

**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,)	Case No. 13-579-AU-ORD
Conduits and Rights-of-Way by)	
Public Utilities.)	

REPLY COMMENTS OF THE OHIO TELECOM ASSOCIATION

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ATTORNEY FOR THE OHIO TELECOM ASSOCIATION

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I. BACKGROUND

Pursuant to the Public Utilities Commission of Ohio's ("Commission") Entry dated July 22, 2013, the Ohio Telecom Association ("OTA") respectfully submits these Reply Comments regarding the Commission's consideration of the newly proposed rules contained in Chapter 4901:1-3 of the Ohio Administrative Code ("O.A.C."), in Case No. 13-579-AU-ORD, which address access to poles, ducts, conduits, and rights-of-way provided by public utilities.

II. INTRODUCTION

The OTA again wishes to express its appreciation to the Commission and Staff for taking the opportunity to review the Commission's current rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities. The OTA is generally supportive of Staff's proposed rules, which largely mirror the Federal Communications Commission's ("FCC") rules.

As the OTA stated in its initial Comments, there are many advantages to Ohio mirroring federal regulations. The benefits of aligning Ohio's rules with the FCC's include consistency in enforcement, reduction in confusion, and assuring appropriate

compliance with state and federal regulations. Moreover, as the OTA explained in its Comments, the Commission's proposed rules should also mirror the FCC's as they relate to the establishment of timeframes for access to a public utility's conduits.¹ The FCC has specifically declined to issue rules for conduit occupancy timeframes:

The record does not demonstrate that attachers are, on a large scale, unable to timely or reasonably access ducts, conduits, and rights-of-way controlled by utilities.²

The FCC has appropriately decided that access to conduits presents different and unique issues than access to poles, and therefore, proposing timeframes is simply not practicable or warranted. The Commission should follow the FCC's policy direction on this issue.

Perhaps most importantly, streamlining Ohio's rules to ensure consistency and compliance with FCC guidance is consistent with Governor Kasich's "Common Sense Initiative" established by Executive Order 2011-01K. Also, as discussed in its Comments, the OTA respectfully requests that the Commission make minor changes to Staff's proposed rules to more fully align its rules with the FCC's rules and relevant sections of the Ohio Revised Code.

Additionally, the Electric Utilities³ have raised an issue concerning the Commission's authority to issue rules regarding access to poles, ducts, conduits, and

¹ *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, (hereinafter "Commission Proposed Rules"), Comments of OTA at 8-9 (July 12, 2013).

² *In the Matter of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, FCC 11-50, ¶45, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration at 24-25 (April 7, 2011).

³ As used herein, "Electric Utilities" refers jointly to 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.

rights-of-way provided by public utilities. As discussed below, the Commission has the authority under federal and state law to require such access on the same terms and conditions as allowed by the FCC. The Electric Utilities do not dispute this; however, they claim that the Commission must adopt requirements that mirror the FCC's requirements through a case-by-case, utility-by-utility process. The Electric Utilities' interpretation of the Commission's authority is inappropriately narrow and runs counter to the Ohio statutory authority and regulatory precedent on the subject.

III. THE COMMISSION'S JURISDICTION

As the Commission has already found, it has authority under Section 4905.71, Revised Code, to issue rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities on the same rates, terms, and conditions as the FCC. In regulatory proceedings dating back to 1996, the Commission has affirmed its jurisdictional oversight concerning this matter.⁴ Within the past year, without any dissenting comments, the Commission again reaffirmed its authority over all public utilities in the regulation of poles, ducts, conduits and rights-of-way.⁵

Furthermore, the Commission's exercise of jurisdiction over all utilities in Ohio is necessary to create uniformity regarding the regulation of poles, ducts, conduits and rights-of-way both within Ohio, and between Ohio and the FCC. As discussed above, uniform rules provide numerous benefits, including consistency in enforcement, reduction in confusion, and assuring appropriate compliance with state and federal

⁴ See, e.g., *In The Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Issues*, Case No. 95-845-TP-COI, Entry on Rehearing at 51 (November 7, 1996).

⁵ *In the Matter of the Commission's Review of Chapter 4901:1-7, of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules*, Case No. 12-922-TP-ORD, Finding and Order at 11 (October 31, 2012).

regulations. Moreover, a lack of uniformity could lead to disparate and discriminatory enforcement of Ohio law. Accordingly, the Commission should exercise its jurisdiction over all utilities in Ohio to create uniform rules and regulations that mirror the FCC's rules and regulations to the greatest extent possible.

Finally, the Electric Utilities' claim that the Commission cannot issue rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities, conflicts with 47 U.S.C. § 224. This federal statute provides that the FCC has jurisdiction to regulate pole attachments, but also confirms that the FCC's regulation does not preempt state action if certain conditions are met. Specifically, 47 U.S.C. § 224(c) ("State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation") provides the following:

- (1) Nothing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.
- (2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the [FCC] that—
 - (A) it regulates such rates, terms, and conditions; and
 - (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.
- (3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—
(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments (emphasis added).

Thus, the Commission has jurisdiction to regulate access to poles, ducts, conduits, and rights-of-way provided by public utilities to the extent it has the state regulatory authority

to issue rules regarding pole attachments, which it has under Section 4905.71, Revised Code, and it certifies this to the FCC.

The Electric Utilities' concede that the Commission has the statutory authority to regulate access to poles, ducts, conduits, and rights-of-way provided by public utilities.⁶ Therefore, by deduction, the Electric Utilities must also concede that the Commission has authority to promulgate rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities.

As has previously been stated in Comments offered in this proceeding, "a pole is a pole."⁷ This simple statement captures the basic policy principle that whether a pole is owned by an electric utility or another utility, the Commission has clearly established its jurisdictional oversight over these implements of Ohio's public utilities. It is not necessary to review these issues on a case-by-case, utility-by-utility basis as advanced by the Electric Utilities. The Commission has established its authority to provide the appropriate regulatory oversight in this matter. To proceed in any other manner would be unduly cumbersome, complicated, and a waste of limited Commission resources that would serve no valuable public purpose.

⁶ Commission Proposed Rules, Joint Comments of Electric Utilities at 11 (July 12, 2013).

⁷ Commission Proposed Rules, Comments of the Ohio Cable Telecommunications Association at 8 (July 12, 2013).

IV. CONCLUSION

For the reasons explained above, OTA respectfully requests that the Commission adopt its position with respect to the proposed rules in these Reply Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments of the Ohio Telecom Association* was served upon the following parties of record this 29th day of August, 2013, *via* electronic transmission.

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