD REQUIRE COSTS ASSOCIATED WITH POLE ATTACHMENTS TO BE BORN PROPORTIONATELY BY THE "COST CAUSER".

A. *Disproportionate and Improper Cost Sharing*

Pole replacement costs are a large component of the make-ready requirements for pole attachments, and pole owners engineering make-ready for attaching entities such as DRS require that any cost associated therewith will be born by the attaching entity. This creates two similar

situations in which costs are inappropriately allocated to the wrong party, which forces smaller companies who are "last to the table" to bear the burden of inflated and disproportionate costs.

The first scenario is present when a new attaching entity discovers that the requested poles have existing clearance violations from other companies that previously attached, which frequently result when no post inspections were performed when these companies applied to attach to the poles. When this occurs, the poles often times have adequate space to accommodate the new entity without replacing the pole so long as the previous companies' existing facilities that were not installed according to NESC space requirements are properly adjusted. Had the pole owner conducted a post inspection, this issue would have been avoided.

A second scenario occurs when a pole requires replacement because there is not enough space available to meet the NESC space requirements. The issue is that the problem existed before the last company applying for attachment on the pole installed its facilities. Neverthless, pole owners are requiring the next attaching entity who requests access on the pole to pay for the complete pole replacement. Essentially, because the pole owner failed to recognize this fact when the previous company made application, the burden is being placed on the wrong company. This has increased pole attachment costs for DRS for years.

The proposed rules recognize these two issues and have attempted to address them in 4901:1-3-04(G). Specifically, this rule will require costs of modifying a facility to be proportionately shared by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. However, the rule goes on to clarify that:

> a party with a preexisting attachment to a pole, conduit, duct, or right-of-way shall not be required to bear **any** of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated **solely** as a result of an

additional attachment or the **modification of an existing attachment** sought by another party. (emphasis added).

Under this standard, the rule does not require a cost-causing entity that has attachments on poles that are not NESC compliant to bear any costs so long as the adjustment or modification results from a subsequent attaching entity. Essentially, the rule does not go far enough.

B. *Proposed Solution*

The Commission should expand upon proposed rule 4901:1-3-04(G) to require the actual "cost causer" to pay for the costs associated with the make-ready work and/or pole replacement. Pole owners are frequently at fault because they failed to conduct a post inspection to ensure NESC space requirements were met. Companies like DRS are paying a post inspection cost to pole owners/utilities, and the utilities should be notifying the preexisting companies of the post inspection to help protect against a pole dispute.

However, the real problem is the "cost causer" because when a utility is challenged, its defense is that it has no duty to look back in time and determine who the actual "cost causer" was. This results in the last attaching entity shouldering 100% of the cost if it wants to attach to the pole. If a preexisting entity is the actual "cost causer" that necessitates an adjustment or a pole replacement, then the preexisting entity should be required to proportionately share in the costs associated with said adjustment or pole replacement regardless of whether the adjustment or pole replacement was brought about by a new attaching entity. Presently and as the proposed rule is currently written, a "cost causer" can shift costs it rightfully should bear to an attaching entity, which places a heavy burden on companies like DRS that inhibits their ability to meet their customers's needs.

Finally, the Commission should require pole owners/utilities to furnish a breakdown of costs to attaching entities when requested. As stated above, pole replacement cost is a large part

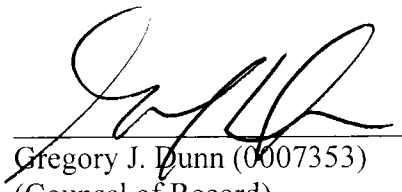
of the make-ready requirements. When a pole requires replacement, the old pole has an in-place value that should be created against the value of the new pole being installed. Attaching entities like DRS never see the created value when paying for the pole installation. Frequent requests are made for a breakdown of costs so the attaching entities can assure that they are paying the proper amount for the work. Presently utility companies will not give a breakdown on any of this cost when a challenge is made. This needs to be addressed as such transparency will help to ensure that attaching companies are not being overcharged for costs and, as a result, will help foster the expansion of broadband access.

Moreover, DRS supports the comments filed by OneCommunity in this proceeding. Allowing for non-discriminatory access to poles, ducts, conduits, and rights-of way, as well as the establishment of a universal time requirement and rate structure is essential to the deployment of high-speed broadband.

V. CONCLUSION

It is essential that utility companies (pole owners) take cognizance and understand that the issues that exist with broadband expansion are not going to improve unless they are required to have a specific documented process that places an equal importance with other types of work. It is not easy for pole owners in today's environment to control the workflow unless a process is created to place the proper responsibilities on all companies associated with pole attachments. We each have requirements to meet the goals set by our company's customer demands. In addition to the foregoing, the Commission should consider establishing a subcommittee of professionals in the industry of joint use to review and establish a set of minimum standard operating rules and penalties for all companies to follow, not only for the pole owners, but any company applying to operate on poles in the state of Ohio.

Respectfully submitted,



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