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 REPLY 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.

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Pursuant to the Attorney Examiner Entry dated July 22, 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") submit the following Joint Reply Comments:

INTRODUCTION

Contrary to the assertions of several cable and telephone industry commenters, proposed Ohio Admin. Code Chapter 4901:1-3 (the "Proposed Rules") represents a dramatic departure from Ohio's existing pole attachment regulations. No commenter has provided evidence that the existing system is deficient in any way. Instead, they are using the Commission's publication of the Proposed Rules as a platform to gain competitive advantages at the expense of electric ratepayers and at the expense of electric system safety and reliability

For example, some Incumbent Local Exchange Carriers ("ILECs") argue that they should enjoy the same rates as other attaching entities, while simultaneously retaining their access advantages under joint use agreements with electric utilities. Because of the unique nature of joint use relationships and the benefits and obligations thereunder, the relationship between

public utilities should remain defined by joint use agreements subject to case-by-case Commission review under Ohio Rev. Code §§ 4905.48 and 4905.51.

Cable industry commenters also argue that the Commission should apply a single rate formula–the lower FCC cable rate formula-to all attachments. The Electric Utilities agree that the Commission should adopt a single rate formula for non-ILEC attachments, but the modified telecom rate formula proposed by the Electric Utilities in their Initial Comments is more equitable than the cable rate formula because it more fairly allocates the unusable space on the pole.

Both telephone and cable industry commenters seek to gain instant access to the market by advocating for make-ready deadlines and other access requirements that exceed even those imposed by the Federal Communications Commission ("FCC"). Those same commenters also argue that the Commission should remove the few provisions of the Proposed Rules that are either favorable to electric utility pole owners or aimed at protecting the safety and reliability of the electric grid. The Commission should reconsider the adoption of the FCC's inflexible and unduly burdensome make-ready deadlines, but should in no event consider the even more onerous requirements suggested by some attachers.

I. THE PROPOSED RULES REPRESENT A DRAMATIC DEPARTURE FROM THE COMMISSION'S EXISTING POLE ATTACHMENT RULES, AND TW TELECOM OF OHIO LLC'S ARGUMENT THAT THE PROPOSED RULES ARE SUBSTANTIALLY SIMILAR TO O.A.C. 4901:1-7-23 IS WITHOUT MERIT.

The Electric Utilities respectfully submit that the Proposed Rules represent a fundamental shift from the current regulatory regime. Currently, the relationship between electric utilities and ILECs is defined by joint use or joint poles agreements and either party has the right to take disputes to the Commission. And the relationship between electric utilities and Competitive

Local Exchange Carriers ("CLEC") and other non-ILEC attachers is defined by Commission-approved tariffs that are on file for each electric utility. In contrast, the Proposed Rules would visit upon electric utilities a broadly applicable, one-size fits-all regulatory paradigm, with essentially no showing whatsoever that the current regulatory regime for electric utilities is inadequate or is not serving the public interest. The Electric Utilities urge the Commission to reject this fundamental shift in regulatory approach and, instead, to modify these Proposed Rules to clarify that they apply only to poles owned by ILECs.

Because the long-standing regulatory regime as applied to Electric Utilities has not previously included prescriptive pole attachment rules, Electric Utilities strongly disagree with the Initial Comments of tw telecom of ohio llc ("TWT"). TWT argues that O.A.C. 4901:1-7-23, which incorporates by reference the Pole Attachment Act, 47 U.S.C. § 224 (the "PAA") and certain of its accompanying regulations, is applicable to electric utilities (as opposed to only telephone companies). (TWT Comments at 2). TWT asserts that as a result, "Ohio is an FCC state for telecommunications carriers seeking to attach to any jurisdictional utility pole, not just communications carrier poles" (emphasis in original). *Id.* at 4. TWT argues that the Proposed Rules therefore do not constitute a dramatic departure from the Commission's existing pole attachment-related rules. *Id.* at 2.

O.A.C. 4901:1-7-23(B), which is the basis of TWT's argument, provides as follows:

> Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and right-of-way shall be established through negotiated arrangements or tariffs. Such access shall be established pursuant to 47 U.S.C. 224 ; 47 C.F.R 1.1401 to 47 C.F.R 1.1403 ; 47 C.F.R 1.1416 to 47 C.F.R 1.1418 ; and the formulas in 47 C.F.R 1.1409(e), as effective in paragraph (A) of rule 4901:1-7-02 of the Administrative Code. The commission will address, on a case-by-case basis, any fact-specific issues related to access to poles, ducts, conduits, and right-of-way. Any change in the public utility's tariffed rates, terms, and conditions for access to poles, ducts, conduits, or right-of-way shall be filed in a UNC proceeding.

This provision is located within Chapter 4901:1-7 of the Ohio Administrative Code, entitled "Local Exchange Carriers." The very name of the chapter indicates that its contents are not applicable to electric utilities. Further, the statute within that chapter entitled "General applicability" states, "The obligations found in rules 4901:1-7-03 to 4901:1-7-27 of the Administrative Code, **shall apply to all telephone companies** pursuant to 47 U.S.C. 251 and 252." O.A.C. 4901:1-7-02(A) (emphasis added). Thus, although O.A.C. 4901:1-7-23 purports to regulate the terms and conditions of access to "public utility poles," O.A.C. 4901:1-7-02(A) limits the applicability of O.A.C. 4901:1-7-23 to public utilities that are telephone companies. In addition, the Commission has never issued an order, finding, or other decision applying O.A.C. 4901:1-7-23 to electric utilities.

