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**

APPLICATION FOR REHEARING 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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August 29, 2014

APPLICATION FOR REHEARING

Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code 4901-1-35, 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. (collectively, the "Electric Utilities") respectfully apply for rehearing of the Finding and Order ("Order") issued in the above-referenced proceeding, because that Order is unlawful and/or unreasonable in the following respects:

1. Rules 4901:1-3-01 through 4901:1-3-06 are unlawful because the Commission lacks the statutory authority to promulgate them.

2. Rule 4901:1-3-03, subparts (A) & (B), are unlawful and unreasonable because:

   a) when read in conjunction with Ohio Rev. Code § 4905.54, they could subject public utilities to penalties of up to $10,000 per violation; and

   b) they are not supported by record evidence in this proceeding.

3. Rule 4901:1-3-03(A)(4) is unreasonable to the extent it provides that a request for access "shall be deemed to be granted" if not denied in writing within 45 days because the rule would allow attaching entities to overload poles and create safety violations, thus compromising the safety and reliability of the electric distribution system.

4. Rule 4901:1-3-03(A)(5)(a) is unlawful and unreasonable because it conflicts with Ohio Admin. Code 4901:1-10-17 regarding disconnection of services for nonpayment.

5. Rule 4901:1-3-03(B)(7) is unlawful and unreasonable to the extent it does not allow electric utilities to deviate from make-ready deadlines due to weather or other force majeure events because it imposes on electric utilities stricter standards in the commercial pole attachment context

than are imposed upon them by the Commission under Ohio Admin. Code 4901:1-10-10(B)(4)(c) in the electric distribution reliability context.

6. Rule 4901:1-3-03(B)(8) is unreasonable because it makes pole owners responsible for correcting the safety violations of third-party attachers.

7. Rule 4901:1-3-04(d) is unreasonable because:

a) it results in under-recovery of pole costs by electric utilities, thus resulting in higher electric rates; and

b) it results in electric customers being forced to cross-subsidize the operations of attaching entities.

For the reasons stated above, and in the Electric Utilities' Memorandum in Support, which is attached hereto and incorporated herein by reference, the Electric Utilities respectfully request that the Commission grant this Application for Rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted this 29th day of August, 2014,

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MEMORANDUM IN SUPPORT

I. RULES 4901:1-3-01 THROUGH 4901:1-3-06 ARE UNLAWFUL BECAUSE THE COMMISSION LACKS THE STATUTORY AUTHORITY TO PROMULGATE THEM.

The Electric Utilities respectfully request that the Commission reconsider its adoption of Rules 4901:1-3-01 through 4901:1-3-06 (the "Rules") because the Commission lacks the statutory authority to promulgate them. In the Commission's Common Sense Initiative Business Impact Analysis regarding the proposed Rules, the Commission stated that the Ohio statutes authorizing the Commission's adoption of the Rules are Ohio Rev. Code §§ 4927.03 and 4927.15. Neither statute authorizes the Commission to promulgate the Rules.

Ohio Rev. Code § 4927.03 is a list of services (such as interconnected VOIP) over which the Commission *does not* have authority; it gives no authority to the Commission to promulgate rules relating to pole attachments or otherwise. Ohio Rev. Code § 4927.15 only gives the Commission the authority to adopt regulations related to *telephone* companies. It does not provide authority to adopt regulations related to electric companies. That statute provides:

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

Ohio Rev. Code § 4927.15 (emphasis added).

Though not specifically cited in the Business Impact Analysis as the statutes "authorizing the Agency to adopt this regulation" the Commission also relied upon Ohio Rev. Code §§

4905.51 and 4905.71 to support adoption of the Rules. Both statutes, though, devise authority for either complaint-based and/or tariff-based regulation (i.e. regulation by exception), as opposed to generic rule-based regulation. Neither devises broad, substantive rulemaking authority over pole attachments.

Ohio Rev. Code § 4905.51, which addresses the joint use relationships between incumbent local exchange carriers ("ILECs") and electric utilities, provides as follows:

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

(emphasis added). The Commission's authority to "prescribe reasonable conditions and compensation for such joint use" requires as conditions precedent: (1) "failure to agree" upon the terms of joint use; and (2) "appl[ication] to the commission" by one party or the other. This statute does not support generic rules but, rather, contemplates provision of due process that is specific to a dispute between the utility pole owner and a particular joint user.

