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**

JOINT COMMENTS 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.

On May 15, 2013, the Public Utilities Commission of Ohio (the "Commission") entered an Order stating that the "Commission is considering adopting a new chapter of rules, in Chapter 4901:1-3, O.A.C., specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities." The Commission attached the text of proposed Chapter 4901:1-3, O.A.C. (the "Proposed Rules") to its May 15, 2013 Order, and ordered that all interested persons file comments and reply comments on the Proposed Rule by June 14, 2013 and by July 1, 2013, respectively. On May 30, 2013, 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. (the "Electric Utilities") filed a Joint Motion for Extension of Time to File Comments. On June 4, 2013, the Attorney Examiner entered an Order granting the Electric Utilities' motion for extension, and setting a new deadline for initial comments of July 12, 2013, and for reply comments of July 30, 2013. Pursuant to the Commission's Orders of May 15, 2013 and June 4, 2013, the Electric Utilities now respectfully submit the following comments on the Proposed Rules:

INTRODUCTION

The Electric Utilities

The Electric Utilities are investor-owned electric utilities collectively serving approximately 4.8 million electric service customers throughout the state of Ohio.

The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "FirstEnergy Companies"), collectively serve 2,000,000 electric service customers. The FirstEnergy Companies have approximately 114,000 miles of distribution lines and own approximately 1.4 million poles. In addition to their own poles, the FirstEnergy Companies' facilities are attached to approximately 185,000 poles owned by incumbent local exchange carriers ("ILECs"). The FirstEnergy Companies have approximately 622,000 third party attachers, and approximately 306,000 ILEC attachments, in addition to jointly owned poles. There are fourteen (14) different ILECs, each with its own set of franchises and service territories, which operate alongside of the FirstEnergy Companies within portions of the FirstEnergy Companies' certified service territories.

Duke Energy Ohio, Inc. ("Duke Ohio") provides electricity to approximately 690,000 customers. Duke Ohio owns approximately 8,300 miles of overhead distribution lines, 4,000 miles of underground distribution facilities, and approximately 249,000 poles in the state of Ohio. Further, Duke Ohio facilities are attached to approximately 71,000 ILEC-owned poles. There are six (6) different ILECs which operate within portions of Duke Ohio's certified service territory. With regard to poles jointly used by Duke Ohio and the ILECs within its service territory, 66% are owned by Duke Ohio and 34% are ILEC-owned. There are approximately 369,000 third-party attachments to Duke Ohio poles.

The Dayton Power and Light Company ("DP&L") delivers electricity to approximately 571,000 electric service customers in the state of Ohio. DP&L owns approximately 18,200 miles of distribution lines and approximately 347,100 poles. In addition to its own poles, DP&L's facilities are attached to approximately 40,100 ILEC-owned poles. There are eight different ILECs operating in DP&L's service territory.

Ohio Power Company ("AEP Ohio") serves approximately 1,500,000 customers within the state of Ohio. AEP Ohio owns approximately one million poles in Ohio. AEP Ohio is attached to approximately 83,000 ILEC poles. ILEC's are attached to approximately 350,000 AEP Ohio poles. AEP Ohio has another 590,000 attachments on its poles that are primarily cable television ("CATV") attachments but also include competitive local exchange carrier ("CLEC") attachments and other third-party attachments such as governmental entity attachments. The total annual cost of maintaining AEP Ohio's pole plant is approximately $98 million per year.[1] AEP Ohio currently recovers approximately 15.5% of this annual cost from parties attaching to AEP Ohio poles (primarily ILECs, CLECs, and CATV).

The Electric Utilities' Position

The Electric Utilities respectfully request that the Commission reconsider adoption of some or all of the Proposed Rules. As an initial matter, the Proposed Rules may be a solution in search of a problem. The existing statutory and regulatory framework governing joint use and pole attachments in Ohio has for decades provided certainty for pole owners and attachers through Commission oversight over joint use agreements and pole attachment tariffs. This framework has proven more than sufficient to govern those limited situations where disputes

[1] Calculated by multiplying the annual per pole cost (as determined in accordance with the Federal Communications Commission's methodology) by the total number of AEP Ohio distribution poles.

arise, and has not discouraged the deployment of broadband or other communications services. Moreover, there does not appear to be a factual record of any sort—let alone a substantial factual record—to support the sea change embodied by the Proposed Rules. In short, the Electric Utilities request that the Commission refrain from fixing something that is not broken.

Though the Electric Utilities believe the comprehensive rules proposed by the Commission are unnecessary and unsupported by a record of need or propriety, there are a number of provisions the Electric Utilities would nonetheless support in the event the Commission intends to move forward with adopting new pole attachment regulations. For example, the Electric Utilities support those Proposed Rules that reserve to electric utilities the authority to make final determinations regarding attachment requests where such attachments would threaten the safety and reliability of the electric utility's infrastructure, and those that encourage the mediation of pole attachment disputes. There are also provisions of the Proposed Rules that are non-objectionable to (even if not enthusiastically supported by) the Electric Utilities.

The Electric Utilities, though, urge the Commission to reconsider three key aspects of the Proposed Rules: (1) the promulgation of rules governing the relationship between ILECs and electric utilities, which rules appear to grant rights to ILECs that surpass even those conferred by the Federal Communications Commission ("FCC"); (2) the wholesale adoption of the FCC's telecom and cable rate formulas, which are largely the product of federal statutory restrictions that do not exist under Ohio law; and (3) the wholesale adoption of the FCC's make-ready deadlines which, given the scope of applicability of the Proposed Rules, would actually place greater burdens on the Electric Utilities than the FCC rules. Specifically, the Electric Utilities request that the Commission: (1) clarify that the joint use and joint ownership relationships

between ILECs and electric utilities are excepted entirely from the Proposed Rules; (2) adopt the unified, modified rate formula proposed by the Electric Utilities herein; and (3) delete or modify the proposed make-ready deadlines to recognize the operational realties facing the Electric Utilities. The Electric Utilities also request that the Commission closely scrutinize the important issue of whether it possesses the statutory authority to promulgate the Proposed Rules.

SUMMARY OF COMMENTS

Overview

The Electric Utilities urge the Commission to reconsider the adoption of the Proposed Rules, which the Electric Utilities view as unnecessary and unwarranted. Under the current statutory and regulatory scheme in Ohio, there have been very few pole attachment disputes that have resulted in complaints before the Commission. In addition, several of the Electric Utilities have, within the past few years, proposed new pole attachment tariffs, after negotiating with cable and telecommunications providers, which have been acceptable to both the Electric Utilities and the attachers, and have been approved by the Commission. Further, the Electric Utilities do not believe that Ohio's current statutory and regulatory scheme is in any way hindering the deployment of broadband, as the Electric Utilities continue to receive a steady stream of requests for attachments to deploy broadband, and broadband build-outs are ongoing in the Electric Utilities' service territories.

However, if the Commission feels compelled to promulgate new regulations governing pole attachments beyond those limited regulations that it has previously adopted, the Electric Utilities urge the Commission to reconsider three aspects of the Proposed Rules.

Joint Use Relationships

First, the Commission should not undertake regulation of the rates, terms, and conditions of access by electric utilities and ILECs to each other's poles. If adopted, the Proposed Rules may inadvertently provide rights to ILECs which far exceed those granted under the federal regulations, including the right of mandatory access to electric utilities' poles and entitlement to the telecom rate.[2] The ILEC/electric utility relationship is fundamentally different than the relationship that either of those types of entities has with CLECs or cable television providers. The relationship between ILECs and electric utilities is analogous to a joint venture, in which both entities have invested in pole infrastructure, and have contracted to set and maintain a certain percentage of the parties' joint use poles. In contrast, the relationship between an ILEC or electric utility and a CLEC or cable television provider is more akin to a landlord- tenant relationship, wherein the attacher tenant rents space on the owner's poles.

Based on the May 15, 2013 Order, it does not appear that the Commission intends to make radical changes to the ILEC/electric utility relationship, but the Proposed Rules could be construed to create that result absent clarification. These new regulations should not be construed such that ILECs (or for that matter electric utilities) could terminate or disregard their obligations under joint pole use agreements and suddenly opt to be treated as CLECs or cable television providers, which have never undertaken the obligations of pole ownership. The Commission should allow joint use agreements to continue to govern the relationships between

[2] In the Commission's Common Sense Initiative Business Impact Analysis regarding the Proposed Rules, the Commission states that the Proposed Rules differ from the FCC's regulations in two noteworthy ways: (1) by encouraging parties to mediate pole attachment disputes and (2) by making clear that the Proposed Rules apply equally to both attachments to poles and to conduit occupancy. Because the Proposed Rules appear to grant ILECs a mandatory right of access and a right to the proposed telecom rate—two rights that ILECs do not have under the federal statute and accompanying regulations—the Electric Utilities question whether the Commission intended to grant such rights to ILECs, given the aforementioned statement of the Commission in its Business Impact Analysis.

electric utilities and ILECs, and Ohio Rev. Code §§ 4905.48, 4905.51 will continue to allow Commission oversight regarding such agreements where either the ILEC or the electric utility (each a public utility under Ohio law) believes that the rates, terms or conditions of attachment proposed by the other are unjust or unreasonable.