Despite the fact that TWT argues in *this* proceeding that it is clear O.A.C. 4901:1-7-23 applies to electric utilities, TWT has previously described that very issue as "ambiguous." *See* Comments of tw telecom of ohio llc On the Public Utilities Commission of Ohio's Business Impact Analysis in Case No. 12-922-TP-ORD at 3 ("…the clarifying language found at Rule 4901:1-7-02(B)[1] can be seen as words of limitation, rather than clarification, arguing that the Commission's use of the term 'public utility' in Rule 4901:1-7-23(B)[2] is also limited by the language in Rule 4901:1-7-02(B) and only extends to telecommunications carriers"). Further, in the above-cited proceeding, TWT proposed that the Commission clarify that the term "public utility" in O.A.C. 4901:1-7-23 has the same meaning as under 47 U.S.C. § 224 – i.e., that the term "public utility" includes both electric utilities and telecommunications carriers. *Id.* at 3-4.

[1] While TWT cites to Ohio Rev. Code 4901:1-7-02(B), it is clear from the context of its statement that it intends to refer to Ohio Rev. Code 4901:1-7-02(A). *See* Comments of tw telecom of ohio llc On the Public Utilities Commission of Ohio's Business Impact Analysis in Case No. 12-922-TP-ORD at 3.

[2] *Id.*

In its Initial Comments in this proceeding, TWT makes much of the fact that the Commission initially accepted the position that O.A.C. 4901-1-7-23(B) should be clarified to state that it applies to all public utilities, and not just to telephone companies. (TWT Comments at 4-5). But this revision of O.A.C. 4901:1-7-23(B) was without any input from electric utility stakeholders, and it was ultimately withdrawn by the Commission. In short, TWT not only previously contended that the current language was "ambiguous," but also the Commission has withdrawn the very language that would have clarified the alleged ambiguity.

TWT also argues that "…the Commission's regulations have clearly applied to 'utilities' since *at least* 1996 when the Commission issued its 95-845 Guidelines" (emphasis in original) (TWT Comments at 3). It is unclear to the Electric Utilities what TWT means by this statement, because the Electric Utilities do not dispute that the Commission has the authority, as circumscribed by the Ohio legislature pursuant to Ohio Rev. Code §§ 4905.51 and 4905.71, to regulate the rates, terms, and conditions of access to public utilities' (including electric utilities') poles. But this is an entirely different issue than whether O.A.C. 4901:1-7-23, which incorporates by reference the PAA and certain FCC rules and regulations, is applicable to electric utilities.

The Commission's Entry on Rehearing in *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Nov. 8, 1996) (the "95-845 Guidelines"), which was adopted in 1996, is irrelevant to the issue of whether O.A.C. 4901:1-7-23, which was adopted in 2007, is applicable to electric utilities. Further, the provision of the 95-845 Guidelines cited by TWT in no way implies that the Guidelines apply to electric utilities. (*See* TWT Comments at 3). In fact, the 95-845 Guidelines state under the heading of "Jurisdiction" and the subheading of "Scope,"

that "[e]ach facilities-based and nonfacilities-based entity engaged in the business of providing basic local exchange service to, from, through or in Ohio shall be considered a LEC subject to Commission jurisdiction." (95-845 Guidelines at Appendix A, § II(A)(1)). The 95-845 Guidelines do not state that they are applicable to electric utilities, and electric utilities do not fall within the scope of the Guidelines as defined by the Guidelines themselves.

And even accepting, *arguendo*, that TWT is correct, and that O.A.C. 4901:1-7-23, incorporating by reference the PAA and certain FCC regulations, is applicable to electric utilities, the Proposed Rules are much broader and more burdensome upon electric utilities than even the PAA or its accompanying regulations, as explained in the Electric Utilities' Initial Comments. The Commission should thus reconsider the adoption of the Proposed Rules, or at least clarify that proposed O.A.C. 4901:1-7 is not applicable to electric utilities.

II. THE COMMISION SHOULD REJECT OTA'S AND AT&T'S PROPOSED REVISIONS TO O.A.C. 4901:1-3-02(A) BECAUSE THE REVISIONS WOULD DELEGATE THE COMMISSION'S RULEMAKING AUTHORITY TO THE FEDERAL GOVERNMENT.

Proposed O.A.C. 4901:1-3-02(A) provides as follows:

> Each citation contained within this chapter that is made to either a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter **as effective on June 1, 2013.**

(emphasis added). OTA and The AT&T Entities ("AT&T") both argue that the phrase "as effective on June 1, 2013" should be deleted from Proposed O.A.C. 4901:1-3-02(A). (OTA Comments at 5-6; AT&T Comments at 7-8). OTA and AT&T argue that the date certain reference is an unnecessary and cumbersome limitation which, in the future, could put the Commission in the position of attempting to enforce superseded federal law that had been incorporated into the Commission's rules. *Id.* OTA and AT&T allege that such a result is

particularly problematic here because the Commission is acting under authority delegated to it by federal law. *Id.*

First, the Commission should reject OTA's and AT&T's proposal because it would violate Ohio's nondelegation doctrine. Ohio's nondelegation rule prohibits the General Assembly from incorporating by reference future amendments to federal statutes. *See State v. Gill*, 584 N.E.2d 1200 (Ohio 1992); *City of Cleveland v. Piskura*, 60 N.E.2d 919 (Ohio 1945). Gill involved an Ohio statute that prohibited buying or selling food stamps in violation of the federal Food Stamp Act, "as amended." *Id.* at 1201. The defendant, who had been convicted under the Ohio statute, argued that it allowed subsequent amendments to the Food Stamp Act to determine what conduct violated Ohio law. *Id.* The Ohio Supreme Court rejected this argument. The Court recognized that, if the statute incorporated future amendments to federal law by reference, it would violate the nondelegation rule. *See id.* at 1202. Because the General Assembly is presumed not to enact unconstitutional statutes, the Court interpreted the phrase "as amended" to mean the federal Food Stamp Act (with its amendments) as it existed when the General Assembly enacted the statute. *Id.* While *Gill* involved a statute rather than an administrative rule, *Gill* is no less applicable here because the General Assembly, which enabled the Commission with rulemaking authority, cannot authorize the Commission to do something it cannot do itself.