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

> Every telephone or electric light company that is a public utility…shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or

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

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

In response to these concerns (raised by the Electric Utilities in their initial Comments), the Commission stated:

> The Commission emphasizes that while R.C. 4905.51 and R.C. 4905.71 provide the Commission with authority to resolve disputes, nothing within these statutes or others prohibit the Commission from establishing rules to address the regulation of pole attachments, conduits, and rights-of-way. Additionally, through its adopted rules, the Commission is implementing the mechanisms provided for under these statutes.

Order at ¶ 9. However, the fact that there is not a statute prohibiting the Commission from adopting the Rules does not mean that the Commission is authorized to adopt them. "The commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute." *Canton Storage and Transfer Co., Inc. v. Public Utilities Comm'n of Ohio*, 647 N.E.2d 136, 141 (Ohio 1995). The Supreme Court of Ohio has stated:

> The commission is an arm of the Legislature and an administrative body, having only such powers as are specifically granted….Section 4901.13, Revised Code…confers upon the commission authority to adopt and publish rules to govern its proceedings, and to regulate the mode and manner of investigations, but nowhere

> in the statute is any power delegated to the commission to make any general rules other than for the government of its own proceedings.

The Akron & Baberton Belt Rd. Co. v. Public Utilities Comm'n of Ohio, 135 N.E.2d 400, 403 (Ohio 1956).

Through the Rules, the Commission is not "implementing the mechanisms provided for" under Ohio Rev. Code §§ 4905.51 and 4905.71 (which permit the Commission to regulate joint use relationships upon the filing of a complaint, and to regulate pole attachment relationships in the context of a tariff or complaint proceeding). The Rules, with very few exceptions, do not establish procedures by which pole attachment complaints will be resolved or tariffs will be considered. Instead, the Rules purport to prescriptively regulate those relationships through "general rules" in the absence of a complaint or tariff proceeding. Rule 4901:1-3-02 ("Purpose and scope") expressly states, "[t]his chapter establishes rules for the provision of attachments" and refers to the Rules as "[t]he obligations found in this chapter." Even Rule 4901:1-3-04(D), which appears in subpart (1) to acknowledge the Commission's statutory limitations by stating that "[t]he commission shall determine whether a rate, term or condition is just and reasonable *in complaint proceedings or in tariff filings*," unwinds that recognition by predetermining the result of any rate dispute in subpart (2): "The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(1)…for determining a maximum just and reasonable rate for pole attachments."

Because the Rules exceed the Commission's statutory authority, they are unlawful, and the Electric Utilities respectively request that the Commission withdraw them.

II. RULES 4901:1-3-03(A) & (B) ARE UNLAWFUL AND UNREASONABLE.

Rules 4901:1-3-03(A) & (B) are unlawful and unreasonable for at least two reasons: (1) when read in conjunction with Ohio Rev. Code § 4905.54, they subject public utilities to penalties of up to $10,000 per violation; and (2) they are unsupported by the record evidence in this proceeding.

A. Rules 4901:1-3-03(A) & (B) Are Unlawful and Unreasonable Because, When Read in Conjunction with Ohio Rev. Code § 4905.54, They Could Subject Public Utilities to Excessive Penalties.

Rules 4901:1-3-03(A) & (B) set forth deadlines within which a public utility must (1) respond to requests for access, (2) notify attaching entities prior to removal or termination of service to facilities, increases in pole attachment rates, or modification of facilities, (3) perform surveys, (4) present attaching entities with estimates of charges to perform make-ready, and (5) send notices to entities that may be affected by make-ready. *See* Rules 4901:1-3-03(A)(4) & (5); 4901:1-3-03(B). Those deadlines are based upon similar deadlines set by the Federal Communications Commission ("FCC") in its April 2011 Order.[1]

However, the consequences of a pole owner's (even inadvertent) failure to comply with the deadlines in Rule 4901:1-3-03 could be far more severe than noncompliance with the FCC's analogous deadlines. Under the FCC's April 2011 Order, an attacher's sole remedy for a pole owner's failure to comply with the survey or make-ready deadlines is to hire a contractor to complete the required work in the communications space, and in the case of a pole owner's failure to comply with the deadline to provide an estimate, is to file a complaint with the Commission. *See* April 2011 Order at ¶ 23, Table 1. While, like the FCC rules, Rule 4901:1-3-03(B)(4) includes

[1] *See* Report and Order and Order on Reconsideration, *In the Matter of Implementation of the Act, A National Broadband Plan for Our Future*; WC Docket No. 07-245, GN Docket No. 09-51 (FCC 11-50) (April 7, 2011) (the "April 2011 Order"). *See also* Order at ¶ 26, stating, "…the Commission finds that the proposed time frames are consistent with the FCC's existing parameters [i.e., 47 C.F.R. 1.420(c)] and should be adopted."

a contractor self-help remedy where a pole owner fails to comply with make-ready deadlines, violations of Rules 4901:1-3-03(A) & (B) are also subject to excessive penalties under Ohio Rev. Code § 4905.54. That statute provides as follows:

> Every public utility…shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901…the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense….

