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 Provided by Public Utilities.	))))	Case No. 13-579-AU-ORD

REPLY COMMENTS OF THE AT&T ENTITIES

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Introduction

The AT&T Entities[1] ("AT&T"), by their attorney, submit these reply comments in the captioned case. Initial comments totaling 221 pages were filed by twelve parties, some jointly.[2] The initial comments raise many significant factual, legal, and policy issues for the Commission's consideration.

The initial comments reflect a wide range of opinion on the path the Commission should follow, from "do nothing" to "do everything" and a number of options in between. Some parties argue that the Commission does not have authority to do some of what is proposed in the rules, while others argue that the Commission should exercise its authority to do much more.

The Commission should reject the positions espoused by both the "do nothing" and "do everything" advocates. Their positions are flawed for the reasons explained below. The best answer, from both a public policy and legal standpoint, is the one AT&T proposed in its initial comments. AT&T proposed, as a better alternative to the draft rules, that the Commission simply incorporate the FCC's rules adopted in 2011 into its own rules, without restatement or modification. AT&T Comments, p. 3. AT&T explained that this can be done readily and consistent with the applicable legal requirements in Ohio, R. C. §§ 121.71 – 121.76. Id. This

[1] The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Corp., Teleport Communications America, LLC, and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

[2] Initial comments were filed by the AT&T Entities ("AT&T"), Data Recovery Services, LLC ("DRS"), the City of Dublin ("Dublin"), the Ohio Electric Utilities ("the Electrics"), Fiber Technologies Networks, L.L.C ("FiberTech"), Frontier North, Inc. ("Frontier"), the Ohio Cable Telecommunications Association ("OCTA"), the Ohio Telecom Association ("OTA"), OneCommunity, PCIA - The Wireless Infrastructure Association and the HetNet Forum ("PCIA"), tw telecom of ohio llc ("TWTC"), and Zayo Group, LLC ("Zayo").

approach would be much more straightforward than attempting to "rewrite" some of the FCC rules, deleting from some and adding to others, noted AT&T. Id. The Commission is aware that the FCC had embarked on a four-year process, beginning in 2007, to update and revise its pole attachment rules.[3] This substantial effort culminated in the adoption of the revised rules in 2011. The FCC summarized its own orders as follows:

- The Commission revised its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks.

- The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years has demonstrated the need to provide more guidance.

- The Commission established a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communications space; improved its enforcement rules; reinterpreted the telecommunications rate formula within the existing statutory framework; and addressed rates, terms, and conditions for pole attachments by incumbent LECs.

- The Commission also resolved multiple petitions for reconsideration and addressed various points regarding the nondiscriminatory use of attachment techniques.

76 FR 26631, May 9, 2011.

The FCC docket was a huge undertaking that involved carefully balancing many of the same competing interests evident in the comments in this case. There is simply no need - - and no sound public policy justification - - to reopen and relitigate the many issues that have been thoroughly addressed by the FCC. This is why AT&T recommends, as the best alternative, the wholesale adoption by the Commission of the FCC's rules without any changes, except for the addition of the proposed voluntary mediation process.

[3] The FCC's Notice of Proposed Rulemaking was released on November, 20, 2007 (FCC 07-187). Its Further Notice of Proposed Rulemaking was released on May 20, 2010 (FCC 10-84).

Several commenting parties are generally supportive of the FCC's rules and the approach they take to the issues. TWTC supports the goals of the FCC rules and recounts the problems it has encountered with an electric utility. TWTC, pp. 3-5[4]. The OTA supports the mirroring of the FCC rules in many instances. OTA, pp. 2, 7, 8-11. Zayo supports the FCC's 2011 order. Zayo, p. 3.

AT&T suggests that those who recommend deviation from the FCC's rules should meet a substantial public policy test. This is especially true here, where the FCC had a long and very focused rulemaking docket. The result was that the FCC promulgated very complex and detailed rules where appropriate, while specifically declining to adopt rules where inappropriate. As such, there should be a high burden on those who seek to deviate from the FCC rules by urging the Commission to establish unique and different state rules. Such parties should be required to demonstrate that some aspect of the FCC rules does not work in Ohio because of unique or special circumstances. It should not be sufficient that a particular party simply does not like the outcome reached by the FCC and that it advocates a different outcome here, conveniently ignoring any public policy justification. AT&T notes that many of the parties' initial comments fall into that camp and therefore fail the public policy test. All of this underscores that it is appropriate to question why the Commission should adopt state-specific rules, given 30+ years of history and with everything that the FCC accomplished in the 2011 revisions to its rules.