Rate Formula

Second, the Commission should not adopt the FCC's rules regarding convoluted and separate rates for telecommunications and cable attachments. Instead, the Electric Utilities urge the Commission to adopt a unified rate formula, as proposed *infra*, that (1) equitably distributes pole costs based upon the burdens that attaching parties place on poles and the costs such attachers avoid by not having to build their own pole networks, and (2) does not result in the cross-subsidization of the cable and telecommunications industries by electric rate payers. The Electric Utilities do not object to use of the FCC's long-standing methodology for calculating the "Net Cost of a Bare Pole" and the "Carrying Charge Rate," as incorporated in the Proposed Rules. However, the Electric Utilities propose that the Commission adopt a single rate formula that does not differentiate between the type of service provided over a particular attachment, because the vast majority of attachers are now providing both cable and telecommunications services (among other broadband-enabled services). In addition, the rate formula proposed herein dispenses with the artificial multipliers included in the federal formula. The Electric Utilities' proposed rate formula also differs from the federal formula in that it allocates the communications worker safety zone—where neither high voltage electric lines nor communications lines may be placed—as unusable (or common) space. The Electric Utilities' proposed revisions to the rate formulas would result in a single, easy-to-compute attachment rate formula that does not unfairly and negatively impact electric ratepayers.

Make-Ready Deadlines

Third, the Commission should not adopt the FCC's make-ready timelines. For decades, access to public utilities' poles has been governed by tariffs and joint use agreements, which the Commission has the authority to review, pursuant to Ohio Rev. Code §§ 4905.51, 4905.71, and there is no reason to believe that the current system should be overhauled. The Proposed Rules' imposition of inflexible make-ready deadlines upon electric utilities prioritizes the deployment of cable, television, and information services over the safety and reliability of the electric utilities' pole infrastructure and the power grid. Further, the Proposed Rules are unfair in that they fail to provide safe harbors for pole owners that cannot meet the deadlines due to factors beyond their control, including weather conditions, private property issues, and the unresponsiveness of existing attachers.

Should the Commission nevertheless proceed with imposing the FCC's artificial and overly aggressive make-ready deadlines, the Commission should revise those deadlines, as discussed *infra*, to: (1) accommodate utility operational constraints; (2) to recognize additional instances in which the deadlines are inapplicable; and (3) to reduce the heavy burden on utilities that will result from implementation of the proposed deadlines. The Commission should also clarify that the make-ready deadlines are only applicable to attachments by cable television operators and telecommunications carriers, as opposed to any attachment by any attacher.

Provisions of the Proposed Rules Supported by the Electric Utilities

The Electric Utilities appreciate the Commission's inclusion of certain provisions in the Proposed Rules that will help to ensure the safety and reliability of the Electric Utilities' infrastructure while still accommodating requests for attachment. The Electric Utilities support the requirement in proposed O.A.C. 4901:1-3-03(C) that an attaching entity availing itself of the

self-help contractor remedy for survey or make-ready work choose a contractor pre-approved by the pole owner and allow a representative of the pole owner to accompany and consult with that contractor. The Electric Utilities believe that it is absolutely essential, as set forth in proposed O.A.C. 4901:1-3-03(C)(4), that an electric utility's consulting representative has the absolute right to make final decisions to deny attachment requests on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes. The Electric Utilities further support the Commissions' inclusion in the Proposed Rules of O.A.C. 4901:1-3-06, which provides a forum for informal resolution, through mediation or arbitration, of pole attachment disputes. The Electric Utilities hope that this provision will encourage relatively swift and inexpensive resolution of certain pole attachment disputes which might otherwise be resolved through costly and time-consuming complaint proceedings.

Statutory Concerns

Though the Electric Utilities support certain of the Commission's Proposed Rules, as noted above, the Electric Utilities are concerned that the Commission may lack statutory authority to promulgate the Proposed Rules. In the Commission's Common Sense Initiative Business Impact Analysis regarding the Proposed Rules, the Commission states that the Ohio statutes authorizing the Commission's adoption of the Proposed Rules are Ohio Rev. Code §§ 4927.03 and 4927.15. Ohio Rev. Code § 4927.03, though, constitutes a list of services over which the Commission *does not* have authority. That statute provides, for example, that the Commission has no authority over certain telecommunications services, including interconnected voice over internet protocol-enabled ("VOIP") services, wireless services, or resellers of wireless

services, with certain exceptions. Ohio Rev. Code § 4927.03 contains no statement authorizing the Commission to promulgate rules relating to pole attachments.

Ohio Rev. Code § 4927.15, the other statute cited by the Commission as the basis for its authority to promulgate the Proposed Rules, only gives the Commission the authority to adopt regulations related to telephone companies. That statute provides:

> The rates, terms, and conditions for 9-1-1 service provided in this state by a telephone company or a telecommunications carrier and **each of the following provided in this state by a telephone company** shall be approved and tariffed in the manner prescribed by rule adopted by the public utilities commission and shall be subject to the applicable laws, including rules or regulations adopted and orders issued by the commission…:
>
> …
>
> (3) Pole attachments and conduit occupancy under section 4905.71 of the Revised Code….

Ohio Rev. Code § 4927.15 (emphasis added).

Though not specifically cited in the Business Impact Analysis as the statutes "authorizing the Agency to adopt this regulation" the Commission also relies upon Ohio Rev. Code §§ 4905.51 and 4905.71 to support adoption of the Proposed Rules. Both statutes, though, appear to support either ad hoc regulation or tariff-based regulation (i.e. regulation by exception), as opposed to generic rule-based regulation. Ohio Rev. Code § 4905.51, which addresses the joint use relationships between ILECs and electric utilities, provides as follows:

> Every public utility having any equipment on, over, or under any street or highway shall…for a reasonable compensation, permit the use of such equipment by any other public utility whenever the public utilities commission determines, as provided in section 4905.51 of the Revised Code, that public convenience, welfare, and necessity require such use or joint use, and that such use will not result in irreparable injury to the owner or other users of such equipment or any substantial detriment to the service to be rendered by such owners of other users.
>
> **In case of failure to agree upon such use or joint use, or upon the conditions or compensation for such use or joint use, any public utility may apply to the commission**, **and if after investigation** the commission ascertains that the public

> convenience, welfare, and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service to be rendered by such owner or other users, **the commission shall direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use.**

(emphasis added). Thus, the Commission's authority to "prescribe reasonable conditions and compensation for such joint use" appears to require as conditions precedent a "failure to agree" upon the terms of joint use and "appl[ication] to the commission" by one party or the other.

Similarly, Ohio Rev. Code § 4905.71, which addresses the relationship between telephone and electric utilities on the one hand, and non-utility attachers on the other hand, states:

> Every telephone or electric light company that is a public utility…shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or placement of same in conduit duct space, by any person or entity other than a public utility that is authorized and has obtained, under law, any necessary public or private authorization and permission to construct and maintain the attachment, so long as the attachment does not interfere, obstruct, or delay the service and operation of the telephone or electric light company, or create a hazard to safety. **Every such telephone or electric light company shall file tariffs with the public utilities commission containing the charges, terms, and conditions established for such use**.
>
> **The commission shall regulate the justness and reasonableness of the charges, terms, and conditions contained in any such tariff, and may, upon complaint of any persons in which it appears that reasonable grounds for complaint are stated, or upon its own initiative, investigate such charges, terms, and conditions and conduct a hearing to establish just and reasonable charges, terms, and conditions, and to resolve any controversy that may arise among the parties as to such attachment.**

(emphasis added). Thus, under § 4905.71, the trigger for the Commission's authority to "regulate the justness and reasonableness of the charges, terms, and conditions" appears to be either the filing of a tariff or complaint.

The Commission's historical approach to regulating joint use and pole attachments has been consistent with the complaint-based and tariff-based regulatory framework outlined in Ohio Rev. Code §§ 4905.51 and 4905.71. From the Electric Utilities' perspective, this ad hoc approach has served all stakeholders and their Ohio customers/ratepayers well. Though, as noted above, there are certain provisions of the Proposed Rules the Electric Utilities support (and others the Electric Utilities view as non-objectionable), the Electric Utilities also urge caution as the Commission considers a dramatically new approach, especially considering the success of the Commission's past approach.