Second, if the phrase "as effective on June 1, 2013" was removed from O.A.C. 4901:1-3-02(A), as advocated by AT&T and OTA, any changes to the Administrative Code occasioned by an amendment to federal law would be invalid under Ohio Rev. Code § 119.02. Ohio law permits the General Assembly to "delegate rule-making authority to agencies." *Amoco Oil Co. v. Petroleum Underground Storage Tank Release Comp. Bd.*, 733 N.E.2d 592, 596 (Ohio 2000)

(*citing Belden v. Union Cent. Life Ins. Co.*, 55 N.E.2d 629, 635 (Ohio 1944)). However, "…the General Assembly must provide standards to guide the agency in its rulemaking. The administrative agency must adopt rules within the standards provided by the General Assembly in order for the rules to be valid." 733 N.E.3d at 596. (emphasis added) (internal citations omitted). Here, the Ohio Administrative Procedures Act provides these standards. The Act sets forth specific requirements for rulemaking, including public notice of the rule (along with a statement of reasons), publication of its full text, and a hearing. *See* Ohio Rev. Code § 119.03. If an agency fails to follow those procedures, then the rule is invalid. *Id.* at § 119.02. Under OTA's and AT&T's proposal, the Proposed Rules would change automatically if the PAA or the federal pole attachment regulations referenced therein changed–without notice, without a statement of reasons, and without a hearing to contest those changes. Therefore, those changes would be invalid under Ohio Rev. Code § 119.02.

OTA and AT&T further argue that the phrase "as effective on June 1, 2013" should be deleted because it could require the Commission to enforce outdated federal statutes and regulations. (OTA Comments at 5-6; AT&T Comments at 7-8). However, the Ohio Supreme Court addressed that very argument in *Gill*, and stated that the General Assembly could avoid that problem by updating or revising the state food stamp statute at issue there to incorporate amended versions of the federal food stamp law. 584 N.E.2d at 1202. The Commission could follow the same approach here by amending the Proposed Rules, consistent with the Ohio Administrative Procedures Act, if the federal statue or regulations referenced in the Proposed Rules change. The Commission should therefore reject OTA's and AT&T's proposed edit to O.A.C. 4901:1-3-02(A).

III. CONTRARY TO THE ILEC COMMENTERS' ASSERTIONS, THE PROPOSED RULES SHOULD NOT APPLY TO ATTACHMENTS MADE BY ELECTRIC UTILITIES AND ILECS TO EACH OTHER'S POLES.

A. The Commission Should Not Modify the Definition of "Pole Attachment" to Include Attachments by Public Utilities, and Should Remove Public Utilities From the Definition of an "Attaching Entity."

OTA and AT&T argue that the definition of a "pole attachment" should be revised to reflect that an attachment by a public utility falls within that definition as set forth at proposed O.A.C. 4901:1-3-01(K). (*See* AT&T Comments at 5-6; OTA Comments at 4). The Electric Utilities oppose this modification. OTA and AT&T argue that the Proposed Rules' current definition of "pole attachment" fails to account for the fact that pursuant to Ohio Rev. Code 4905.51, a public utility can be an attaching entity. *Id.* AT&T's and OTA's seemingly innocuous change to the Proposed Rules would appear to give ILECs rights which far exceed those granted under the federal regulations or the rights granted to their competitors, the CLECs. An ILEC's rights and obligations with respect to attachments to electric utility poles are currently, and should remain, defined by the joint use or joint pole agreement that the ILEC has signed. This proposed change would apparently give the ILEC the power to pick and choose whether an attachment would (1) be made pursuant to a joint use agreement, or (2) be made as if the ILEC were a CLEC (with mandatory access and an entitlement to the telecom rate). Such a result is also implied by proposed O.A.C. 4901:1-3-01(A), which includes public utilities within the definition of an "attaching entity."

The Commission should reject AT&T's and OTA's proposal that attachments by public utilities be included in the definition of a "pole attachment," and the Commission should remove "public utilities" from the definition of an "attaching entity." The rights, privileges, and obligations between public utilities should remain defined by joint use or joint pole agreements

subject to Commission review under Ohio Rev. Code §§ 4905.48 and 4905.51 without layering on to those agreements inconsistent provisions from the Proposed Rules, for those reasons set forth in detail in the Electric Utilities' Initial Comments. (Electric Utilities Comments at 6-7, 12-16).

B. The Commission Should Clarify that Any Attachment Rate Formula It Adopts Is Inapplicable to Attachments by ILECs and Electric Utilities to Each Other's Poles.

1. ILECs Do Not Suffer from Competitive Disadvantages That Entitle Them to the Same Rate as CLECs, as Contended by Frontier.

Frontier North, Inc. ("Frontier") (an ILEC formerly known as General Telephone Company of Ohio) proposes that the Commission adopt a uniform rate formula applicable to all service providers, including ILECs. (Frontier Comments at 2). Frontier's proposal is designed to give it a competitive advantage over CLECs and other entities that attach to public utility poles. Frontier has cloaked its proposal in the garb of parity, but Frontier's goal is to maintain all of the advantages that ILECs have as public utilities and as signatories to joint use or joint pole agreements, while significantly reducing ILECs' financial commitments under those agreements.