[4] The claim, quoted by TWTC, that "Ohio isn't an FCC state" (TWTC, p. 4) begs the question, "Why isn't Ohio an FCC state?"

In its initial comments, AT&T explained that, in following the recommendation to adopt the FCC rules, the Commission could still adopt its own mediation process, as has been proposed, in addition to the adoption, in whole, of the FCC's substantive rules. Id. p. 4. Then, as now, AT&T submits that if the Commission chooses not to simply adopt the FCC rules, with its own mediation process alongside those rules, and instead insists on its own state-specific set of rules, the Commission should adopt the suggestions in AT&T's initial and in these reply comments.

Definitions

The Electrics ask the Commission to revisit the definition of an attaching entity at proposed rule 1(A) to more narrowly circumscribe the types of attaching entities that are encompassed by the proposed rules. Electrics, p. 24. But the proposed definition mirrors the FCC's definition in 47 CFR § 1.402(m). The FCC purposely broadened this definition to achieve its stated public policy goals. In light of this, the Commission should not narrow the definition based on the Electrics' unfounded objection. No sound reason has been given to depart from the policy adopted by the FCC.

OCTA proposes a definition of "communications space." OCTA, Attachment A, p. 1. OCTA states that including this definition would complement access to the pole tops. OCTA, p. 5. It is not clear, however, that the proposed definition accomplishes that objective. AT&T believes that this is another situation where the better alternative is to adopt and follow the FCC's rules and policies, including those that explicitly permit pole-top attachments.

Joint Use

No aspect of the proposed rules deals directly with the existing statutory provisions governing the joint use of utility facilities. However, the Electrics interpret the proposed rules as having significant and dire consequences on existing joint use arrangements. Not surprisingly, this position reflects that taken by the Coalition of Concerned Utilities in the FCC proceeding.

In light of that interpretation, the Electrics argue that the Commission should not undertake regulation of the rates, terms, and conditions of access by electric utilities and ILECs to each other's poles. Electrics, pp. 6, 15. They suggest that the relationship between ILECs and electric utilities is analogous to a joint venture. Electrics, p. 6. They contrast that relationship with that between an ILEC or electric utility and a CLEC or cable provider, which they say is more akin to a landlord-tenant relationship when the tenant rents space on the pole. Electrics, p. 6.

The Electrics warn that the proposed rules should not allow the ILECs (or for that matter, the electric utilities themselves) to terminate or disregard their obligations under joint use agreements and opt to be treated like CLECs or cable television providers. Electrics, p. 6.

The Electrics express the fear that the proposed rules appear to invite public utilities to terminate their existing joint use agreements, and then seek to have their "attachments" on the other public utility's poles regulated by the Commission under the proposed rules. Electrics, p. 13.

Predicting the impact on joint use negotiations, the Electrics posit that the proposed rules create an incentive ***not*** to reach an agreement, but rather create a dispute that would be resolved by imposing the default rates in a former joint use setting. Electrics, p. 16.

Frontier addresses joint use in its comments. Frontier argues that the ILECs pay significantly higher rates for attachments on poles owned by investor-owned electric companies when compared to what cable television systems ("CATVs") and competitive local exchange carriers ("CLECs") pay. Frontier, p. 1. Frontier suggests that the Commission adopt a uniform rate formula for pole attachments by all service providers, including ILECs, CLECs, CATVs, and Electrics. Frontier, pp. 2, 11. Frontier posits that the ILECs are being asked to help pay for both the initial construction and the recurring annual carrying costs of stronger and taller poles that have become necessary to accommodate additional attachers, even though ILECs derive no benefit from such poles. Frontier, p. 4. Frontier also argues that the imbalance in pole ownership in favor of the Electrics has been exacerbated by overbuilding, which is a practice followed by the Electrics to set taller poles beside existing ILEC poles, which results in the ILECs having to transfer their facilities to the new Electric poles and thereby lose ownership of its own poles. Frontier, p. 5.