DISCUSSION

I. THE PROPOSED RULES SHOULD NOT APPLY TO ATTACHMENTS MADE BY ELECTRIC UTILITIES AND ILECS TO EACH OTHER'S POLES.

The Commission needs no new regulations to oversee ILEC and electric utility relationships. The provisions in the Proposed Rules that are designed to ensure that voluntary contracts remain the primary means of defining rights and obligations are a good start, but need additional modifications to achieve that result by explicitly excluding the ILEC/electric utility relationship from the Proposed Rules.

ILECs and electric utilities are both public utilities in Ohio subject to the full array of Commission powers; they both have franchise rights and obligations; they both have privileges to site facilities along the public right-of-way; they both have rights to condemn private property as needed for public utility use. Their rights and obligations are spelled out in detailed joint use or joint ownership agreements that are already subject to the Commission's oversight. Although these contracts have existed for many decades, there have only been a handful of disputes that have been taken to the Commission for resolution. The absence of a significant number of complaints to the Commission by ILECs or electric utilities against eachother should be viewed

as indicating that the existing regulatory and contractual approach has worked well. In the rare circumstance where a dispute does arise between these two types of utilities, the Commission has the authority to resolve those disputes pursuant to Ohio Rev. Code §§ 4905.48 and 4905.51.

The ILEC/electric utility relationship is fundamentally different from the relationship that either has with other entities that typically own no poles but seek to attach to ILECs' or electric utilities' poles to provide telecommunications, cable television, internet, or other services. The Proposed Rules contain language that appears to recognize the importance of retaining the historical ILEC/electric utility relationship and joint use agreements, but then blurs the distinction by apparently giving ILECs and electric utilities the opportunity to convert their relationship into an owner/attacher relationship subject to the same charges and processes that are applied with respect to non-utility attachers. The Electric Utilities urge that the Proposed Rules, if adopted, explicitly provide that Commission actions with respect to ILEC/electric utility relationships will continue to be governed by Ohio Rev. Code §§ 4905.48 and 4905.51, and that the Proposed Rules do not apply to that relationship.

The Proposed Rules could radically upset the traditional and well-operating relationships between public utilities and also has the potential to restrict the Commission's authority to regulate those relationships. The rules as proposed appear to invite public utilities to terminate their existing agreements, then seek to have their "attachments" on the other public utility's poles regulated by the Commission under restrictions that appear to impose a requirement on the Commission to apply certain specific formulas without regard to any other public interest factors. To understand how this result could occur, it is necessary to examine the provisions of proposed O.A.C. 4901:3-04.

The Proposed Rules include what appears to be a strong statement in support of maintaining the voluntary contracts between electric utilities and ILECs, stating in proposed O.A.C. 4901:1-3-04(B) that: "Rates, terms and conditions for non-discriminatory access to public utilities poles, conduits, and right-of-way by another public utility shall be established through negotiated agreements." But read in context with other parts of the same section, that statement loses much of its meaning. Proposed O.A.C. 4901:1-3-04(D)(2) states that if parties fail to reach an agreement, the Commission will resolve disputes by applying the FCC formulas based on usable and unusable space and certain rebuttable presumptions. This appears to imply that the FCC formulas would be applied even as between two public utilities operating under a joint use agreement if there is a "dispute" between them. Moreover, it invites a public utility to declare that such a dispute exists for the sole purpose of having the formula rates applied.

As discussed *infra*, the proposed formula rates have flaws even as applied to non-public utility attachers. But they make no sense at all in the context of two public utilities operating under a joint use agreement. A typical joint use agreement may be based on contractually assigning responsibilities for the ILEC to set and maintain, for example, 40% of the joint use poles, and the electric utility to set and maintain 60% of the joint use poles (another common ownership ratio is 50% each for the ILEC and electric utility; such ownership ratios vary by contract). Importantly, the poles set by each party under these agreements are of sufficient height and strength, and with the appropriate clearances, to accommodate both parties. By entering into such agreements, the parties are able to avoid construction of redundant pole networks (and the accompanying expense and aesthetic nuisance associated with redundant

networks).[3] Contractually, payments between an electric utility and an ILEC may be computed on a per joint use pole basis (usually netted so that only one net invoice is issued) or, alternatively, may be computed based on the deficiency between the number of joint use poles owned by an entity versus the target percentage ownership level for that entity in the contract. In either event, the effects are essentially the same – both utilities have committed to set and maintain a certain percentage of joint use poles, and the net payments from one to the other are made to compensate the public utility that is providing benefits in excess of its contractual commitments to the other public utility.

By way of contrast, the relationship between a pole owner and a typical attacher is analogous to that of a landlord and tenant. The tenant attacher promises to abide by certain rules and pays rent to the pole owner. The tenant attacher also pays for make-ready work necessary to accommodate its attachment because the pole network is not specifically built on the front-end to accommodate third-parties. The relationship between electric utilities and ILECs operating under joint use agreements, on the other hand, is more akin to a partnership or joint venture arrangement among investors. A regulatory structure designed to establish the proper level of "rent" to be paid by a tenant to an owner is simply an improper paradigm to apply to two partners/investors that share ownership obligations with the corresponding benefit of a pole network built-to-suit.

Joint use agreements between public utilities differ practically from pole license agreements between public utilities, on the one hand, and non-public utility attachers, on the other, in that parties to joint use agreements are able to construct much more extensive facilities

[3] The construction of joint use networks also benefits third-party attachers such as CLECs and cable providers, because absent such joint use, electric utilities or ILECs setting poles for their own equipment only would set shorter poles with insufficient space for communications space attachments.

on the other party's poles. The power space utilized by an electric utility on a telephone pole may be up to nine feet, and in urban areas, it is not unusual to find a telephone company consuming three feet of pole space on an electric pole. The cost allocation formulas in such agreements are structured very differently from pole attachment agreements. Electric utilities and ILECs often appear to pay significantly higher pole cost allocations to each other, but such allocations cannot be viewed in a vacuum. All of the rights and obligations in the joint use agreement must be viewed as a whole to determine the equities of the relationship.

The Proposed Rules jeopardize these longstanding agreements by creating a default cost allocation methodology and access rules when the parties are unable to reach mutual agreement. Such default rules do not lend themselves well to a joint use relationship and would almost certainly impair the ability to negotiate a mutually-agreeable outcome. The Proposed Rules create an incentive not to reach agreement, but instead to create a dispute that would be resolved by imposing the default rules.

The cost allocation methodology set forth in the Proposed Rules is based upon an assumption that the attaching party is only making a single attachment to the pole and is responsible for all non-recurring engineering and make-ready expenses associated with the attachment. Such a pricing model is not appropriate to apply to a joint use relationship between two public utilities. In fact, application of such default allocations would dramatically alter existing cost allocations. In cases where an ILEC now shares by mutual agreement 40% of the annual costs, it is estimated that the ILEC's cost responsibility would fall to 9.15% if it could disregard its joint use obligations and pay only the per pole formula rate. Similarly, for electric utilities now paying 60% of an ILEC's pole costs, such electric utility's allocation could fall to

24.5%. AEP Ohio estimates that its current allocation of pole cost expense recovery from pole attachers would fall from 15.56% to 7.5% if all parties moved to the proposed default rates.

The FCC recognized in its April 2011 Order that cost allocations in joint use relationships must be viewed differently, finding that:

> …we recognize the need to exercise [our] authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers…the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect to potential remedies for incumbent LECs and the details of the complaint process itself. These complexities can arise because, for example, incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.

April 2011 Order at ¶ 214. As such, the FCC did not set forth a formula to be applied to joint use relationships. This Commission should do the same in order to allow flexibility for the unique joint use relationships that public utilities are engaged in within Ohio.

The solution to the concerns expressed above is to move and modify the language set forth in proposed O.A.C. 4901:1-3-04(B) to the General Applicability section of proposed O.A.C. 4901:1-3-02. Revised O.A.C. 4901:1-3-02(F) should read as follows:

> (F) The provisions set forth in 4901:1-3-03 and 4901:1-3-04 shall not apply with respect to the rates, terms and conditions for access to one public utility's poles, conduits, and rights-of-way by another public utility. Rates, terms and conditions for attachments between two public utilities shall be established through negotiated agreement and shall be subject to the Commission's jurisdiction and oversight pursuant to Ohio Rev. Code §§ 4905.48 and 4905.51.

Corresponding changes as necessary should be made within proposed O.A.C. 4901:1-3-03 and 4901:1-3-04 to remove references to a public utility attachment to another public utility's poles or conduits.

II. THE PROPOSED RULES SHOULD CONTAIN A DIFFERENT RATE FORMULA THAN THE FCC-SANCTIONED FORMULAS CURRENTLY PROPOSED BY THE COMMISSION.