Frontier attempts to justify its proposal that ILECs should be entitled to the same rate as CLECs and cable television providers ("CATV") by focusing on the alleged discrimination it suffers in paying more per foot for its attachments to electric utility poles than a CLEC pays (Frontier Comments at 1, 6-7). Frontier alleges that this result is due to joint use agreements that were based on assumptions about the relative amount of space on poles used by telephone utilities and electric utilities that are no longer valid, and by a shift over time in the actual percentage of poles owned by electric utilities and telephone companies.[3] *Id*. at 3-5. It alleges

[3] Frontier's assertion that a shift in ownership percentages justifies reducing ILEC responsibilities is wholly without merit. (Frontier Comments at 5). It is ILECs themselves that have caused that shift by choosing to cut back on pole ownership and maintenance costs and, instead, to pay

that it is disadvantaged against competitors, and proposes the establishment of a single uniform formula that would apply to all attachments, including ILEC attachments to electric utility poles. *Id*. at 7-8. It is noteworthy that despite all of the supposed discrimination faced by Frontier under its allegedly outdated joint use agreements, Frontier is not asking the Commission to find that joint use agreements are void as against public policy. Instead, it is asking to retain all of the embedded benefits of those agreements, while reducing its financial commitment to the same level that a CLEC would pay for an attachment. Even the FCC recognized that: "Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently."[4] Frontier should not be permitted to gain a competitive advantage through enjoying the low rates available to its competitors while still enjoying advantageous joint use rights that are not available to its competitors.

The advantages that Frontier and other ILECs enjoy are substantial. As pointed out by Fiber Technologies Networks, L.L.C. ("Fibertech"), a CLEC, ILECs have the "inherent advantage of already ubiquitous networks." (Fibertech Comments at 5-6). Under the terms of most joint use agreements, the electric utility will automatically place a pole tall enough and strong enough to sustain the load of the ILEC's facilities. Because such joint use poles are constructed to accommodate an ILEC attachment, no additional licensing procedure is required

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electric utilities whatever charges are established within joint use agreements for ownership deficiencies. There are no lawsuits or complaints known to the Electric Utilities that have been filed by ILECs demanding the right to own more poles; on the other hand, there have been suits and complaints filed by electric utilities to force ILECs to honor their commitments under joint use agreements. Arguments to reduce ILEC responsibilities based on electric utility revenues earned from third-party attachers are similarly flawed, as ILECs also earn those revenues from attachments on the poles that they own. *See id.* at 4.

[4] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, as adopted and released on April 7, 2011 (the "April 2011 Order") at ¶ 216.

when the ILEC is ready to attach. ILECs can therefore immediately capitalize upon opportunities to provide telecommunications or other services using their existing networks. However, it is important to keep in mind that the reason ILECs have access to a ubiquitous existing network is because they have paid for it and have made ongoing financial commitments that CLECs, such as Fibertech, are not willing to make. The higher costs per attachment that Frontier complains about have been incurred to create that ubiquitous network that gives ILECs like Frontier the ability to reach new markets more quickly than CLECs. And conversely, the immediate access that Fibertech deplores as providing a benefit to ILECs that Fibertech does not receive, is obtained by ILECs at a cost and subject to ongoing financial commitments that CLECs like Fibertech are unwilling to make.

Among other benefits received under joint use agreements, ILECs typically have the ability to place multiple attachments on a pole at a single per pole price, whereas pole attachment licensees pay a per attachment price. ILECs further demand and often receive the lowest position on the pole and do not generally permit other parties to construct facilities below them regardless of any pole space that may be available. The lowest position on the pole permits easy access and the ability to sag in their heavier ILEC copper facilities. ILECs, as pole owners, also have the right to engineer their own pole attachments and replace joint use poles and facilities in an expedited manner, allowing them greater speed to market.

The benefits recited above are not an exhaustive list, nor do all such benefits exist in all joint use agreements in the same manner as described. Joint use agreements vary widely, which is yet another reason why they must be judged on a case by case basis. Frontier's argument that it is stuck in unwieldy joint use agreements that are based on historical conditions that no longer exist is simply not true. ILECs have continued to enter into new joint use agreements long after

they abandoned the use of uninsulated conductors and long after cable television companies began attaching their facilities to ILEC and electric utility poles. Furthermore, ILECs have always enjoyed the right to challenge any joint use price or access term they found objectionable pursuant to Ohio Rev. Code § 4905.51, and some ILECs have indeed exercised that right. ILECs simply cannot be permitted to enjoy a full menu of access rights, including multiple attachments on the pole and the lowest position on the pole, at the *a la carte* price that pole attachment licensees pay for much more limited access rights. Even the FCC recognized that such a condition would hamper efforts to create a level playing field.[5] The Commission should reject recommendations to force lower pole attachment rates in joint use agreements between public utilities.

2. As Recognized by the FCC, the Rate for ILEC Attachments to Electric Utility Poles Should Be Set by Private Contract.

The Electric Utilities agree with AT&T and OTA that this Commission should exclude joint use attachments from a uniform rate methodology. Both AT&T and the OTA support incorporation of the FCC approach to rates as set forth in the April 2011 Order into the Proposed Rules. (AT&T Comments at 3; OTA Comments at 9-10). In contrast to the Proposed Rules, which would appear to allow ILECs to take advantage of the telecom rate formula, the FCC explicitly chose not to adopt a rate formula for ILEC pole attachments, but rather to handle the matter on a case by case basis in a manner similar to the manner set forth in Ohio Rev. Code § 4905.51.[6] The FCC reasoned that if a "pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a

[5] *Id.* at ¶ 217.