Ohio Rev. Code § 4905.54. By way of contrast, the FCC's deadlines do not carry with them any specific monetary penalties for noncompliance. *See* April 2011 Order at ¶¶ 107-09 (FCC specifically declined to adopt a provision specifying that compensatory damages could be awarded where an unlawful denial or delay of access was established).

The potential penalties that could be imposed under Ohio Rev. Code § 4905.54 for a public utility's failure to abide by the timelines set forth at Rule 4901:1-3-03 are unduly burdensome and vastly disproportionate to any potential harm that could result from such noncompliance. The Commission should therefore clarify that it will not impose the penalties set forth in Ohio Rev. Code § 4905.54 for violations of Rule 4901:1-3-03.

B. Rules 4901:1-3-03(A) & (B) Are Unlawful and Unreasonable Because They Are Not Supported by Record Evidence.

The record is devoid of complaints by prospective broadband customers that they are underserved because of delays by public utilities in processing requests for attachments. Similarly, there is no evidence in the record indicating that Ohio citizens currently have less access to broadband than any other state due to the absence of the aggressive, newly-adopted make-ready deadlines. Instead, Rules 4901:1-3-03(A) & (B) are based on FCC rules, which were premised

upon a different factual record, and which are currently the subject of a pending petition for reconsideration before the FCC.[2] The Commission rejected the Electric Utilities' recommendation for longer make-ready timelines than proposed in the May 15, 2013 version of the proposed Rules on the basis that "the proposed time frames are consistent with the FCC's existing parameters [i.e., 47 C.F.R. 1.1420(c)] and should be adopted." Order at ¶ 26. However, the FCC's adoption of make-ready deadlines was based upon the specific administrative record before it. *See* April 2011 Order at ¶ 19 ("Our rules…reflect a close examination of the record developed in this proceeding."); *see also, e.g.,* April 2011 Order at ¶¶ 21, 24, 31- 33, 35, 42 (discussing record evidence supporting deadlines adopted in that proceeding). Here, in essence, the Commission has borrowed the FCC's conclusion without record evidence to support the adoption of similar rules in *this* proceeding. Absent such evidence, the imposition of those aggressive deadlines is unreasonable.

III. RULE 4901:1-3-03(A)(4) IS UNREASONABLE BECAUSE IT THREATENS THE SAFETY AND RELIABILITY OF THE ELECTRIC GRID.

The last sentence of Rule 4901:1-3-03(A)(4) states: "A request for access to a public utility's poles, ducts, conduits, or rights-of-way that is not denied in writing within forty-five days of the request shall be deemed to be granted." That sentence was not included in the rules proposed by the Commission in its May 15, 2013 Order. In its July 30, 2014 Order adopting the Rules, the Commission stated, "To clear up any ambiguity that may exist regarding requests for access that are not denied, the Commission has added a sentence clarifying that such requests are granted if not denied in writing within 45 days." Order at ¶ 20. It does not appear that any commenter

[2] *See* Electric Utilities' Comments at p. 23, n.6. Because the FCC has not yet even completed its administrative review of those deadlines, it is unreasonable to accept them as the basis for the deadlines adopted in this proceeding.

requested that this sentence be added to the Rules; there is no evidentiary justification for it in the record; and no such default principle exists under the FCC's analogous rule. See 47 C.F.R. § 1.1403(b).

The last sentence of Rule 4901:1-3-03(A)(4) threatens the safety and reliability of the electric grid. There are many reasons an electric utility might fail to respond to an application for pole attachment within the 45 days set forth in Rule 4901:1-3-03(A)(4), including simple human error, a computer server failure, a glitch in an electronic notification system or a weather event that does not suspend the deadlines. Whatever the reason, it should not result in an attaching entity being allowed to overload a pole, create a clearance violation, or otherwise impair the safety and reliability of the electric distribution system. This is especially problematic given the unlimited nature of the Commission's definition of "attaching entities" with rights under its Rules. Unlike the FCC's rules, the Commission's new Rules are not limited to entities with conventional facilities and with at least some institutional understanding of pole loading, clearance requirements and other construction standards. The rule, as written, would allow a complete newcomer, who seeks to attach something unconventional in a dangerous location on the pole, to freely proceed with attachment simply because the pole owner, for whatever reason, has not timely responded to an application.