A. The Commission Should Adopt a Modified Version of the FCC Telecom Rate Formula That Does not Result in Cross-Subsidization of the Telecommunications and Cable Television Industries by Electric Rate Payers.

The Electric Utilities do not support the proposed incorporation into the Ohio Administrative Code of the recently adopted and substantially reduced pole attachment cost recovery formula set forth in 47 C.F.R. § 1.1409. The federal rules are based upon a federal statute that categorizes pole attachers into various groups based upon the type of attaching entity and the communications signal carried over the wires by such entity, rather than the actual burden placed on the pole and the avoided costs the attaching party enjoys by not building its own pole plant. The FCC concluded that the different rate categories resulted in competitive disparities among providers of telecommunications services, and decided to eliminate those disparities—unfortunately, on the backs of electric ratepayers.

The recently adopted FCC telecom rate formula sought to technically comply with the oddities of the federal statute, while also attempting to create a single rate outcome. The FCC chose the lowest single rate category (the CATV rate) assuming that lower rates would induce increased broadband deployment. Application of the lowest rate to all attaching parties will lead to substantial under-recovery by pole owners of the attaching parties' fair share of pole expenses. The FCC is willing to permit such under-recovery in an effort to promote broadband deployment. This Commission must consider how such allocation changes will affect incentives to own and maintain pole plants and how any such changes affect electric rates.

This Commission also is not saddled with the oddities of the federal statute. This Commission can and should create a pole cost-sharing formula that equitably distributes cost

based upon the burdens placed on the pole and the avoided costs attaching parties enjoy by not having to build pole plants. All costs recovered from attachers are set off against the revenue requirements of the electric companies. It is important, therefore, to carefully allocate pole cost to the cost causer in order to ensure that electric ratepayers do not cross-subsidize services that they may not even enjoy. A wireless telecommunications consumer with satellite television should not be forced to cross-subsidize, for example, Time Warner Cable or AT&T through higher electric bills caused by under-recovery of joint use pole costs. The federal rates result in such a cross-subsidy because the FCC is not charged with protecting (and does not seek to protect) electric ratepayers.

The Electric Utilities therefore recommend a much simpler approach than the federal rules. The Electric Utilities propose that the Commission adopt a single rate formula applicable to all non-public utility attachments to public utility poles. Application of a single rate formula that does not differentiate between the type of service provided over a particular attachment is justified because the vast majority of attachers are now providing both cable and telecommunications services.

The single rate formula proposed by the Electric Utilities is a slightly modified version of the FCC's telecom rate methodology, which this Commission already uses in pole attachment tariff ratemaking. The Electric Utilities' proposed formula is similar to the FCC's telecom formula set forth at 47 C.F.R. § 1.1409(e)(2)(i), in that the maximum rate is calculated by multiplying a space factor by the net cost of a bare pole by the carrying charge. However, the Electric Utilities' proposed formula treats electric utilities and their rate payers more fairly by dispensing with the artificial discounts included in the federal formula and equitably allocating the communications worker safety zone as unusable space. The Electric Utilities urge the

Commission to adopt the following formula for non-public utility attachments to public utility poles:

Proposed Rate (Non-Public Utility Attachers):

Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge

Space Factor = ((space occupied) + (unusable space/number of attaching entities, including the utility))/pole height

Net Cost of a Bare Pole: FCC methodology

Carrying Charge: FCC methodology

Presumed pole height: 37.5'

Unusable space: 27.33'

Presumed Number of Attaching Parties: 3

Thus, the Electric Utilities' proposed rate formula is identical to the FCC's telecom rate formula (*see* 47 C.F.R. § 1.1409(e)(2)), with the exception of the following three deviations, which render the proposed formula more just and reasonable than the FCC's formula:

1. Space Factor. The Electric Utilities' proposed formula dispenses with the 2/3 multiplier set forth in the federal telecom rate formula. *See* 47 C.F.R. § 1.1409(e)(2). The federal formula's 2/3 multiplier is based upon specific statutory language set forth in 47 U.S.C. § 224(e)(2).[4] It was designed to ensure that the pole owner retained at least 1/3 of the cost of the unusable space on the pole. The presumed number of parties set forth in the proposed formula assumes the pole owner as one of the parties sharing unusable space (electric, ILEC, and CATV), so the 2/3 multiplier is not necessary to allocate to the pole owner its share of the cost.

[4] 47 U.S.C. § 224(e)(2) provides: "A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities."

2. Percentages of Fully Allocated Costs. The formula proposed herein also eliminates the .66 and .44 multipliers adopted by the FCC at 47 C.F.R. § 1.1409(e)(2)(i), which are not supported by either the federal record or the record to date at the Commission, and which were implemented solely to negate the statutory allocation of unusable space in the FCC's telecom rate so as to reduce the outcome to approximate the cable rate. *See* April Order at ¶ 149 ("…the specific percentages we select provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the [Federal Communications] Commission policies identified above.").

3. Unusable Space. The Electric Utilities' proposed formula allocates 3.33' of the pole defined as usable space in the federal rules as unusable space. *See* 47 C.F.R. § 1.1418 ("The amount of unusable space is presumed to be 24 feet"). This space represents the communications worker safety zone, a buffer safety area established within the National Electric Safety Code ("NESC") where no high voltage electric lines or communications lines are to be present. This space is typically 40" (3.33'). The communications worker safety zone was established to help separate communications workers that are not trained to be near electric lines from such electric lines. Such space is better defined as unusable or shared space, as is common in joint use agreements, and as was recognized by the Idaho Public Utilities Commission and Louisiana Public Service Commission.[5]

[5] *See In the Matter of the Washington Water Power Co. v. Benewah Cable Co.*, Case No. U-1008-206, Order No. 19229 (Idaho Public Utilities Commission November 7, 1984) (assigning half of the communications worker safety zone as unusable space for purposes of calculating the cable rate); Louisiana Public Service Commission Docket No. U-14325, Order No. U-14325 (Oct. 31, 1980) (adopting the FCC formula "…with the proviso that telephone companies be allocated one foot of the 'work space' or 'safety space" and reasoning "The FCC formula does not address itself to that portion of the 'usable space' not used by either utility as 'occupied' space'. This Commission is of the opinion that a portion of this space should be allocated to the attaching telephone company in calculating rental charges.").

The Electric Utilities request that the Commission clarify that the proposed formula will be substituted for the rates contained in all existing tariffs by ordering each public utility to make a compliance filing to adjust its current rates to the formula rate. The Electric Utilities request that the Commission explicitly state that the proposed formula will be used to calculate the rent owed by attachers governed by such tariffs on an annual basis, inputting the data into the formula from the previous year applicable to the pole owner in question. However, the Commission should clarify that all other operational terms and conditions in existing tariffs shall remain in full force and effect and that no proposal to modify such operational terms and conditions is to be considered in the compliance filing proceedings.

B. The Commission Should Specify that By Adopting a Version of the FCC Rate Formula, It is Not Ceding Its Authority to Regulate Pole Attachments to the FCC.

The Electric Utilities propose that the Commission make clear in proposed O.A.C. 4901:1-3-04(C) that it is not ceding its jurisdiction over pole attachments to any other regulating body:

> (C) Access to poles, ducts, conduits, and rights-of-way as outlined in paragraphs (A) and (B) of this section shall be established pursuant to 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code. In all cases of conflict between the rules set forth in this Chapter of the Ohio Administrative Code and any rule or regulation by any other agency, the Ohio Administrative Code shall govern.

This additional language will forestall future arguments that by including cross-references in the Proposed Rules to an FCC regulation or federal statute, any future changes that the U.S. Congress or FCC might make are automatically imported into the Ohio regulations even without review by this Commission. The FCC is not statutorily charged with an interest in protecting electric rate payers and decisions made by the FCC may not adequately address such interests. Thus, any future changes made in the regulations of any other regulatory body should be made

effective within Ohio only after this Commission has explicitly reviewed them pursuant to Ohio's administrative procedures and issued an order modifying Ohio's regulations to the extent that such changes are found to be consistent with public interest that this Commission is charged with protecting.