The best response to the Electrics' claims about the impact of the proposed rules on joint use arrangements is to point to the rules the FCC adopted. The FCC saw a clear need to revisit its prior interpretation of Section 224(b) with respect to the ILECs. It also articulated the legal basis for making the change in policy that it did. Reference to the FCC's own summary of its action in this regard is helpful:

> Based on the record in this proceeding, we find it appropriate to revisit our interpretation of section 224 with respect to rates, terms and conditions for pole attachments by incumbent LECs. We allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.

76 FR 26628, ¶ 63. The Commission also noted:

> We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities. Over time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases. Further, although we agree with the Commission's prior assessment that "Congress' intent" in section 224—and the 1996 Act more broadly—was to "promote competition," we believe this intent was not limited to entities that were "new telecommunications entrants" at the time of the 1996 Act.

76 FR 26628, ¶ 65. The Commission went on to say:

> We conclude that neither the language or structure of section 224 precludes our finding that incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to section 224(b)(1). The Commission's authority to regulate the rates, terms and conditions of pole attachments by incumbent LECs derives principally from section 224(b) of the Act. In particular, section 224(b)(1) provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." The statute defines the term "pole attachment," in turn, as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."
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> Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for pole attachments," under our revised reading the Commission has a ***statutory obligation*** to regulate the attachments of incumbent LECs.

76 FR 26629, ¶¶ 68, 70 (emphasis added). The Electrics seek to negate the FCC's conclusion that it has such a statutory obligation. The FCC clearly did not cancel joint use agreements, and this Commission has not proposed to do so. The predictions of dire consequences made by the

Electrics are simply unfounded and their recommendations in this regard should not be adopted. Once again, no sound reason has been given to depart from the policy adopted by the FCC.

While the Electrics seek to preserve the status quo on joint use agreements, other parties take the opposite tack. OneCommunity argues that joint use agreements operate to the detriment of non-utility attachers, asserting that these agreements allow access at lower rate, which results in the joint use utilities not paying their fair share of costs when subsequent non-utility entities request access. OneCommunity, p. 8. Frontier explains the issues surrounding joint use that, at least in part, led the FCC to the conclusion it reached. Frontier, pp. 1-7. Joint use agreements, in many instances, are appropriate and have a clear statutory basis in Ohio. R. C. § 4905.51. The differences of opinion between the Electrics, OneCommunity, and Frontier illustrate that the best way to resolve these differences is to adopt, without change, the FCC's rules, as AT&T has proposed. The FCC justified its change in policy and substantiated the need to exercise some limited jurisdiction over the joint use agreements.

Access to poles, conduits, and rights-of-way

Access to Conduit

FiberTech supports the proposal to incorporate time frames for conduit access into the rules. FiberTech, p. 6. In its Initial Comments, AT&T addressed and opposed the expansion of the rules to include conduit occupancy. AT&T asserted that the expansion of the pole attachment rules, processes, and timelines to all conduit occupancy requests is unfounded and would not constitute good public policy. AT&T Comments, p. 3. In its more detailed

challenge to this proposal, AT&T explained why proposed Rule 3(H) poses significant issues.[5] AT&T Initial Comments, p. 9. OTA shares AT&T's view on conduits. OTA, pp. 8-9. The FCC specifically sought comment on that issue (FCC 11-50, fn.132) and declined to extend the pole attachment timeframes and regulatory regimes to conduit occupancy for good reason. This Commission should do so, too.

FiberTech, which proposed this expansion of the regulatory regime at the rules workshop, has sought to support its position in its comments. But the facts it presents are misleading. FiberTech, Attachment A. The jobs cited by FiberTech are AT&T Ohio and AT&T Indiana jobs; a fact that FiberTech did not reveal. AT&T has reviewed the evidence presented by FiberTech. It lists the total number of days from the date FiberTech applied for the field survey until they received an occupancy permit. Importantly, though, FiberTech does not reveal that every job they listed for Ohio required AT&T to do make-ready work, while none of the Indiana jobs did. For any Indiana jobs in which make-ready work was required, FiberTech opted to do it themselves, so they received the occupancy permit upon completion of the field survey. Thus, the time frames listed for the Ohio jobs are for the field survey and the make-ready jobs, while the days listed for the Indiana jobs are just for the field survey. FiberTech has compared apples to oranges. The evidence it presented, once appropriately examined, does not support its argument. In fact, the evidence supports AT&T's position and that of several other parties that the Commission should not adopt rules for conduit occupancy.

