

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter)	
4901:1-3, Ohio Administrative Code,)	
Concerning Access to Poles, Ducts,)	Case No. 13-579-AU-ORD
Conduits and Rights-of-Way by)	
Public Utilities.)	

**THE OHIO TELECOM ASSOCIATION'S MEMORANDUM CONTRA THE
APPLICATIONS FOR REHEARING OF THE ELECTRIC UTILITIES AND
FIBER TECHNOLOGIES NETWORKS, L.L.C.**

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I. BACKGROUND

The Ohio Telecom Association (“OTA”) respectfully submits these comments in opposition to the applications for rehearing in this proceeding regarding the Public Utilities Commission of Ohio’s (“Commission”) July 30, 2014 Finding and Order adopting rules contained in Chapter 4901:1-3 of the Ohio Administrative Code (“O.A.C.”) in Case No. 13-579-AU-ORD, which address access to poles, ducts, conduits, and rights-of-way provided by public utilities. Specifically, in their application for rehearing, the 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. (“Electrics”) again restate their argument that the Commission exceeded its authority when it extended the application of these rules to them. Because the Commission has exercised its authority lawfully, the Commission should deny the Electrics’ application for rehearing on this issue.

Additionally, Fiber Technologies Networks, L.L.C. ("Fibertech") in its application for rehearing argues that the Commission should adopt timeframes for access to a public utility's conduits. Again, because the Commission has exercised its authority lawfully, and followed the Federal Communication Commission's ("FCC") guidance on this matter, the Commission should deny Fibertech's application for rehearing on this issue.

II. THE COMMISSION LAWFULLY EXERCISED ITS STATUTORY AUTHORITY IN THIS PROCEEDING

The Electrics again assert in their application for rehearing the claim that the Commission lacks the statutory authority to promulgate rules applicable to them in this matter. The Commission properly rejected this claim in its Finding and Order and the Electrics raise no new arguments that should dissuade the Commission from staying on its current regulatory path.

The Electrics' claim that the Commission's rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities conflict with 47 U.S.C. § 224. This federal statute, however, explicitly provides that the FCC's regulation does not preempt state action if certain conditions are met. Section 224(c) of Chapter 47, United States Code, states:

- (1) Nothing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.
- (2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the [FCC] that—
 - (A) it regulates such rates, terms, and conditions; and
 - (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests

of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

- (3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—
(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments (emphasis added).

Thus, the Commission has jurisdiction to regulate access to poles, ducts, conduits, and rights-of-way provided by public utilities to the extent it has the state regulatory authority to issue rules regarding pole attachments, which it has under Section 4905.71, Revised Code, and it certifies this to the FCC.

State law provides the Commission with the authority to issue the rules permitted under Section 224(c) of Chapter 47, United States Code. As the Commission has found, it derives its authority under Section 4905.71, Revised Code, to issue rules regarding access to poles, ducts, conduits, and rights-of-way provided by public utilities on the same rates, terms and conditions as the FCC.¹ Section 4905.06, Revised Code, also grants the Commission lawful authority to inspect property and equipment of any public utility for the important public policy goal of public safety.

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

¹ See, e.g., *In The Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Issues*, Case No. 95-845-TP-COI, Entry on Rehearing at 51 (November 7, 1996).

The Electrics' view of the Commission's authority is not supported by either federal or state law. The Commission has authority to issue the rules that it has in this matter. To proceed in any other manner would be unduly cumbersome, complicated and a waste of limited Commission resources.

III. THE COMMISSION CORRECTLY DEFERRED TO THE FCC ON TIMEFRAMES FOR ACCESS TO A PUBLIC UTILITY'S CONDUITS

In its application for rehearing, Fibertech asserts, in part, that it was unreasonable and unlawful for the Commission to fail to establish timeframes for access to conduits. The Commission properly rejected timeframes for conduit access in this proceeding as to do otherwise would run counter to FCC guidance and the plain fact that access to conduits presents different and unique issues than access to poles.

As the OTA explained in its comments and reply comments, the FCC has specifically declined to issue rules for conduit occupancy timeframes:

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

The FCC has appropriately decided that access to conduits presents different and unique issues than access to poles and, therefore, proposing timeframes is simply not practicable or warranted. Furthermore, as the FCC has found, the record surrounding access to conduits does not support the assertion that attachers are unable to timely gain access to conduits. Therefore, the Commission correctly followed the

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

FCC's policy direction on this issue and should reject Fibertech's application for rehearing.

IV. CONCLUSION

Aligning the Commission's rules and regulations on this matter with the FCC's orders will ensure compliance with state and federal regulations in a consistent manner which will reduce confusion and ease compliance and enforcement on these issues. For these reasons, the OTA respectfully requests that the Commission reject the assertions by the Electrics that the Commission lacks subject matter jurisdiction in this proceeding and also reject the request by Fibertech to establish timeframes for access to a public utility's conduits. The Commission has addressed both of these issues in its Finding and Order and the applications for rehearing present no new arguments justifying a rehearing. Therefore, the applications for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *The Ohio Telecom Association's Memorandum Contra the Applications for Rehearing of the Electric Utilities and Fiber Technologies Networks, L.L.C.* was sent by, or on behalf of, the undersigned counsel for The Ohio Telecom Association to the following parties of record this 10th day of September 2014, *via* electronic transmission.

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