III. THE COMMISSION SHOULD NOT ADOPT THE FCC'S MAKE-READY RULES WITHOUT MODIFICATION.

The make-ready deadlines in the Proposed Rules are much broader and more burdensome even than those imposed by the FCC, principally because the deadlines are triggered by a request for access by an "attaching entity." [6] *See, e.g.*, O.A.C. 4901:1-3-01(B)(1), (2). The Proposed Rules define an "attaching entity" as "…cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities **and other entities with either a physical attachment or a request for attachment, to the pole, duct, conduit, or right-of-way**…." O.A.C. 4901:1-3-01(A) (emphasis added). In other words, the deadlines are triggered by *anyone* that makes an attachment request, and could even be construed to apply to anyone who wants to attach *anything* to a pole, including advertising. By way of contrast, the FCC's make-ready deadlines are triggered by a request for access by a "cable operator or telecommunications carrier" only. *See, e.g.*, 47 C.F.R. § 1.1420(c), (d). Thus, the Proposed Rules do not represent simply the adoption of the FCC's make-ready deadlines (which would itself be problematic for the reasons stated below). Instead, the Proposed Rules' make-ready deadlines constitute a vast expansion of the obligations and burdens imposed upon electric utilities even by the FCC, because the Proposed Rules' deadlines apply to attachments by any

[6] A coalition of electric utilities comprised of Consumers Energy, Detroit Edison, FirstEnergy Corp., Hawaiian Electric Company, NSTAR, and Pepco Holdings, Inc. challenged the FCC's make-ready deadlines in a Petition for Reconsideration filed with the FCC on June 8, 2011. The Petition for Reconsideration currently remains pending before the FCC.

entity with a physical attachment to a pole, as opposed to just cable operators and telecommunications carriers. The Commission should revisit the definition of an attaching entity at proposed O.A.C. 4901:1-3-01(A) to more narrowly circumscribe the types of attaching entities that are encompassed by the Proposed Rules.

Even if the Proposed Rules' make-ready deadlines were modified to reflect that they are only applicable to attachments by cable operators and telecommunications carriers, they would still be objectionable. The Proposed Rules' make-ready deadlines are largely inflexible and unworkable. The proposed deadlines do not fully consider the many differences among electric utility pole owners, the even greater differences between electric utility pole owners and ILEC pole owners, and the numerous, justifiable causes of delay that constitute "good and sufficient cause" for noncompliance with those deadlines. Further, the deadlines ignore the fact that the make-ready process varies from utility to utility and pole attachment request to request. The proposed deadlines, moreover, fail to adequately recognize that electric utilities are in the best position to address safety and reliability issues with respect to the attachment of facilities to their poles.

Imposing artificial, inflexible deadlines makes little sense in the operational world of electric utilities and could have unintended consequences. There are too many constraints outside of electric utility control, such as the volume of make-ready requests from multiple sources, weather conditions, service interruptions, local and state requirements, private property issues, environmental regulations, road construction, unauthorized attachments, the unresponsiveness of existing attachers, and the many delays caused by the applicant for attachment itself, to hold utilities responsible for compliance with these deadlines. Hard and fast rules applicable across-the-board to all utilities ignore the unique and unavoidable operational

characteristics of individual systems. For all of these reasons, the FCC's make-ready deadlines, as incorporated into the Proposed Rules at proposed O.A.C. 4901:1-3-03(B), (C) are unworkable, unwise, and should be rejected by the Commission.

Should the Commission nevertheless proceed with imposing make-ready deadlines, those deadlines should at least be revised as explained below to better recognize utility operational constraints, to increase the number of instances in which the deadlines are inapplicable, and to reduce the expected burden on utilities as well as the Commission that will result from an inevitable increase in pole attachment access complaints.

A. The Commission Should Reduce the Minimum Number of Requests for Attachment to Which the Standard Make-Ready Deadlines Apply, and Should Establish More Reasonable Make-Ready Deadlines.

In proposed O.A.C. 4901:1-3-03(B)(5)(a), the Commission proposes that the standard deadlines of 45 days for survey, 14 days for estimate, and 60 days for completing make-ready should be applicable to requests for pole attachments up to the lesser of three-hundred (300) poles or one-half percent (1/2%) of the public utility's poles in the state. The Commission proposes that for "larger" orders, defined as requests for attachment to the lesser of 3,000 poles of five percent (5%) of the of the public utility's poles in the state, the make-ready deadlines should be increased to 60 days for survey, 14 days for estimate, and 105 days for completing make-ready. O.A.C. 4901:1-3-03(B) (5)(b).

The proposed number of attachments constituting these thresholds is far from manageable from the Electric Utilities' perspective. To put the number of pole attachment requests in context, during the fifteen-month period of calendar year 2012 and the first quarter of 2013, The Ohio Edison Company ("Ohio Edison") received requests for more than 13,000 pole attachments with an estimated 17,000 engineering hours. A "larger" 3,000-pole request in a

given month would be nearly triple the average monthly volume in the past year for Ohio Edison, but the Proposed Rules would allow only an additional 60 days to the entire timeline to complete all make-ready work for such a huge project.

Further, in the Proposed Rules, there is no "cap" on the number of sequential requests that a single attacher may submit every 30 days, nor is there any limit on the number of requests that may be submitted collectively by the attacher community in any given period. As a result, multiple attachers (each complying with the limit of 3,000 poles in any 30-day period) could bombard a single utility with multiple 3,000 pole requests every month, each of which would be subject to the Commission's deadlines.

Every utility is operated differently, but no utility can staff adequately for an unknown volume of make-ready work. Utilities do not have unlimited resources sitting idle while waiting for the next pole attachment application to arrive. Instead, skilled utility crews and contractors are constantly at work, moving from place to place, responding to emergencies, balancing conflicting demands on their time and resources and performing make-ready and other assignments as planned and coordinated in advance.

All of this extra work performed for third-party attachers by electric utilities pursuant to Commission order or rule is in addition to the normal electric work that utility personnel must perform for their own customers. Deadlines associated with such enormous make-ready requests very easily could prevent an electric utility from performing its own work, potentially subjecting the utility to not meeting its own reliability standards, and potentially resulting in complaints of inadequate service by electric utility customers.

To bring the make-ready deadlines more into line with the reality of electric utility operations, the Electric Utilities propose that the lower limit on the number of attachment

requests subject to the standard deadlines, including wireless pole-top attachments, be reduced from *300 to 100 poles*, and that the upper limit be reduced from *3,000 to 500 poles*. These limits should apply to the number of poles for which attachment requests are made by *all* attaching entities per month, not just by a single attaching entity. Moreover, the Electric Utilities propose that the make-ready deadlines be extended to 90 days to perform the survey (120 days for large orders); 30 days to provide a make-ready estimate; and 150 days for completion of make-ready work. These numbers would create a much more manageable workflow for utilities providing core electric services to customers throughout Ohio, while preserving the right of attachers to expect reasonably consistent responses to their make-ready requests.

The Electric Utilities thus propose the following modifications to the text of proposed O.A.C. 4901:1-3-03(B), which correspond to the above-stated recommendations:

(1) Survey

> A public utility shall respond as described in paragraph (A)(2) of this section to an attaching entity within ~~forty-five~~ ninety days of receipt of a complete application to attach facilities to its poles (or within ~~sixty~~ one hundred and twenty days, in the case of larger orders as described in paragraph (B)(5) of this section)….

(2) Estimate

> Where a request for access is not denied, a public utility shall present to the attaching entity an estimate of charges to perform all necessary make-ready work within ~~fourteen~~ thirty days of providing the response required by paragraph (B)(1) of this section, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this section, within ~~fourteen~~ thirty days of receipt by the public utility of such survey.

…

(3) Make Ready

…

(b)
…

(ii) Set a date for completion of make-ready work that is no later ~~sixty~~ one hundred and fifty days after ~~notification is sent~~ payment for public utility make-ready work has been received (or one hundred and ~~five~~ ninety days in the case of larger orders, as described in paragraph (B)(5) of this section).

B. Poles Requiring the Rearrangement of Attachments by Governmental Attaching Entities Should be Excluded from the Proposed Rules' Make-Ready Deadlines.

As the Commission's make-ready deadlines acknowledge, the accommodation of a new attachment often requires existing attachers to the pole to relocate or modify their facilities before the new attachment may be affixed to the pole. The conduct of these existing attachers is beyond the pole owner's control and the pole owner cannot be held responsible for delays caused by existing attachers. Existing attachers, for instance, may not make themselves available for the ride-outs necessary to coordinate their rearrangements; they may not be responsive to new attachers; or they may provide unreasonably high make-ready cost estimates. These types of situations arise on a regular basis and pole owners are powerless to compel cooperation by existing attachers, some of whom compete with the proposed attachers in offering similar services.

Rearrangement on a pole is often sequential in nature, requiring, for example, the currently lowest attacher to move first, followed by the second-lowest attacher. The Proposed Rules could allow an existing attacher to affect the rights of other existing attachers simply by delaying moving its facilities until the end of the make-ready deadline. Because the Proposed Rules would give an applicant the right to move third-party facilities that have not been moved by the make-ready deadline, an existing attacher with facilities that required relocation prior to the relocation of other attaching entities' facilities could wait until the last minute to move its

facilities, leaving no time under the deadlines for the remaining facilities to be moved before the applicant could relocate them itself.