[5] The proposed rule provides as follows: "The time frame for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles."

As was the case when the FCC adopted its rules in 2011, there is simply no record support for the application of any timelines - - and especially the same timelines applicable to pole attachments - - to access to ducts and conduit.

In simplest terms, the reason that timeframes for access to poles cannot be adopted for conduit occupancy is that access to poles is generally identifiable by a "line of sight," i.e., you can generally see from a reasonable distance whether additional facilities may be placed on poles.

That is in stark contrast to access to conduit, as the conduit is underground and its entire length cannot be seen. In addition, one must consider whether the conduit is physically capable of accepting a new cable, even assuming the conduit appears to be empty and thus available for use (and is not reserved for a maintenance spare, as allowed by AT&T Ohio's tariff).

Frequently a conduit run is not available because it has collapsed or is blocked. Indeed, one of the jobs that FiberTech highlighted, and criticized for excessive time intervals, in its initial comments was a conduit that was collapsed in Columbus. FiberTech, Attachment A. In that instance, the conduit run was placed in 1958 and at some point an empty conduit duct, unbeknownst to AT&T, had collapsed, rendering it unusable. Whether a conduit is collapsed or blocked cannot be ascertained by a casual site survey or looking at a blueprint of the manhole. Generally, there are two ways to ascertain whether a conduit is not collapsed or blocked. One way is to insert a rod into the conduit and see whether it may traverse to the end of the conduit

run. The second way is to try to install the desired cable/facility and see whether it may traverse to the end of the conduit run. If the cable or rod cannot be fed through to the end of the conduit run, the job typically must be reengineered and rerouted to avoid the unusable conduit. Or, construction crews are required to cut and dig up the street in order to place a new conduit run. Obviously, these are unforeseen and unavoidable circumstances which add significant time to the process of placing cable in the underground environment. All of this underscores why proposing, planning, and executing work in underground conduit is much more complicated than proposing, planning, and executing work on poles.

Even if the conduit is not collapsed or blocked and available for use, other factors outside of the utilities' control can add significant delays. The significant variable that can drastically affect timeframes is permitting with local authorities to perform the required work. That is especially true in major metropolitan areas, where coincidently, the use of conduit is most prevalent. In most cases, many permits are required for conduit work. These can include, but are not limited to, work permits, access permits, day vs. night permits, emergency permits, permits requiring Approved Traffic Control Plans, and the like.

Permitting may vary by political boundaries, i.e., city, county, and state. In some cases, permits are required from the city, county, and state for the same job or even phases of the same job, such as simple entry to the conduit for inspection and then the actual performance of the required work. Sometimes, the required permits must be applied for, and processed, in sequence. Jobs might also require the approval of local zoning or permitting authorities. In such cases, delays of 180 days or more are possible.

Winter weather conditions and even asphalt plant schedules can also affect these timelines and can add to the delays in opening and working on underground conduit. Oftentimes, moratoria on winter digging are encountered because the asphalt plants are closed.

In addition, none of these significant differences between access to poles versus conduits were thoroughly vetted in the FCC's docket, and even less so in this docket. To the FCC's credit, it specifically declined to establish rules with timeframes because not enough empirical data was provided for the record. The Commission should similarly decline to establish rules, including timelines, for access to conduit.

For all of these reasons, the Commission should refrain from establishing any requirements for pole attachments or conduit occupancy that exceed or are inconsistent with those in federal law or the FCC's rules. Proposed Rule 3(H) should therefore not be adopted.

Access to Poles

For their part, the Electrics take the position that 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. Electrics, p. 3. The Electrics also opine that the comprehensive rules proposed by the Commission are unnecessary and are unsupported by a showing of need. Electrics, p. 4. Therefore, not surprisingly, the Electrics do not support the adoption of the FCC's rules.