Further, a rule automatically approving applications to which a utility does not respond within 45 days is unnecessary because the Commission has already given attachers a remedy under such circumstances: the attacher may hire an approved contractor to perform the survey. *See* Rule 4901:1-3-03(B)(4). The Commission should strike the last sentence of Rule 4901:1-3-03(A)(4).

IV. RULE 4901:1-3-03(A)(5)(a) IS UNLAWFUL AND UNREASONABLE BECAUSE IT CONFLICTS WITH OHIO ADMIN. CODE 4901:1-10-17 REGARDING DISCONNECTION OF SERVICES FOR NONPAYMENT.

Rule 4901:1-3-03(A)(5)(a) provides: "A public utility shall provide all attaching entities no less than sixty days written notice prior to: (a) Removal of facilities or termination of any service to those facilities…." In their initial Comments, the Electric Utilities requested that the Commission clarify that that rule does not supersede notification requirements in a utility tariff regarding disconnections for non-payment. Electric Utilities Comments at 40-41. The Electric Utilities argued that some pole attachments consume power and are billed monthly, and that in such cases, notice requirements associated with disconnection for non-payment for electric service should follow existing tariff requirements. *Id.* In the Order, the Commission stated in response to the Electric Utilities' concerns:

> Regulations are not subject to tariffs; rather, tariffs are subject to regulations. As such, Commission regulations, e.g., proposed Ohio Adm. Code 4901:1-3-03(A)(3), provide the framework within which tariffs may be established. Consequently, a tariff provision should not supersede a Commission regulation. Accordingly, the Commission finds that the Electric Companies request should be denied.

Order at ¶ 23.

But the tariffs regarding disconnections for non-payments to which the Electric Utilities referred in their initial Comments were themselves based upon a regulation—Ohio Admin. Code 4901:1-10-17. That regulation provides in relevant part:

> Except as otherwise provided by contract approved by the commission pursuant to section 4905.31 of the Revised Code, each electric utility shall provide the nonresidential customer with a written notice of pending disconnection, which notice shall be postmarked not less than five calendar days before service is disconnected for nonpayment of tariffed service.

Ohio Admin. Code 4901:1-10-17. The requirement in Rule 4901:1-3-03(A)(5)(a) that utilities notify attachers 60 days prior to termination of services to attachers' facilities thus conflicts with the requirement in Ohio Admin. Code 4901:1-10-17 that utilities provide customers with notice of a pending disconnection at least five calendar days prior to disconnection, or as provided in a

utility's contract approved by the Commission. The Commission should address that conflict by clarifying that, to the extent Rule 4901:1-3-03(A)(5)(a)'s notice requirement conflicts with the notice provision of Ohio Rev. Code 4901:1-10-17, the latter regulation shall continue to control.

V. RULE 4901:1-3-03(B)(7) IS UNREASONABLE TO THE EXTENT IT DOES NOT ALLOW ELECTRIC UTILITIES TO DEVIATE FROM MAKE-READY DEADLINES DUE TO WEATHER AND OTHER FORCE MAJEURE EVENTS.

Rule 4901:1-3-03(B)(7) is unreasonable because it fails to recognize the significant impact of weather and other force majeure events on the workforces of electric utilities. Rule 4901:1-3-03(B)(7) provides, in part:

> (7) A public utility may not deviate from the time limits specified in this section unless:
>
> (b) During performance of make-ready for good and sufficient cause it is infeasible for the public utility to complete the make-ready work within the time frame prescribed in this section.
>
> (i) Good and sufficient cause for deviation from the time limits may allow utilities to cope with an emergency declared by a governmental entity but not for routine or foreseeable events such as repairing damage caused by routine seasonal storms….

However, "routine seasonal storms" are often severe and can require utilities to deploy large portions of their workforce and contractors to restore power to affected areas. In such situations, electric utilities cannot simultaneously perform routine surveys, estimates, and make-ready in association with pole attachment applications without extending the timeframe required for power restoration. There are finite resources available to the Electric Utilities. In a power outage situation, the Electric Utilities typically devote maximum resources to power restoration. If some of these resources are reserved or diverted to attend to pole attachment applications, it will slow power restoration.