While this problem exists with respect to all existing attachers, it is particularly difficult to coordinate with attachers that have *no* pole attachment workforce, such as fire departments, highway departments (*e.g.*, traffic control devices), school districts, police departments, municipalities and others. Pole owners typically have no contractual right to move such facilities, and new attachers certainly do not. Based on the experience of the Electric Utilities, these types of entities tend to be highly unresponsive to requests to rearrange their facilities. While the Proposed Rules allow the new attacher to perform make-ready work in the communication space at the expiration of the make-ready deadline, to the extent these facilities must be rearranged to accommodate a new attacher, utilities will be prevented through no fault of their own from meeting the make-ready deadlines.

The Electric Utilities request that the Commission reconsider its make-ready deadlines for the reasons stated above. The deadlines specifically should not apply to the extent that make-ready work would require any attacher owned by or affiliated with a municipality, a state, or the federal government to relocate its facilities. To that end, the Electric Utilities propose that the following additional language be inserted immediately after the existing text of proposed O.A.C. 4901:1-3-03(B)(6)(b):

> …<u>For purposes of this subsection (b), "good and sufficient cause" for deviation from the time limits shall include, without limitation, actions of third parties, including governmental or quasi-governmental entities, beyond the reasonable control of the public utility.</u>

C. The Commission Should Modify the Proposed Rules to Toll the Make-Ready Deadlines Where Warranted by Special Conditions.

i. The Commission Should Toll the Proposed Rules' Make-Ready Deadlines for Storm Service Restoration.

When seasonal storms occur, all electric utilities are stretched thin to make sure that electric service is restored in a reasonable timeframe. During an outage event, the utility's line construction resources, engineering resources, dispatch personnel, supervisors, managers, meter readers, highway workers, salaried staff and others are pulled off of their regular duties to assist in service restoration efforts. This "all hands on deck" approach even for non-major events is common in the electric utility industry and it precludes the performance of any new make-ready work in the interim, including make-ready work requested by communications attachers. It also precludes "immediate" notification to attachers, as attention is focused on issues of public and employee safety and service restoration. Similarly, the duration of any make-ready deviations for storm-related service restoration is unlikely to be known.

Not only do utilities apply this "all hands on deck" approach to the restoration of their own local service outages, they also routinely lend line crews, along with design and engineering personnel and management expertise to assist other electric utilities in the restoration of their power. These mutual assistance arrangements are necessary because the extraordinary nature of storm restoration work often requires far more personnel than even the utilities own fully reassigned personnel. The Electric Utilities, through membership in such organizations as the Great Lakes Mutual Assistance Group, the Southeastern Electric Exchange, and as signatories to the EEI Mutual Assistance Agreement, have entered into mutual assistance agreements with other electric companies throughout much of the country to cooperate in the recovery from weather events and other natural disasters.

To recognize these storm restoration realities, the Electric Utilities request that the Commission adopt an objective test for these events that would automatically be considered good and sufficient cause: *if a company's normal internal staffing is not available due to a weather event or other force majeure event, the make-ready clock should automatically be tolled.* This tolling must extend to an appropriate number of days following such an event, as well, since utilities must provide rest to overextended workers who had been working 16-hour days to help their own as well as neighboring or even distant utilities and the public they serve recover from a storm or other weather event. Communications to affected attaching entities should be made as soon as practicable after such an event.

The Electric Utilities therefore propose the following modifications to proposed O.A.C. 4901:1-3-03(B)(6)(b):

> (b) During performance of make-ready for good and sufficient cause that renders it infeasible for the public utility to complete the make-ready work within the prescribed time frame. A public utility that so deviates shall ~~immediately~~ as soon as practicable notify, in writing or by electronic means, the attaching entity requesting attachment and other affected entities with existing attachments, and shall include the reason for, and date and duration of the deviation. The public utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations. For purposes of this subsection (b), "good and sufficient cause" for deviation from the time limits shall include, without limitation, actions or requirements of third parties, including governmental or quasi-governmental entities, beyond the reasonable control of the public utility, and storm-related service restoration.

ii. The Commission Should Toll the Proposed Rules' Make-Ready Deadlines for Projects Requiring Local Government Permitting or the Obtaining of Easements over Private Property.

The Commission should also allow the make-ready clock to be tolled for pole attachment projects that are delayed by the local government permitting process, which also rests beyond the control of electric utilities and can create uncontrollable delays in attachment projects. For

example, make-ready projects may require a utility truck to be parked on a road, which requires a permit from the city, county, or state department of transportation. Without the permit, there can be no parking. Police may need to be hired to direct traffic or otherwise protect a work area. Without such assistance, there can be no work. Environmental permits may be required by the Environmental Protection Agency. Without the permits, the work cannot occur.

Property rights may need to be obtained to authorize the attachments as requested by the attacher because, for example, a guy wire may need to be installed on private property. Without the private easement, the attachment cannot occur.

All of these types of occurrences (and this is not an exclusive list) raise issues and cause delays that an electric utility cannot control. The utility should not be responsible for any such delays that preclude compliance with the new deadlines. The Electric Utility's suggested modifications to proposed O.A.C. 4901:1-3-03(B)(6)(b), as set forth in subsection (i) above, accomplish this objective by clarifying that good and sufficient for noncompliance with the make-ready timelines includes requirements imposed by a governmental entity (*e.g*. local government permitting requirements).

iii. The Commission Should Toll the Proposed Rules' Make-Ready Deadlines for Poles with Preexisting Safety Violations.

The make-ready deadlines should also be tolled if existing attachments are found to be in violation of safety codes, at least until such time as it is agreed which attaching entity is responsible for paying to correct the safety violation. Electric utilities did not create those violations and should not be held responsible for correcting them within the new deadlines.

The Electric Utilities, like most electric utilities, have encountered numerous preexisting safety violations on poles to which new attachers seek access, and often there is considerable dispute about which existing attacher may have caused the safety violation. To alleviate these

disputes and to allow the parties to proceed with the necessary make-ready, the Commission should establish three presumptions regarding which attaching entity caused the existing violation. First, to the extent that an unauthorized attachment exists on the pole, the presumption should be that the unauthorized attacher caused the safety violation and that entity should be required to pay for a pole replacement. Failure to pay would be grounds for disconnection. Second, the owner of an attachment that is not in compliance with the rules should bear the responsibility to pay to correct the violation. Third, make-ready deadlines should be tolled under these circumstances until the safety violation has been corrected by the attacher that caused the violation.

Implementing these presumptions will alleviate the considerable delay associated with determining responsibility for a safety violation that must be remedied before an attaching entity can gain access to a pole. Without these presumptions, disputes will continue indefinitely while the affected utility is unable to take action on the new attachment request.

To implement these suggestions, the Electric Utilities propose that the Commission insert the following new paragraph into the Proposed Rules:

> 4901:1-3-03(B)(8):
>
> If safety violations are found to exist on a pole requested for attachment the following rules shall apply:
>
> (a) If an unauthorized attachment is found on a pole, a rebuttable presumption shall arise that the unauthorized attacher caused the safety violation.
>
> (b) An attachment that is found not to be in compliance with the utility's applicable engineering and construction standards shall be financially responsible to correct the violation.
>
> (c) The timelines described in paragraphs (B)(1) through (B)(3) shall be tolled until the violation is remedied.

E. The Commission Should Modify the Proposed Rules to Include Penalties for Unauthorized Attachments and Safety Violations.

Noticeably absent from the Proposed Rules is any recognition of a proactive approach to the problem of unauthorized attachments and safety violations. Utilities need the regulatory authority to combat the endemic problem of unauthorized attachments and attacher safety violations.

i. The Commission Should Allow Public Utilities to Include Unauthorized Attachment Penalties of Up to $100 in Tariffs and Pole Attachment Agreements.

The Commission should allow pole owners to include provisions in tariffs and pole attachment agreements imposing penalties for unauthorized attachments and safety violations of up to $100 per violation.

In today's competitive environment, speed-to-market and cost cutting are strong forces driving the rollout of new communication services. Electric system safety, reliability and efficiency, on the other hand, are alien to this environment. Construction crews hired by cable and telephone companies are often paid to string cables over utility poles per mile or per pole (i.e., in a manner that rewards speed but not safety). Distance covered, not quality of work, is the primary objective. The faster they string cable, the more they get paid. Noncompliant attachments "count" as much as compliant ones.

Adding to the problem, communications attachers often appear to be poorly trained with respect to NESC compliance. They take shortcuts that make their jobs easier, but do not comply with established safety and construction practices. Unlike electric companies, many cable companies, CLECs and emerging telecommunication service providers do not even have in place established safety programs or qualified engineering and safety departments.