[6] *Id.*

telecommunications carrier or cable operator, we believe that a different rate should apply."[7] The Commission further stated that "…the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[8] The Electric Utilities thus join AT&T and OTA in their position that the Proposed Rules should not provide a set rate for attachments by ILECs to electric utilities' poles.

IV. CONTRARY TO OCTA'S ASSERTION, THE CABLE RATE FORMULA IS NOT THE ONLY RATE FORMULA CURRENTLY APPLIED BY THE COMMISSION, AND A MODIFIED VERSION OF THE TELECOM RATE FORMULA IS A MORE EQUITABLE FORMULA TO APPLY TO NON-ILEC ATTACHMENTS.

While the Electric Utilities agree with the OCTA that the Commission should apply one rate formula to all non-ILEC attachments to public utility poles, the Electric Utilities disagree with OCTA's assertion that the Commission currently applies the cable rate to all such attachments (including telecommunications attachments), or that the cable formula should be the single rate formula used by the Commission going forward. (*See* OCTA Comments at 8-16).[9]

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[7] *Id.*

[8] *Id.* at ¶ 216.

[9] OCTA argues that the Commission should delete proposed O.A.C. 4901:1-3-03(A)(5) stating that "Cable operators must notify pole owners upon offering telecommunications services or any comparable services regardless of the technology used" from the Proposed Rules. (OCTA Comments at 13). Should the Commission adopt a single rate formula for all non-ILEC attachments to public utility poles, then the Electric Utilities agree with OCTA's proposal. However, if the Commission adopts a dual rate system containing both a telecom and a cable rate formula, as currently proposed, then the Commission should reject OCTA's proposal. Although the FCC's April 2011 Order did revise the telecom rate formula to approximate the cable rate, there are situations (e.g., where the public utility rebuts the average number of attaching entities) where the telecom rate will still be higher than the cable rate. If a dual rate system is adopted, proposed O.A.C. 4901:1-3-03(A)(5) will be necessary in order for public utilities to obtain the information necessary to know which rate to charge to CATVs providing both cable and telecom services. If a cable operator provides a public utility with notice that it is providing telecommunications services, the public utility can thereafter require the CATV to specify in its permit applications whether it is requesting to attach a telecom or CATV attachment, and in that way, determine which rate to charge for individual attachments.

OCTA argues that the Commission has a "long standing approach of applying one single pole attachment rate formula," and that formula is the FCC's cable rate formula. (OCTA Comments at 9-10). In support of its assertion that the Commission has adopted the FCC's cable rate formula as applicable to all attachments, OCTA cites to *In re Cincinnati Bell for Authority to Adjust its Rates and Charges and to Change its Tariffs*, Case No. 81-1338-TP-AIR, Opinion & Order, Jan. 7, 1983, p. 42. (OCTA Comments at n.4). However, OCTA ignores the fact that, subsequent to the proceeding cited by OCTA, the Commission approved the use of higher telecom pole attachment rates in Ohio. *See, e.g., In the Matter of the Application of Cincinnati Bell Telephone Co. for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and For a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT, Opinion and Order, April 9, 1998. In addition, OCTA ignores the fact that in 2007, the Commission adopted O.A.C. 4901:1-7-23, which is applicable to third-party attachments to ILEC poles, and which expressly incorporates by reference "the formulas in 47 C.F.R. 1.1409(e)." 47 C.F.R. 1.1409(e) includes both the federal cable and telecom rate formulas. OCTA's assertion that the Commission currently applies the cable rate formula to all attachments is thus simply wrong.

The Electric Utilities also disagree with OCTA's assertion that the cable rate formula is the most equitable formula to apply to non-ILEC pole attachments. (OCTA Comments at 10-11). It is no surprise that OCTA supports the cable rate formula, as opposed to the more equitable cost-sharing principles embodied in the telecom rate formula. The primary difference between the cable rate formula and the telecom rate formula is the manner in which the cost of the unusable pole space is allocated among attaching entities. The telecom rate formula, while not perfect, recognizes that the unusable space on a pole is of equal benefit to all parties attached to the pole, and thus (almost) equally allocates the unusable space on the pole amongst all

attaching entities. By way of contrast, the cable rate formula only allocates the unusable space on the pole pro rata based on the amount of space occupied by the licensee on the pole's usable space. The result is that under the cable rate formula, only 7.4% of the cost of the unusable space of the pole is allocated to the licensee. *See* 47 C.F.R. §§ 1.1409(e)(1), 1.1418. The telecom rate is thus more fair than the cable rate because it uses a more equitable method of allocating the unusable space on the pole. Accordingly, the Electric Utilities support application of a modified, simplified version of the telecom rate formula for all non-public utility pole attachments, as set forth in its Initial Comments. (Electric Utilities Comments at 18-22).

V. THE COMMISSION SHOULD NOT ADOPT THE FCC'S MAKE-READY RULES, BUT IF CERTAIN OF THOSE RULES ARE ADOPTED, THE COMMISSION SHOULD REJECT THE PROPOSALS BY TELEPHONE AND CATV COMMENTERS TO MAKE THOSE RULES EVEN MORE BURDENSOME UPON ELECTRIC UTILITIES.

Many of the CLEC and CATV stakeholders indicated in their comments that they are not content even with the overly burdensome make-ready requirements imposed upon pole owners under the FCC's regulations, and advocate the imposition of even more stringent make-ready duties upon pole owners. Those same commenters also argue that the Commission should remove the few provisions of the Proposed Rules that are favorable to electric utility pole owners and/or are aimed at protecting the safety and reliability of the electric grid. The Commission, however, is charged with protecting both electric utility ratepayers and telephone and cable television customers.