Unless the Commission intends for power restoration following "routine seasonal storms" to take a back seat to pole attachment application processing, Rule 4901:1-3-03(B)(7)(b)(i) should be revised to clarify that "good and sufficient cause for deviation from the time limits" includes the repairing of damage caused by "major events" as defined at Ohio Admin. Code 4901:1-10-01(T). Such a provision would conform to the Commission's existing policy in the distribution system reliability context. In Ohio Admin. Code 4901:1-10-10, the Commission specifically excludes from its performance standards for electric service reliability "performance data during major events." 4901:1-10-10(B)(4)(c). "Major event" is defined at Ohio Admin. Code 4901:1-10-01(T) as follows:

> "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 3.5 of standard 1366-2012 adopted by the institute of electrical and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

Rule 4901:1-3-03(B)(7)(b)(i), as currently written, imposes on electric utilities stricter compliance standards in the commercial pole attachment context than are imposed upon electric utilities in the far more crucial electric reliability context. The rule should thus be revised to clarify that "major events" as defined at Ohio Admin. Code 4901:1-10-01(T) constitute good and sufficient cause for deviation from the make-ready deadlines.

However, if the Commission retains the aggressive, newly-adopted make-ready deadlines in order to promote a faster duplication of broadband providers, then the Electric Utilities respectfully request that the Commission also explicitly acknowledge that it has mandated that

make-ready deadlines take precedence over the restoration of electric service. Further, the Commission should relieve electric utilities from all liability for failure to meet reliability standards due to completion of make-ready work for broadband deployment.

VI. RULE 4901:1-3-03(B)(8) IS UNREASONABLE BECAUSE IT MAKES POLE OWNERS RESPONSIBLE FOR CORRECTING SAFETY VIOLATIONS OF THIRD PARTY ATTACHERS.

Rule 4901:1-3-03(B)(8) provides as follows:

> If safety violations are found to exist on a pole requested for attachment the attacher that is found not to be in compliance with the utility's applicable engineering and construction standards shall be financially responsible for correction of the violation. *The pole owner shall be responsible for performing the actual correction.*

Rule 4901:1-3-03(B)(8) (emphasis added). Though no part of this rule was included in the version of the rules proposed by the Commission on May 15, 2013, the first sentence is non-objectionable (apart from the concern raised in Section I, *supra*) and consistent with industry practice. The second sentence is not. The Commission stated with regard to the addition of Rule 4901:1-3-03(B)(8):

> The Commission believes that safety violations should be promptly inspected and that the cause of the violation be determined at such inspection. If an attachment is found to be out of compliance during a safety inspection, the attacher causing the safety violation or non-compliance should be financially responsible for correction of the violation, but the correction itself should be performed by the pole owner since the violation is located on its pole. The rule has been revised accordingly.

Order at ¶ 39. No commenters advocated for a requirement that pole owners be responsible for correcting attachers' safety violations. In fact, in the Electric Utilities' experience, attachers prefer the opportunity to correct the violations themselves. In any event, there is no record evidence supporting such a requirement.

The fact that a safety violation "is located on [a utility's] pole" does not logically lead to the conclusion that the pole owner should be the party responsible for correcting that violation.

The third party attacher—and not the pole itself—is the cause of the violation. It is therefore the owner of the attachment that should be responsible, both operationally and financially, for correcting the violation. This is especially true in light of the Commission's rejection of the Electric Utilities' proposal to toll the deadlines where there are existing third party violations. *See* Order at ¶ 39.

Requiring electric utilities to correct third party safety violations is also unduly burdensome because it requires them to devote portions of their workforce that would otherwise be committed to their primary mission—the provision of safe and reliable electric service—to the commercial operations of third party attachers. While the Electric Utilities do (and must) reserve the right to correct such safety violations where attaching entities fail or refuse to correct them in a timely manner, the primary responsibility for such corrections should lie with the responsible attaching entity.

In cases where new attachments are being delayed as a result of an existing attacher failing to correct an existing safety violation within the communications space, the new attaching party could be given the option to correct the existing safety violation and hold the violator responsible for the costs associated with such correction. This option would permit efficient resolution of the issue, because the new party will already have crews trained to work on communications facilities that can expediently correct the violation and construct the new facilities during one visit to the pole. Often times, the solution is as simple as raising an existing attachment that is sagging too low for required ground clearances.