Minimal oversight of work contracted by attachers is not unusual. As a result, the Electric Utilities have encountered countless NESC violations caused by attachers, including clearance violations, improper pole guying, ungrounded messenger wires and other equipment, excessive overlashing, improper use of boxing and extension arms, improper installation of equipment, improper hole drilling, the displacement and damage of utility equipment, customer outages, and a host of additional safety violations and poor construction practices. Huge bundles of coiled cables, wires duct-taped to poles and splices covered by garbage bags are not uncommon, causing an eyesore at a minimum but more importantly, wind and ice-loading concerns.

In short, contractors hired by cable companies and CLECs cannot be depended upon to keep the electric distribution system operating safely and reliably. Utilities need regulatory tools to combat the problem, yet the Commission's proposed regulations do not provide enforcement mechanisms to police even the most basic of construction requirements. Easy access to electric distribution systems should not come at the expense of safety and reliability. The Commission's regulations should not be so one-sided as to mandate attachment without insisting on compliance with applicable codes. The FCC, when adopting mandatory make-ready deadlines in its April 2011 Order, also adopted safe harbors for the imposition of unauthorized attachment penalties, in order to strike a balance between an attacher's right to access and a pole owner's rights to punish attachers for safety violations and unauthorized attachments. Here, the Commission is considering make-ready deadlines that are even more burdensome than those imposed by the FCC, without including a provision in the Proposed Rules addressing unauthorized attachments and safety violations.

The Commission must promote responsible behavior on the part of those who are granted mandatory access. To that end, the Commission should allow utility pole owners to impose penalties for unauthorized attachments and safety violations up to *$100 per violation*. The Electric Utilities suggest the following language:

4901:1-3-03(B)(8):

(d) In addition to the actual costs incurred for remediation and lost revenues, public utilities may impose penalties through tariffs or contract for unauthorized attachments or safety violations in an amount up to $100.00 per violation applicable to all utilities and attaching entities subject to Commission jurisdiction under this Chapter.

ii. The Proposed Rules Should State that the Commission will Promptly Accept and Apply Tariff Changes for Unauthorized Attachment and Safety Violation Penalties.

It is highly unlikely that any attaching entity will be eager to agree to new unauthorized attachment penalties or to the new safety violation penalties unless compelled. To remedy this concern, the Electric Utilities request that the Commission state that it will promptly accept and apply tariff changes adding unauthorized attachment penalties and safety violation penalties for attachers subject to Commission jurisdiction.

F. The Proposed Rules Should Allow Pole Owners to Discontinue or Limit the Use of Bracketing, Boxing, and Extension Arms Going Forward, Regardless of Past Policy.

In many cases, attaching parties have constructed boxed and/or bracketed attachments without consulting or requesting permission from the electric utility. Proposed O.A.C. 4901:1-3-03(7)(G) may be read to require utility pole owners to require attaching entities to remove all instances of bracketing, boxing, extension arms and other attachment techniques permitted in the past if it ever wishes to restrict such use in the future. Such an interpretation, however, would require utilities wishing to control widespread abuse of such techniques to disrupt existing

attachments, and for existing attachers to expend considerable time and resources in removing their existing attachments. Similarly, unauthorized attachments should not be cited as a reason for an attaching entity to demand equal treatment.

The Electric Utilities request clarification that pole owners may restrict future use of bracketing, boxing and extension arms on their poles by imposing a new policy applicable to all attaching entities going forward, regardless of whether the utility has chosen to do so in the past. This clarification would eliminate any need for attaching entities to bear the burden and expense of removing or otherwise modifying existing attachments. This is not "discriminatory," but rather treats similarly situated attachers similarly. All attachers filing such requests in the future will be treated in the same manner as all other filing attachers.

Therefore the Electric Utilities propose the following modification to proposed O.A.C. 4901:1-3-03(G):

> (G) The public utility is required to allow attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity on the pole, consistent with the utility's then-current engineering practices and standards.

G. The Proposed Rules Should Allow Pole Owners to Prohibit Pole-Top Attachments if Such Prohibition is Nondiscriminatory, and if Pole Owners Allow Pole-Top Attachments, Should Require that Such Attachments Be Made in Compliance with the Public Utility's Construction Standards.

With respect to the attachment of wireless antennas to electric utility poles, the Commission establishes rules for "wireless attachments above the communications space." The rules should make clear that (1) public utilities may prohibit all pole-top attachments on a non-discriminatory basis; (2) where a public utility allows pole-top attachments, any such attachment must be in compliance with the utility's engineering and construction standards; and (3) each utility retains the exclusive right to perform work, or directly employ contractors to work, in the

power space. The Electric Utilities therefore recommend that the following language be added as proposed O.A.C. 4901:1-3-03(B)(3)(b)(vi):

> (vi) State any applicable engineering and construction standards, or whether the utility has prohibited all pole-top attachments on a non-discriminatory basis.

In addition, the Electric Utilities recommend that the Commission make the following modification to proposed O.A.C. 4901:1-3-03(B)(4):

> (4) For wireless attachments above the communications space, a public utility shall ensure that make-ready is completed by the date set by the public utility in paragraph (3)(b)(ii) of this section (or, if the public utility has asserted its fifteen-day right of control, fifteen days later). Only the public utility or its direct contractors may perform make-ready work above the communications space.

H. The Proposed Rules Should Allow Public Utilities to Require Attaching Entities to Utilize Electronic Notification Systems.

To facilitate both broadband deployment and the safe and efficient distribution of electric utility services, utilities should be allowed to require the use of electronic notification systems ("ENS"). Such ENS, including, for example, the Spatially-enabled Permitting And Notification System ("SPANS") and the National Joint Utilities Notification System ("NJUNS"), are extremely useful tools for pole owners and attachers that ensure both owners and attachers will keep informed of the progress of their pole attachment projects. Additionally, ENS track existing attachments, so if any attachments need to be relocated or modified, ENS can quickly and efficiently notify the attacher in question.

The Electric Utilities request that the Commission allow utility pole owners to require all attachers to participate in any ENS established or adopted by a utility, to efficiently facilitate the notification process for new attachments. Without electronic notification, prompt notification

will be impossible in the real world. The Electric Utilities therefore propose the following change to proposed O.A.C. 4901:1-3-03(A)(2):

> (2) Requests for access to a public utility's poles, ducts, conduits, or rights-of-way must be in writing. If the public utility establishes or adopts an electronic notification system, the attaching entity must participate in the electronic notification system to qualify under this Chapter. If access is not granted within ~~forty-five~~ ninety days of the request for access, the public utility must confirm the denial in writing by the ~~forty-fifth~~ ninetieth day. The public utilities denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

To address similar "in writing" requirements that may be scattered across the proposed regulations, the Electric Utilities propose that a definition be added to proposed O.A.C. 4901:1-3-01 stating:

> (J) 'In writing,' for purposes of this chapter, shall include postings by either the public utility or the attaching entity in an electronic notification system established or adopted by a public utility.

I. The Proposed Rules Should Provide that Public Utilities Are Not Liable for Claims or Damages Resulting from Public Utilities' Compliance with the Proposed Rules' Make-Ready Requirements.

Guidance is needed regarding the extent that utilities are liable when existing attachers are moved involuntarily. Under the Proposed Rules, not only the pole owner but the new communications attacher may for the first time be authorized to move a third-party attacher's facilities. This mandatory rearrangement or relocation of existing attachments by other entities may result in damage to existing attachments, interruption of service to customers, or even injury to or death of workers on the pole or members of the public. As the owner of the pole, electric utilities are commonly included as defendants in any court action seeking remedies for such injury or damage. Under these completely new circumstances, pole owners must be assured that they do not incur liability for these forced relocations. To address this potential liability, the

Electric Utilities propose that the following language be inserted as proposed O.A.C. 4901:1-3-03(B)(7)(c):

> (c) Public utility pole owners shall not be subject to liability for damages that may arise in connection with an attaching entity's performance of make-ready work.

J. Proposed O.A.C. 4901:1-3-03(A)(3)(c) regarding Notice by Public Utilities to Attaching Entities of Modifications to Attachments Is Overly Broad and Unduly Burdensome.

Proposed O.A.C. 4901:1-3-03(A)(3)(c) is overly broad and unduly burdensome as written. The Electric Utilities should not be required to notify an attaching entity of any changes to a pole unless the changes affect the attaching entity's equipment. Modifications to the electric utility's facilities, or to any third-party's facilities that do not affect the other attachers on the pole, would be irrelevant to those third-party attachers, and the proposed notification requirement would create an unnecessary burden upon the Electric Utilities.