As set forth in their Initial Comments, the Electric Utilities urge the Commission not to adopt the make-ready rules contained in the Proposed Rules. However, if the Commission insists upon the adoption of make-ready rules, it should adopt the more flexible rules advocated by the Electric Utilities in their Initial Comments, as opposed to the wholly unfair and

unworkable make-ready requirements advocated by some telephone and CATV industry commenters, which would far exceed even the FCC's burdensome requirements.

A. New Pole Attachment Rules are Not Needed to Address Make-Ready Issues.

In their Initial Comments, the Electric Utilities argued that Ohio's existing statutory and regulatory framework regarding joint use and pole attachments has been sufficient to address those few instances where disputes have arisen, and has not discouraged the deployment of broadband or other communications services. (Electric Utilities Comments at 3-4). Certain telephone and CATV industry commenters have expressed the opposite belief, alleging that the Proposed Rules are needed in order to combat make-ready practices by pole-owners that have stymied the deployment of their services. For example, the Wireless Infrastructure Association and the HetNet Forum (together, "PCIA") argue that Ohio's system is broken, and cites as examples the fact that AEP Ohio will not allow repeater boxes to be attached to its poles and requires that antennas and equipment are tested in a lab before the attachment is approved, and that Ohio Edison does not allow equipment to be attached to its poles, but instead requires that it be installed on the ground. (PCIA Comments at 8). However, PCIA does not allege that it has attempted to take advantage of its remedies under Ohio's existing system by challenging the subject practices in a Commission complaint proceeding, and that such efforts have failed. In fact, PCIA has never filed a Complaint with the Commission, as it is entitled to do under existing Ohio Rev. Code 4905.71. None of the commenters have provided evidence–anecdotal or otherwise–indicating that Ohio's existing system, whereby pole owners and attachers negotiate make-ready issues through private contracts which are subject to Commission oversight, has failed.

B. Attachers Are Not Entitled to an Instant Network at the Expense of Electric System Safety and Reliability.

The common theme of attaching entities' comments regarding make-ready issues is that Ohio electric utilities do not move fast enough for their liking. Several commenters argue for even more aggressive make-ready deadlines than those proposed by the Commission. Fibertech, for example, after claiming that shorter access times are needed "to prevent right-of-way owners from unlawfully utilizing delay tactics to stall and potentially halt the public's access to high-capacity broadband services," argues that the FCC rules are "inadequate to the task of promoting the public's access to fiber optic-based broadband services." (Fibertech Comments at 7, 8). OCTA proposes "hard deadlines that must be followed" and that remedies even beyond those proposed by the Commission are necessary, such as allowing an attaching entity to perform the make-ready work if the pole owner fails to issue a make-ready estimate within 14 days after the deadline for completion of the survey. *Id.* at 3, 7-8. Data Recovery Services, LLC ("DRS") proposes "damages" be assessed against pole owners for each day that deadlines are not met. (DRS Comments at 8).

These commenters opine that unless they can achieve an "instant network," then they have been unfairly discriminated against and Ohioans will suffer undue hardship. Fibertech, for example, claims that small customers "usually seek alternative providers between 30 to 60 days prior to their existing service contract expiring. Those customers are not willing or able to wait months for an alternative service." (Fibertech Comments at 16). DRS also complains that "if the customer cannot have the service delivered in a timely manner it will be forced to order the desired connectivity from a provider that has preexisting lines." (DRS Comments at 3-4). DRS argues that since existing providers of broadband services are aware that it takes time to install

new lines, they are "able to charge the prospective customer more than the customer expected to pay had DRS been able to provide the services." *Id.* at 4.

The Commission must not lose sight that the issue being raised by these allegations is not that Ohioans do not have timely access to broadband services; rather, it is that new entrants want customers to have faster access to broadband services offered by those new entrants. Such comments fail to acknowledge that it took time for existing providers to construct their networks, particularly where attachment to poles required make-ready work by an electric distribution utility with safety and reliability priorities including service restoration and work scheduling logistics. The demand for an instant network is unrealistic and should not be paid for by electric customers in the form of funding an over-staffed payroll to achieve unrealistic deadlines, "liquidated damages" for missing those unrealistic deadlines, or through the risk of lower electric reliability if attaching entities are allowed to perform make-ready work in the power space or to otherwise disregard the utilities' engineering standards. The Commission does not have the luxury of placing the business opportunities of these new entrants above the safe and reliable operation of the electric distribution system.

1. The Commission Should Reject Fibertech's Proposal Requiring Pole Owners to Allow Temporary Attachments.

An example of an attacher's attempt to achieve instant access at the expense of electric grid safety and reliability, which should be rejected by the Commission, is Fibertech's proposed requirement that pole owners permit temporary attachments to their poles. (Fibertech Comments at 13-17). First, there is nothing in the rules, existing or proposed, that precludes a prospective attacher from reaching a voluntarily negotiated agreement with a pole owner that would authorize temporary attachments. The parties to such an agreement would be in the best position

to define the rights and obligations of the parties with respect to temporary attachments. Such private agreements have previously been reached between electric utilities and attachers in Ohio.