VII. RULE 4901:1-3-04(D) IS UNREASONABLE BECAUSE IT RESULTS IN CROSS-SUBSIDIZATION OF THE OPERATIONS OF ATTACHING ENTITIES BY ELECTRIC UTILITY CUSTOMERS.

Rule 4901:1-3-04(D) is unreasonable because it will unfairly and negatively impact the electric customers whom the Commission is charged with protecting. Rule 4901:1-3-04(D)(2) provides: "The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(1), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for pole attachments." The formula set forth at 47 C.F.R. 1.1490(e)(1) is the FCC's cable rate formula, which the FCC applies to determine the maximum just and reasonable pole attachment rate applicable to cable providers (who do not also provide telecommunications services) in the absence of an alternative agreement between the cable provider and pole owner. The Commission, through Rule 4901:1-3-04(D)(2), has adopted the cable rate formula as applicable not only to cable providers, but also to *all* entities "with a physical attachment…to the pole" other than ILECs. *See* Rules 4901:1-3-01(A) & (N); 4901:1-3-04(D)(2).

In their initial Comments, the Electric Utilities advocated that the Commission adopt a single rate formula, but that the single rate formula should be a modified version of the FCC's telecommunications rate formula, rather than its cable rate formula. Electric Utilities Comments at 18-19. In its Order, the Commission justified the adoption of the FCC's cable rate formula on the basis that (1) the FCC's telecommunications rate formula yields rates nearly identical to the rate produced by the cable rate formula, (2) the cable rate formula has been deemed to be compensatory by the courts, and (3) the cable rate formula is well known and requires fewer inputs than the telecommunications rate formula. Order at ¶¶ 40-41.

The first of these reasons is only true when a pole owner fails to rebut the presumption regarding the average number of attaching entities. Many pole owners rebut the presumption, yielding rates in the range of 50% higher than the cable rate formula. With respect to the second reason, the fact that courts have found the cable formula to be merely compensatory (as in passing

constitutional muster) does not mean the courts have found it to be fair to either electric utilities or their customers. The third reason suggests that the telecom rate formula inputs are not well known, when in fact they are. The FCC's telecom rate formula has been in effect for more than 15 years.

Allowing for the under-recovery of pole costs by electric utilities is unreasonable because it will increase electric rates. Adoption of the cable rate formula is also unreasonable because it results in cross-subsidization of attaching entities by electric utility customers. That is because all costs recovered from attachers are set off against the revenue requirements of the electric utilities. Thus, the electric utilities are *not* defending a profit motive. Instead, failure to allocate costs fairly will result in electric customers cross-subsidizing the companies providing services over third party attachments—services that those electric customers may not even enjoy. And there is no guarantee that the lower pole rental rates will even be passed on to the attachers' customers instead of merely improving the attachers' bottom lines. The FCC is not statutorily charged with protecting electric customers; the Commission is. The Commission can and should create a cost-sharing formula that equitably distributes pole costs based upon the burdens placed on the pole and the costs avoided by attaching entities.

In addition, the Commission did not specify in Rule 4901:1-3-04(D) the mechanism by which pole owners will annually adjust their pole attachment rates, so that those rates are based upon the utilities' most recent pole cost data. The Order only states, "The Commission will address in a future entry the filing of tariffs consistent with the adopted rule." Order at ¶ 41. The Electric Utilities request that in that future entry, and consistent with the Electric Utilities' initial Comments, the Commission order each public utility to make a compliance filing to adjust its current rates to the rate formula that is ultimately adopted. *See* Electric Utilities Comments at

22. The Commission should explicitly state that the formula will be used to calculate the rent owed by attachers governed by such tariffs on an annual basis, based upon the pole owner's cost data from the previous year. However, the Commission should clarify that all other operational terms and conditions in existing tariffs shall remain in full force and effect, and that no proposal to modify such operational terms and conditions is to be considered in the compliance filing proceedings.

CONCLUSION

For the reasons stated above, the Electric Utilities respectfully request that the Commission grant the Electric Utilities' Application for Rehearing and issue an Entry on Rehearing consistent with this filing.

Respectfully submitted this 29th day of August, 2014,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 29th day of August, 2014 by e-mail, as noted below, on the parties listed below.

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Summary: App for Rehearing Application for Rehearing by Ohio Electric Utilities (Ohio Power, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Dayton Power & Light, Duke Energy Ohio) electronically filed by Mr. Robert M. Endris on behalf of Burk, James W. Mr.