Additionally, this provision should be clarified such that these notification rules do not supersede notification requirements that may be in a utility tariff regarding disconnections for non-payment. While most attachments are just physical attachments, many are attachments that consume power and are billed monthly. Notice and other requirements associated with disconnection for non-payment should follow the existing tariff requirements and not be superseded by these regulations.

The Electric Utilities thus propose the addition of the following language to proposed O.A.C. 4901:1-3-03(A)(3):

> (c) Any modification of facilities affecting the attaching entity's equipment other than routine maintenance or modification in response to emergencies.
>
> (d) These notification provisions do not apply to and do not supersede notice requirements set forth in a utility tariff or in other Ohio Administrative

utility bill.

K. Proposed O.A.C. 4901:1-3-03(B)(2)(a) Regarding Estimates Should be Clarified and Revised.

Proposed O.A.C. 4901:1-3-03(B)(2)(a) should state that if a public utility withdraws an outstanding estimate due to non-payment within the specified time period, then the timelines revert to the beginning of the process as described in proposed O.A.C. 4901:1-3-03(B), and the attaching entity's application must be reiterated or resubmitted. The applicant should have 21 days to make payment before the estimate can be withdrawn in order to better reflect the amount of time necessary for its payment processing to remit payment. The Electric Utilities therefore propose the following modifications to proposed O.A.C. 4901:1-3-03(B)(2)(a):

> (a) A public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning ~~fourteen~~ twenty-one days after the estimate is presented. If the estimate has been withdrawn, the attaching entity must reiterate or resubmit its application, and the process starts anew with the timeline beginning with paragraph (B)(1) of this section.

L. Under Proposed O.A.C. 4901:1-3-03(B)(3), Public Utilities Should Be Required to Notify Existing Attachers that Will Be Affected by Make-Ready "Promptly" rather than "Immediately."

The Electric Utilities submit that the term "immediately" in proposed O.A.C. 4901:1-3-03(B)(3) suggests a standard for the communication required by that provision that is unreasonably stringent and prone to interpretations that could lead to more disputes than necessary. The Electric Utilities also suggest that allowing electronic communications would reflect current technology and could result in a more efficient and timely communication, given that a number of attachers may require simultaneous communications. Moreover, public utilities should have the option to delegate to the requesting attaching entity the responsibility for

providing notification to affected existing attachers. The Electric Utilities therefore propose the following changes to proposed O.A.C. 4901:1-3-03(B)(3):

(3) Make-ready

> Upon receipt of payment specified in paragraph (B)(2)(b) of this section, the public utility shall ~~notify~~ ~~immediately~~ promptly and in writing or by electronic means either notify directly, or provide to the requesting attaching entity the contact information for, all known entities with existing attachments that may be affected by the make-ready. A requesting attaching entity providing such notification must provide timely status updates to the public utility regarding the project.

M. Proposed O.A.C. 4901:1-3-03(B)(3)(a) Should Specifically State that Only Electric Utilities or Their Direct Contractors May Perform Make-Ready Work in the Power Space.

The Electric Utilities appreciate the Commission's clear specification of the distinction between attachments in the communication space and the electric space. The Electric Utilities' interpretation of the Proposed Rules is that only electric utilities, or their direct contractors, may perform work in the power space, including in manholes. The Electric Utilities request that the Proposed Rules state clearly that under no circumstances will work be performed in the power space by any entity other than electric utilities or their direct contractors.

N. Proposed O.A.C. 4901:1-3-03(B)(3)(a)(iii), (b)(iii) Should Be Edited to State that Existing Attachments May Not Be Modified Where Such Modification Would Increase Pole Loading.

Language should be added to proposed O.A.C. 4901:1-3-03(B)(3)(a)(iii), (b)(iii) to clarify that existing attachments cannot be modified if such modification would increase the loading on the pole. The Electric Utilities propose the following modification to proposed O.A.C. 4901:1-3-03(B)(3)(a)(iii):

> (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion, except where such modification would increase loading on the pole.

The Electric Utilities propose the following modification to proposed O.A.C. 4901:1-3-03(B)(3)(b)(iii):

> (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion, except where such modification would increase loading on the pole.

O. Proposed O.A.C. 4901:1-3-03(B)(7) Should Contain an Explicit Statement that Attachers' Self-Help Remedy to Hire Contractors Does Not Extend to Make-Ready Work in the Power Space.

The Electric Utilities strongly urge the Commission to make completely clear in the Proposed Rules that attaching entities do not have the right to perform work in the power space. The Electric Utilities therefore propose the following modification to proposed O.A.C. 4901:1-3-03(B)(7):

> (7) If a public utility fails to respond as specified in paragraph (B)(1) of this section, an attaching entity requesting attachment in the communications space may, as specified in section (C) of this rule, hire a contractor to complete a survey. If make-ready work is not completed by the date specified in paragraph (B)(e)(a)(ii) of this section, the attaching entity requesting attachment in the communications space may hire a contractor to complete the make-ready in the communications space alone:

P. Proposed O.A.C. 4901:1-3-03(C)(3) Should Specify What Constitutes a Reasonable Opportunity for a Public Utility to Accompany an Authorized Contractor Hired by an Attacher.

The Electric Utilities are unsure what is meant by a "reasonable opportunity" for an electric utility to accompany and consult with the authorized contractor and the attaching entity. Since the same personnel would be performing surveys and make-ready estimates along with other job duties, any lack of accommodation in scheduling such activities would simply cut into the work being performed on behalf of other attaching entities and/or electric customers. The Electric Utilities therefore propose the following modification to proposed O.A.C. 4901:1-3-03(C)(3):

An attaching entity that hires a contractor for survey or make-ready work shall provide the public utility with a reasonable opportunity (to include no less than ten (10) business days' prior notice) for a public utility representative to accompany and consult with the authorized contractor and the attaching entity.

Q. The Commission Should Modify Proposed O.A.C. 4901:1-3-03(C)(4) to Clarify that Electric Utilities Have the Absolute Right to Make Final Determinations to Deny Access to an Electric Utility's Poles for Reasons of Insufficient Capacity, Safety, Reliability, or Generally Applicable Engineering Purposes.

Electric utilities are obligated to serve electric customers reliably and safely, and are subject to many standards established by the Commission regarding electric service. Therefore, any final determinations made pursuant to proposed O.A.C. 4901:1-3-03(C)(4) must rest with the electric utility representative. The Electric Utilities therefore suggest the following modifications to proposed O.A.C. 4901:1-3-03(C)(4):

(4) The consulting representative of an electric utility ~~may~~ shall make final determinations, on a non-discriminatory basis, ~~where~~ whether there is insufficient capacity and for reasons of safety, reliability, engineering and construction standards, and generally applicable engineering purposes.

R. Proposed O.A.C. 4901:1-3-04(G) Requiring Subsequent Attaching Entities to Share Proportionately in the Cost of Modifications Should be Altered or Deleted.

The Electric Utilities do not support the requirement in proposed O.A.C. 4901:1-3-04(G) that subsequent attaching entities share proportionately in the cost of modifications unless such attachments occur during the time that make-ready is being performed which is covered by the first sentence of the paragraph. Attaching entities currently "take the poles as they find them," which means that sometimes new attachers benefit from prior modifications, while at other times paying for modifications that allow subsequent attachers to benefit. The Electric Utilities propose striking the last sentence of proposed O.A.C. 4901:1-3-04(G).

Alternatively, the Electric Utilities recommend that proposed O.A.C. 4901:1-3-04(G) not be interpreted to require reapportioning the cost of the modification to create refunds to attaching entities when new attachments are made. Such record-keeping would require manual processing and would be administratively burdensome. The Electric Utilities propose, in the alternative, adding the following sentence to the end of the paragraph: "This provision shall not require refunds to be paid to existing attaching entities."

CONCLUSION

The Electric Utilities respectfully request that the Commission reconsider the adoption of the Proposed Rules, as Ohio's current statutory and regulatory framework has proven more than sufficient to address the issues surrounding joint use and pole attachments. However, if the Commission is intent on adopting new pole attachment regulations, the Electric Utilities request that the Commission reconsider those provisions of the Proposed Rules that would apply to the relationship between ILECs and electric utilities, and that adopt the FCC's telecommunications and cable rate formulas and make-ready deadlines. The Electric Utilities urge the Commission to modify the Proposed Rules to specify that the ILEC/electric utility relationship is not governed by the Proposed Rules, to adopt the alternative rate formula proposed by the Electric Utilities, and to alter the make-ready timelines to render them more flexible and equitable to electric utilities. The Electric Utilities look forward to working further with the Commission and its Staff on these issues of great importance to the stakeholders and their customers.

Respectfully submitted this 12th day of July, 2013,

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Summary: Comments Initial comments of Ohio Electric Utilities electronically filed by Mr. Robert M. Endris on behalf of Burk, James W. Mr.