It should be noted that the Electrics opposed the expansion of the FCC rules in that agency's comprehensive docket and have, to date, unsuccessfully challenged those rules in federal court. *See* *American Electric Power Service Corporation, et al., Petitioners v. Federal Communications Commission, et al.*, United States Supreme Court No. 12-1396, petition for a writ of certiorari pending. The Electrics should not be heard to challenge portions of the FCC rules in this case and to make changes that the FCC rejected in its comprehensive docket.

As a fall-back position, in the event the Commission adopts a comprehensive regulatory approach, the Electrics urge the Commission to reconsider three key aspects of the proposed rules. Electrics, p. 3. These are the following:

> (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 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.

In each of these claims, the Electrics simply disagree with what the FCC has done. As stated before, simply disagreeing with the FCC without providing appropriate justification should not be enough to pass the public policy test or to support any departure from the FCC's carefully crafted rules.

Jurisdiction to adopt rules

Underlying both their primary and secondary arguments is the Electrics' bold claim that the Commission has no jurisdiction to adopt pole attachment rules that affect them.

They argue that R. C. § 4927.15 only gives the Commission the authority to adopt such rules related to telephone companies. Electrics, p. 10.

Even if the Electrics' reading of R. C. § 4927.15 is correct, the matter does not end there. There can be no debate that the Commission has broad statutory jurisdiction over the Electrics, as evidenced by several excerpts from the Ohio Revised Code:

> The public utilities commission is hereby vested with the ***power and jurisdiction to supervise and regulate public utilities*** and railroads, ***to require all public utilities to furnish their products and render all services exacted by the commission or by law***, and ***to promulgate and enforce all orders relating to the protection, welfare, and safety of*** railroad employees and ***the traveling public***, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

R. C. § 4905.04 (emphasis added).

> The jurisdiction, supervision, powers, and duties of the public utilities commission extend to ***every public utility*** and railroad . . . .

R. C. § 4905.05 (emphasis added).

> The public utilities commission has ***general supervision*** over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code . . . .
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> The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. ***The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety***.
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R. C. § 4905.06 (emphasis added). In connection with its general supervisory power over the regulated public utilities, then, the Commission has the specific power to inspect their lines and other facilities and to prescribe any rule or order that the Commission finds necessary for the

protection of the public safety. The proposed rules governing pole attachments and conduit occupancy, when applied to the electric utilities, clearly fit within that statutory authority. The Electrics read R. C. § 4927.15 in a vacuum and ignore the other broad jurisdictional provisions that apply to them.

Make-ready work and timelines

On the issue of make-ready work, the Electrics assert that the Commission should not adopt the FCC's make-ready timelines. Electrics, p. 8. The Electrics claim that the proposed rules prioritize the deployment of cable, television, and information services over the safety and reliability of the electric utilities' pole infrastructure and the power grid. Electrics, p. 8. On the subject of the proposed deadlines, the Electrics also claim that 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 attaching parties. Electrics, p. 8. In each of these arguments, the Electrics fail the public policy test and do not justify any deviation from the FCC's rules.

FiberTech claims that without adequate oversight, the response of owners to pole applications will be characterized by inordinate delays and the imposition of unduly high costs. FiberTech, pp. 2, 6. DRS makes the unsupported claim that the utility companies "almost always" fail to process requests in a timely manner. DRS, p. 5. Such unsupported claims do not justify making any changes to the established timelines in the FCC rules.

Furthermore, FiberTech recommends that the Commission adopt shorter timelines. FiberTech, p. 7. The OCTA believes that the proposed deadlines should be more

explicit in order to make it even clearer that there is a definite date by which a required action may lawfully be taken. OCTA, p. 3. Echoing this sentiment, DRS proposed that a deviation provision must articulate the specific instances in which a public utility may deviate from the timelines. DRS, p. 7.

The Electrics ask the Commission not to apply the proposed make-ready deadlines 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. Electrics, p. 29. Similarly, the Electrics suggest that the make-ready timelines should be tolled for pole attachment projects that are delayed by the local government permitting process. Electrics, p. 31. The Electrics also take the position that the make-ready deadlines should also not apply 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. Electrics, p. 32.

In each of these cases, the commenting parties have not justified a departure from the FCC's rules. The FCC clearly wrestled with the differing views on survey, make-ready, and attachment timelines and came up with a balanced, national solution. No substantial or valid reason has been shown to deviate from the FCC's prescribed timelines for each of these activities.