Second, Fibertech's argument for temporary attachments does not comport with National Electric Safety Code ("NESC") provisions or best practices. Fibertech notes that authorizing temporary attachments would allow it to install its fiber in order to serve customers while continuing to argue with the utility over whether any make-ready work is necessary. (Fibertech Comments at 16). This suggests that Fibertech is advocating that attachers should be allowed to make temporary attachments even in situations where there is a difference of opinion as to whether the pole requires make-ready work to achieve compliance with the NESC and other standards. In such situations, if it is later determined that make-ready work was necessary, the temporary attachment would have been made in violation of the NESC and other applicable standards. A temporary attachment does not alleviate the need to satisfy NESC requirements. The "install-it-now, bring-it-up-to-code-later" approach has several inherent problems including, without limitation, changes in staff who agreed to the approach, changes in project priorities leaving the required corrections of the violations to be excessively delayed or never addressed at all, and budgeting issues that delay or postpone the required corrections of the violations. The FCC previously rejected a similar request by Time Warner Cable to attach first and clean-up later.[10]

Third, if the Proposed Rules were to compel the availability of temporary attachments, there would be an increased risk of litigation with respect to make-ready costs. Pole owners only recover the make-ready costs they incur on behalf of an attacher. There is no profit in make-ready work and no incentive to impose unnecessary make-ready costs on an attacher. On the

[10] *See In the Matter of Kansas City Power & Light Company v. Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City,* 14 FCC Rcd. 11599 (1999).

other hand, the attacher has strong economic incentives to avoid make-ready charges to the maximum extent possible. If an attacher is permitted to make a temporary attachment, there is no economic motivation for the attacher to pay necessary make-ready costs. It could simply make its temporary attachment, refuse to pay for the make-ready work, and, in effect, dare the utility to sue it to force compliance with the obligation to pay for the make-ready costs.

Fourth, Fibertech's recommendation is overly broad and without sufficient detail to implement. Fibertech's proposal fails to identify (1) the circumstances where installation of a temporary attachment would be justified; (2) the circumstances where a temporary attachment could not be permitted, *e.g.,* where a pole is already overloaded or the attachment would otherwise create a safety violation; (3) how quickly an attacher would be required to return and make a permanent attachment and the penalty for failing to do so; or (4) the types of equipment or attachment techniques that would be permitted for temporary attachments. Fibertech has failed to adequately describe any of these elements, which would be essential to implementing its proposal. The Commission cannot reasonably adopt such a proposal without a substantial amount of additional information.

The Electric Utilities also note that, while Fibertech cites to New Jersey and New York as having implemented rules that, under certain circumstances, allow for temporary attachments, Fibertech has failed to persuade the FCC and its home state of Connecticut to adopt such rules, although it has been urging that position since at least 2008.[11] (Fibertech Comments at 14-15).

[11] *See* "Implementation of § 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments," FCC Docket Nos. WC-245, *et al.*, Comments of Fiber Technologies, LLC and Kentucky Data Link, Inc., pp.25-29, filed March 7, 2008. *See also*, Connecticut Department of Public Utility Control, Docket No. 07-02-13, Order issued Apr. 30, 2008 (permitting temporary attachments only for emergency restoration of service and rejecting Fibertech proposals for a broader application).

Fibertech's proposal is unreasonable and unsupported and should be rejected by the Commission.

2. The Commission Should Reject PCIA'S Proposal to Create a Rebuttable Presumption that All Wireless Pole Attachments that Comply with National Safety Standards Are Safe.

Another example of an attacher's attempt to achieve instant access at the expense of electric system safety and reliability is PCIA's proposal that "The PUC should adopt 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…." (PCIA Comments at 17). PCIA's proposal ignores the fact that, unlike wireline attachments, which are fairly consistent from an engineering perspective, wireless antennae vary considerably in dimension, placement on the pole, vertical and horizontal space occupied, and loading profile. Approval of a wireless antenna that covers a significant portion of the pole circumference may require additional engineering approval because installation of the antenna will render the pole un-climbable.

In addition, the Commission should reject PCIA's proposal because it ignores the fact that, even if a particular type of wireless attachment meets national safety standards, that does not mean that the use of that piece of equipment in all situations is safe. For example, just because a wireless antennae meets national safety standards does not mean that it should be placed, along with its cumbersome appurtenances, on a utility pole that is highly vulnerable to pole strikes, such as a pole on a two-lane highway. That is because although the equipment might be safe in a vacuum, if it plummeted from the pole and landed on top of a car that struck that pole, the results could be deadly. Moreover, the Electric Utilities must consider the potential regular exposure of their employees to Radiofrequency Radiation, which can vary by antennae.

Even the FCC has not adopted the rebuttable presumption proposed by PCIA, and allows pole owners to deny pole top access for reasons of insufficient capacity or safety, reliability, or generally applicable engineering purposes. (April 2011 Order at ¶ 75). As recognized by the FCC, the deployment of wireless equipment should not come at the expense of the reliability of the electric system or the safety of the general public. *See id.*

C. The Commission Should Reject Proposals by Attachers Aimed at Removing the Few Protections for Electric Utilities Included within the Proposed Rules.

In addition to arguing for make-ready deadlines that would be more burdensome upon electric utilities even than those adopted by the FCC, CLEC and CATV commenters have argued for the removal from the Proposed Rules of some of the only provisions aimed at protecting electric utilities and their customers. A particularly egregious example is Fibertech's proposal that the words "generally applicable engineering purposes" in proposed O.A.C. 4901:1-3-03(A)(1) and 4901:1-3(C)(4) and "engineering standards" in proposed O.A.C. 4901:1-3-03(A)(2) be stricken. (Fibertech Comments at 18). Under the PAA and the Proposed Rules as currently written, there are only four reasons why a pole owner can deny an attacher access to its poles: (1) insufficient capacity; (2) safety; (3) reliability; or (4) generally applicable engineering purposes. 47 U.S.C. § 224(f)(2); proposed O.A.C. 4901:1-3-03(A)(1). Fibertech proposes that the Commission revise the Proposed Rules to give electric utilities even less authority to protect and maintain their systems than they have under the PAA by specifying that pole owners may not deny access to their poles for generally applicable engineering purposes. (Fibertech Comments at 18). Though capacity, safety, and reliability may overlap substantially with engineering concerns, they are not perfectly congruous. Moreover, all access denials are subject to Commission oversight, so Fibertech's concern that the term "engineering purposes" could

"easily be interpreted and/or used to include any reason for denial of access to poles" is simply unjustified. *See id*; *see also* Ohio Rev. Code 4905.71.

