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

REPLY COMMENTS of tw telecom of ohio llc

I. Introduction

By Entry dated May 15, 2013, the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued for comment Staff's proposed rules to be codified in Ohio Administrative Code ("O.A.C.") Chapter 4901:1-3, specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities ("Proposed Rules"). In addition to tw telecom of ohio llc ("TWTC"), initial comments were filed by: Ohio Electric Utilities ("EDUs"); Ohio Cable Telecommunications Association ("OCTA"); Ohio Telecom Association ("OTA"); The AT&T Entities ("AT&T"); PCIA - The Wireless Infrastructure Association and the HetNet Forum ("PCIA"); Fiber Technologies Networks, L.L.C. ("Fiber Tech"); Frontier North, Inc. ("Frontier"); Data Recovery Services, LLC ("Data Recovery"); OneCommunity; City of Dublin; Ohio ("Dublin"); and Zayo Group, LLC ("Zayo").

TWTC submits the following in reply to the comments received by the Commission from the afore-named parties.

II. Reply Comments

In its initial comments, TWTC took a simple, but from the perspective of a facilities-based CLEC, critically important position of supporting the adoption of the Staff's proposed

rules. Simply put, a more robust expression of the Commission's current facility access rule would help CLECs like TWTC address the problems that they are *currently* experiencing in gaining access to jurisdictional utility poles—namely stonewalling by electric utilities that believe they only have the obligation to *negotiate* pole attachment agreements with CLECs, without any guidance from a firmly-established set of Commission rules. This only results in CLECs having to either forgo attaching its own, newly deployed facilities to those poles, or to accept a grossly discriminatory and non-cost-based rate imposed by pole owners. This situation is not only contrary to the FCC's and PUCO's express policies with respect to facility access, but it harms competition and the greater economy of the state.

Consistent with its initial comments, TWTC urges the Commission to adopt the Staff's proposed rules, but with improvements to Staff's proposal suggested by other commenters, as discussed below. TWTC believes that certain modest enhancements would lead to an even better rule.

A. Make-Ready Issues

Customers of CLECs like TWTC demand the installation of telecommunications services within a commercially reasonable timeframe—days or weeks, not months. The whole purpose of 47 U.S.C. § 224 is to provide non-discriminatory access to poles for providers of communications services so that competition for these services could develop and flourish. The speed at which that access occurs is made all the more important when incumbent facilities are in place—those facilities obviously do not have the same constraint.

This basic point about the importance of timely and non-discriminatory access to poles was expressed nearly uniformly by the competitive carrier commenters, with the OTA expressing its support for inclusion of the FCC's timelines and AT&T objecting only to the inclusion of

conduit space within the scope of the timelines (AT&T, at 9-10). See generally, Fibertech, PCIA, OCTA, Data Recovery Services. Only the EDUs have proposed significant, and largely unwarranted, changes to the Staff's make-ready timelines that would largely eviscerate the essential benefits of both the FCC's rules and the Staff's proposal. This divide provides the Commission sound evidence for the need for including aggressive make-ready timelines in these rules if the Commission is to further its policy of encouraging pro-competitive and non-discriminatory access to poles, ducts and conduits. The test for these timelines should be one of *reasonableness*, rather than ridged adherence to the FCC's rules. With the comments provided in this proceeding, the Commission has strong evidence in Ohio that unreasonable delays are in fact a reality faced by competitive carriers. For this reason, the make-ready timelines explicitly incorporated into the Staff's proposal at 4901:1-3-03(B) are certainly a positive step, but improvements can be made. TWTC supports the proposed modifications to 4901:1-3-03(A) and (B). OCTA, at pp. 3-8.

To the contrary, TWTC urges the Commission to specifically reject the proposed modifications to 4901:1-3-03(B) offered by the EDU's. The EDUs have made clear that they do not believe that these rules are really necessary in the first place and that the status quo is working just fine. EDUs at pp. 3-5 ("Proposed Rules may be a solution in search of a problem"). Consistent with this view, many of the proposals made by the EDUs are an attempt at keeping things the way they currently exist. In particular, the EDUs do not seem to understand that pre-existing agreements with ILECs are not a means of obtaining a free pass to discriminate against other attachers. The EDUs' proposed insertion of 4901:1-02(F) should be rejected outright as it is flatly inconsistent with a policy of non-discriminatory access to poles. Indeed, it is precisely the anticompetitive effects of legacy arrangements that 47 USC § 224 was intended to neutralize.