Third-party administration

FiberTech proposes third-party administration of pole attachments and conduit occupancy. This removes the owners' control of access to poles and places that responsibility

with an independent entity. FiberTech, p. 5. FiberTech does not even come close to justifying a move to third-party administration in Ohio. Moreover, it fails to address who will bear the costs for the third-party administrator. There is simply no basis - - and none has been shown - - for creating a third-party administration process here to supplant the pole owners' rightful control over the process.

Similarly, DRS proposes a detailed administrative process for managing pole access. DRS, pp. 8-9. While not as extreme as the proposed third-party administration process, the DRS proposal would tie the hands of the pole owners, who obviously need some operational flexibility in meeting the needs of all attaching parties.

Temporary attachments

FiberTech proposed allowing temporary attachments to serve a customer prior to the expiration of prescribed timeframes. FiberTech, pp. 14-15. Temporary attachments create significant administrative and operational problems, not just for the pole owner, but for subsequent attachers as well.

It is important to realize that temporary attachments, by their very nature of being temporary, are typically not as reliable and stable as a permanent attachment. In addition, guy wires for added pole stability are typically not necessary, as the attachment is only temporary. But far too often, the attaching party fails to remove the attachment, or appropriately convert the temporary attachment to a permanent attachment. This can damage the pole and decrease its life expectancy. Moreover, temporary attachments can quickly become unsafe. For example, it is common to use a metal "band" to attach facilities to the pole in a temporary situation, as opposed

to drilling through the pole and using a bolt. But, Ohio's all too common freeze and thaw cycles in the winter can result in the "band" sliding down the pole and interfering with lower permanent attachments or even sliding to the ground. Either case presents a safety hazard. And, as the pole owner cannot police all the poles to ensure that attachments were property installed, temporary attachments often remain in place.

Temporary attachments can create conflicts with subsequent attaching parties who go through the permanent attachment process. If a temporary attachment is not removed at the appropriate time, subsequent attachers may be denied access to the pole, or may bear the cost for a new and larger pole, if the existing pole does not have adequate space for the additional attachment.

Given all of these issues, the Commission should not authorize temporary attachments in its rules, but should allow pole owners to address the terms and conditions for making temporary attachments, if they are allowed at all, in their reasonable and non-discriminatory pole attachment practices.

Penalties

DRS proposes that the Commission should establish a penalty per day for each day the utility fails to adhere to established timelines. DRS, p. 8. OCTA argues that the rules should provide both broader and more specific remedies for violations of the access rules and for unreasonable terms and conditions OCTA. OCTA, p. 3.

The Electrics propose that the Commission should modify the proposed rules to include penalties for unauthorized attachments and safety violations. Electrics, p. 34. In a related point, they ask that the Commission promptly accept and apply tariff changes adding unauthorized attachment penalties and safety violation penalties. Electrics, p. 36.

Here again, these parties have not justified any deviation from the FCC rules or the creation of state-specific penalties and remedies in the rules. These matters would be best handled in a complaint process, on a case-by-case basis, either before this Commission or the FCC.

Pole-top attachments

PCIA urges the Commission ensure that wireless attachers have access to utility infrastructure at just and reasonable rates, terms and conditions mandated by section 224 of the Telecommunications Act. PCIA, p. 6. OTA supports this view. OTA, p. 7. AT&T supports the comments of PCIA and OTA. AT&T favorably cited proposed Rules 3(B)(3)(b) and 3(B)(4), which address wireless attachments above the communications space, in its initial comments. AT&T also suggested that the rules should specify that wireless attachments are permitted above the communications space and, specifically, on pole tops, noting that this right has been confirmed by the FCC. AT&T Initial Comments, p. 9. PCIA echoes this sentiment. PCIA notes that, currently, the largest obstacle to Distributed Antenna Systems (DAS) and small cell deployment is the lack of prompt access to utility poles, including pole tops, at equitable rates. PCIA, p. 7.

PCIA challenges AEP Ohio's assertion that the current regulatory scheme is working fine and that there's nothing broken. PCIA contends that this clearly ignores the wireless broadband projects currently in stalled negotiations and those abandoned due to unreasonable terms, conditions and rates. PCIA, p. 8.