Yet another example of the attachers' overreaching is OCTA's proposal to revise proposed O.A.C. 4901:1-3-03(A)(4) to include a presumption that, where an attacher files a petition for a temporary stay of a pole owner's removal of the attacher's facilities, increase of pole attachment rates, or modification of the attacher's facilities, that such petition would be deemed granted, instead of denied, in the event the Commission did not rule on the petition within the required 30-day period. (OCTA Comments at 8). OCTA states that this revision is necessary in order to preserve the attacher's "vital access to utility facilities." *Id.* However, proposed O.A.C. 4901:1-3-03(A)(4) provides that a petition for a temporary stay "shall not be considered unless it includes…a showing of irreparable harm and likely cessation of service." OCTA's proposal would allow a petition for temporary stay to be deemed granted even where an attacher had failed to meet the high threshold of showing irreparable harm. The Commission should deny OCTA's proposal.

D. The Commission Should Deny OCTA's Request to Extend the Deadline for Attachers to Respond to Make-Ready Estimates from 14 Days to 45 Days.

OCTA states that the Commission's proposed 14-day period is not always sufficient for attachers to review make-ready estimates, and requests that the Commission modify proposed O.A.C. 4901:1-3-03(b) to more than triple the time for attachers to review make-ready estimates from 14 days to 45 days. (OCTA Comments at 4). OCTA argues this modification is necessary in order to recognize situations involving "a small number of personnel handling pole attachment responsibilities" or "large project[s] requiring make-ready work on a large number of poles." *Id.* The notion that attachers should have as much time to review an estimate as the pole owner has to perform the entire make-ready survey defies common sense. Further, OCTA's proposal is

unworkable given the dynamic nature of electric distribution systems. A make-ready estimate is prepared based on a snapshot of the pole in time, and the more time that passes following the preparation of the estimate, the more likely the conditions on the pole are to change, thus rendering the estimate inaccurate. It is also noteworthy that the lack of personnel and the demands created by large projects that OCTA complains about are not unique to attachers, and are equally suffered by electric utilities.

E. The Commission Should Reject Fibertech's Self-Serving Proposals to Enhance its Competitive Position Against ILECs at the Expense of Electric Utility Customers.

Fibertech argues that the current system whereby pole owners control access to poles and competitors apply to owners for permission to serve their customers is fundamentally unfair. (Fibertech Comments at 5). Fibertech makes two proposals which it alleges are aimed at leveling the playing field between pole owners and attachers. *Id.*

First, Fibertech's proposes the establishment of an "independent entity" to control access to poles. *Id.* Fibertech identifies two advantages of its proposal: (1) making ILECs undergo the same licensing process as their competitors and (2) removing the alleged motivation for pole owners with existing (or contemplated) communications services to slow the deployment of competitive providers' facilities or to impose excessive costs. *Id.* Fibertech identifies no jurisdictions that have implemented such a plan, and cites only one jurisdiction that is considering such an approach. *Id.* However, that docket has been pending for more than two years, and the current status from the working group meetings is that all parties but one have agreed that the state's two electric distribution utilities will act as the Single Party Administrator in their respective territories. *See DPUC Investigation into the Appointment of Third Party Statewide Utility Pole Administrator for the State of Connecticut*, Docket No. 11-09-09, Report

of Pole Attachment Working Group on Recommended Pole Administration Structure at 7-10 (Feb. 28, 2013). Thus, even in the lone example cited by Fibertech, electric utility pole owners would not relinquish control over pole access.

Second, Fibertech proposes that the alleged fundamental unfairness of the current system could be combatted by requiring that pole owners treat competitive providers in the same manner that public utilities currently treat each other. (Fibertech Comments at 5). Thus, for example, if an electric utility allows an ILEC to attach to its poles without first obtaining a permit, then the electric utility should be required to allow CLECs to access its poles without a permit as well. *Id.* at 5-6. Fibertech ignores the fact that permitting is not required in joint use relationships because joint use poles are built to a specific height and strength necessary to accommodate each joint user, as set forth in the parties' joint use agreements. In other words, joint use poles are built to suit the joint use relationship, and each of the parties to the joint use agreement agrees in advance to share in the cost of constructing and maintaining the joint use network. By way of contrast, space on electric utility poles is not pre-assigned for use by non-ILEC attachers, and the permitting process is necessary in order to ensure that there is enough space on the pole for the applicant to attach and that the applicant may do so without creating a safety violation.

Fibertech cloaks its arguments in the suggested goal of achieving parity or a level playing field with ILECs. But what it really seeks is to remain unencumbered by the obligations that ILECs have voluntarily assumed through joint use agreements, while eliminating the rights that ILECs have obtained under those joint use agreements. The Commission should reject Fibertech's proposals.

CONCLUSION

For the reasons set forth in their Initial Comments and in these Reply Comments, the Electric Utilities respectfully request that the Commission reconsider the adoption of the Proposed Rules. However, if the Commission insists upon adoption of new pole attachment regulations, the Electric Utilities request that the Commission revise 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 in their Initial Comments, and to alter the proposed make-ready timelines to render them more flexible and equitable to electric utilities in the manner suggested in the Electric Utilities' Initial Comments, so as to maintain the safe and reliable operation of the electric distribution systems across the state.

Respectfully submitted this 29th day of August, 2013,

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