As a final point concerning 4901:1-3-03(H), AT&T, the OTA recommend that the Commission delete this provision as going beyond the requirements included in the FCC's rules. Access to conduits is no less critical to the timely deployment of competitive facilities than is access to poles. And the potential for discriminatory treatment by incumbents towards competitors is no less great. If there are practical difficulties with the application of make-ready timelines that apply to poles to conduits, then the conduit owner should be required to seek a waiver of the rule after explaining the specific circumstances as to why the waiver is necessary. Extended timelines for conduits should be the exception, not the rule.

B. Rates

Concerning the Staff's proposed rate formulas, the strong consensus reflected in the comments is that a unified, simpler rate structure is preferable. There is some divergence over what that "simplified" rate should be. The OCTA makes a compelling argument that the Commission's longstanding standard formula for tariff-based attachments under R.C. 4905.71 should be the Commission's formula. That formula does have the benefit of being well-established and understood, is fully compensatory and easy to calculate and apply. While it is true that Section 224 and the Telecom Act have placed constraints on the FCC's ability to craft perfectly non-discriminatory attachment rate formulas the Commission is not so constrained and has more leeway in adopting the FCC's lead towards a unified, cost-based rate regime.

On the other hand, there was support voiced for the Staff's proposal that follows the FCC's 2011 revised methods that still differentiate between cable and telecom attachments but to a much smaller degree than was the case prior to the most recent pronouncements. This is the position espoused by PCIA. PCIA at pp. 14-15. By voicing its support for the Staff's proposed rule in its initial comments, TWTC was essentially agreeing to this bifurcated rate structure, but

only because it represents an improvement to the status quo (no effective guidance for electric utilities despite established rules). On balance, in light of fact that this Commission is not bound by the same statutory constraints as the FCC, and that it is evident that the FCC is headed in the direction of a single, cost-based rate, the arguments of the OCTA should carry the day. TWTC would urge the Commission to move away from the Staff position and towards the unified rate structure recommended by the OCTA.

On the question of rates, the EDUs are again the outliers in this debate and the Commission should ignore their comments as being out of sync with the policy direction of the Staff, the Commission and the FCC. Although the EDUs support a unified rate formula that does not differentiate between the types of service providers, their proposed modified version of the FCC telecom rate should be rejected outright. The EDUs' claim that the cable rate formula will lead to a substantial under recovery for pole owners of the attaching parties' "fair share" of pole expenses. It is an undisputable economic reality that so long as an attachment covers its incremental cost, there is no cross-subsidy. The argument that such a rate forces a satellite television customer to subsidize wire based video services is nonsense. It may be a fair question to ask whether the attachment rate should be greater than a pure incremental cost price, but the Commission's established formula does this by including factors over and above the cost of the occupied space alone. Electric consumers are clearly better off with communications facilities attached than without. Moreover, while the impetus to price attachments on some form of embedded cost basis may seem to have appeal for electric ratepayers, the Commission must balance this impulse against the greater harm posed by the creation of economic roadblocks to the deployment of needed competitive infrastructure. As Frontier succinctly put it, "[r]egulation

that constrains incentives to invest in and deploy the infrastructure needed to deliver modern communications services is also not in the public interest." Frontier at p. 8.

C. Miscellaneous Comments

Both the OTA and AT&T argue that the Commission should modify the proposed rule to include the limitation in R.C. 4905.51 that utilities requesting access to poles demonstrate that the use of the joint facility is required for the "public convenience, welfare and necessity." There are at least two compelling reasons why this suggestion should be rejected by the Commission. First, the Commission is, with respect to communications attachments, acting under its delegated authority pursuant to 47 U.S.C. § 224, and federal law does not contain any such limitation. Second, and perhaps more importantly, R.C. 4927.02 provides a more than ample demonstration that communications provider access to utility poles is in the public convenience and necessity—competition and the deployment of competitive facilities is essential to the success of the stated polices of Ohio. Any additional requirements on this score would service purely as an anticompetitive barrier and delay tactic on the part of incumbent providers.

Finally, TWTC supports the comments of AT&T (at pp. 7-8) and the OTA (at p. 5) regarding the deletion of proposed 4901:1-3-02(A), and instead should allow those references to federal regulation to evolve as those underlying sections of the federal regulations evolve.

III. Conclusion

TWTC requests that the Commission carefully consider the points raised herein and in its comments.

Respectfully submitted on behalf of
tw telecom of ohio llc

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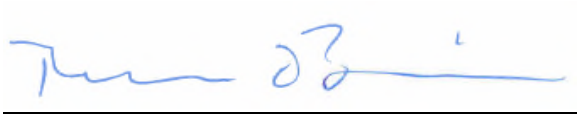
CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing was served by either electronic mail or by regular U.S. Mail this 29th day of August 2013.



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Summary: Reply Comments of tw telecom of ohio llc electronically filed by Teresa Orahood on behalf of Thomas O'Brien