PCIA notes that some utility companies employ a blanket prohibition on pole-top attachments or impose excessively strict conditions that make it impossible for attachers to utilize the pole-top space. PCIA, p. 8.

PCIA also comments that, beyond access to pole tops, the make-ready schedule and lack of prompt communication and decisions from the utilities have delayed projects otherwise ready for deployment. PCIA, p. 10.

PCIA states that telecom pole attachments, including DAS and small cells, should not be targeted to provide a revenue stream for the utility pole owners out of proportion to the rates charged to other pole attachers. PCIA, p. 15.

PCIA advocates for the adoption of a rebuttable presumption that all wireless pole attachments that comply with national safety standards are safe because the wireless attachers, like all pole attachers, are required to comply with uniform national safety standards, and because safety and reliability of wireless infrastructure is in the best interest of the pole attachers, as well as utilities. PCIA, p. 17.

In stark contrast to the PCIA and AT&T positions, the Electrics propose that the rules should allow pole owners to *prohibit* pole-top attachments if the prohibition is nondiscriminatory. Electrics, p. 37. They further suggest that if a pole owner allows pole-top attachments, the rule should allow the pole owner to require that such attachments be made in compliance with the pole owner's construction standards. Electrics, p. 37.

A prohibition against pole-top attachments, as proposed by the Electrics, would conflict with the explicit authority granted by the FCC. The FCC explained its order as follows:

> We clarify that section 224 allows wireless attachers to access the space above what has traditionally been referred to as "communications space" on a pole. On previous occasions, the Commission has declined to establish a presumption that this space may be reserved for utility use only, and has stated that the only recognized limits to access for antenna placement are those contained in the statute. Yet wireless attachers assert that pole top access is persistently challenged by pole owners, who often impose blanket prohibitions on attaching to some or all pole tops. Blanket prohibitions are not permitted under the Commission's rules. We reject the assertions of some utilities that our rule regarding pole tops will create a "*de facto* presumption in favor of pole top attachments" or otherwise "restrict an electric utility's right to deny access for reasons of safety and reliability." Instead, we clarify that a wireless carrier's right to attach to pole tops is the same as it is to attach to any other part of a pole. Utilities may deny access "where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes."

76 FR 26624, ¶ 26. The FCC has established an appropriate national public policy in this regard that this Commission should follow.

Notice of changes to poles

The Electrics argue that proposed rule 3(A)(3)(c) is overly broad and unduly burdensome. Electrics, p. 40. They propose that the pole owner should not be required to notify an attaching entity of *any* changes to a pole unless the changes affect the attaching entity's equipment. Electrics, p. 40. Here, the Electrics quibble with the administrative duty to provide

notice to attaching parties of changes to a pole. Is it reasonable for the Electrics to decide, on their own, if a proposed change will affect an attaching party's equipment? AT&T suggests that the better approach is to provide notice to all attaching parties so those parties themselves can decide if the changes will affect their equipment and, if so, the appropriate steps to take to protect their interests.

Rights-of-way

OCTA suggests that proposed Rule 3(E) provides for the Commission's review of a cable operator's authority to occupy rights-of-ways and that, in doing so, it exceeds the Commission's authority. OCTA, p. 6. Close examination of proposed Rule 3(E), though, reveals no such provision. AT&T does not understand the proposed rules to be intended to impact local control over rights-of-way in any respect. OCTA's view is countered by that of Dublin, which supports the Rule3(E)(4) language in the rules to the effect that nothing in that rule is intended to abridge the legal rights and obligations of municipalities and landowners. Dublin, p. 4.

Rates, terms, and conditions for poles, ducts, and conduits

The commenting parties offer widely differing opinions on the establishment of rates for pole attachments and conduit occupancy. They also offer up variations on the FCC's approach on the appropriate rate formulas.

The Electrics argue that the Commission should not adopt the FCC's rules regarding separate rates for telecommunications and cable attachments. Rather, they say, the Commission should adopt a unified rate formula. Electrics, p. 7. The Electrics assert that it is

important to carefully allocate pole cost to the cost causer in order to ensure that electric ratepayers do not cross-subsidize services. Electrics, p. 19. The Electrics propose their own rate formula. Electrics, p. 7.

For its part, OCTA argues that the Commission should not change the existing pole rate formula. OCTA, p. 8. OCTA suggests that a multi-tiered rate structure complicates the Commission's regulation of pole rates and decreases the regulatory certainty on which pole owners and communications service providers depend. OCTA, p. 11.

The Electrics also propose that the Rule 4(G) requirement that subsequent attaching entities share proportionately in the cost of modifications should be altered or deleted. Electrics, p. 44. Conversely, the OCTA supports the concept that parties benefitting from or requiring the modification work should be required to bear the costs of such work. OCTA, p 4.

DRS proposes that the Commission should expand proposed Rule 4(G) to require the actual "cost causer" to pay make-ready costs, further claiming that the utility is a causer by not properly inspecting work completed on a pole. DRS, p. 11. DRS also suggests that the utilities need to provide a complete breakdown of costs so the attaching entities can be assured they are paying the proper amount. DRS, p. 12.

OneCommunity advocates for a rate structure, as well as terms and conditions, for pole attachments that apply to all entities regardless of how they are classified. OneCommunity, p. 6.

PCIA urges the Commission to closely follow the FCC's rate formula, if not adopt the same formula. PCIA, pp. 4, 14. PCIA advocates for the adoption of the FCC's 2011 Order's methodology for calculating rental rates charged to pole attachers. PCIA, pp. 10-11.

Frontier urges the Commission to establish a uniform pole attachment rate formula that applies to any entity that seeks to attach to poles owned by a public utility. Frontier, p. 8. That rate should, Frontier continues, equitably share costs among all pole owners and attachers. Frontier, p. 9.

Zayo supports regulating pole rates based on the FCC's 2011 Order. Zayo, p. 3. Zayo emphasizes the importance that pole rental rates play in the deployment and availability of broadband infrastructure. Zayo, p. 1. Zayo sees benefits in the areas of the growth of advanced broadband services, more competition, and economic development. Zayo, pp. 1-2.

None of the parties offering alternatives to the approach taken by the FCC on the rate formula and its application have justified any deviation from the rules adopted by the FCC. The comments of parties who seek to deviate from the FCC rules by urging the Commission to establish unique state rules should be subjected to a high burden of proof to demonstrate that some aspect of the FCC rules does not work in Ohio because of unique or special circumstances. Conveniently, none of these parties has done so. As noted previously, it should not be sufficient that a particular party simply does not like the outcome reached by the FCC and that it advocates a different outcome here. The recommended changes to the approach taken by the FCC in this regard should not be adopted.

Complaints

OCTA suggests revising proposed Rule 5 to provide for specific remedies in the event that a pole owner does not comply with access timelines and other access requirements. OCTA, p. 7. FiberTech recommends that Rule 5 be amended to require the resolution of complaints within 90 days rather than the proposed maximum of 365 days. FiberTech, p. 21.

As to both suggestions, AT&T submits that if state rules are to be adopted at all, the existing complaint rule (O.A.C. § 4901:9-01) provides an appropriate process, with any needed flexibility, to address a complaint related to the issues under consideration here. If anything, OCTA and FiberTech's issues would likely be better addressed via the mediation process proposed in the draft rules. Accordingly, the OCTA and FiberTech recommendations should not be adopted.

Mediation and arbitration of agreements

The Electrics support proposed rule 6, which provides a forum for informal resolution, through mediation or arbitration, of pole attachment disputes. Electrics, p. 8. PCIA supports a mediation process that is done in good faith and is not used to subvert the timelines outlined in the rules. PCIA, p. 15. As explained above, if the Commission were to act favorably on AT&T's recommendation to defer to the FCC's jurisdiction, the proposed mediation rule could still be adopted. AT&T supports these comments and the proposed mediation process.

Conclusion

The wide disparity of views expressed in the initial comments and the soundness of the public policies and rules established by the FCC in 2011, coupled with the lack of

evidence in the record, underscore that the best course for the Commission to follow would be the wholesale adoption of the FCC rules, without change, but with the addition of the proposed voluntary mediation process. Given the comprehensive approach that has been taken by the FCC, based on its significant work in crafting a balanced national public policy, this course of action would best serve the public interest.

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Certificate of Service

I hereby certify that a copy of the foregoing has been served by first-class mail, postage prepaid, or by e-mail as noted below, this 29th day of August, 2013 on the parties listed below.

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