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**PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND THE HETNET  
FORUM MEMORANDUM CONTRA  
THE APPLICATIONS FOR REHEARING**

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**INTRODUCTION**

PCIA – The Wireless Infrastructure Association<sup>1</sup> and the HetNet Forum,<sup>2</sup> a membership section of PCIA (together “PCIA”), pursuant to O. A. C. § 4901-1-35(B), write in general opposition to the applications for rehearing in the above-captioned case that were filed by the Ohio utility companies on August 29, 2014.<sup>3</sup> Additionally, as noted below, PCIA supports the AT&T Entities’ (“AT&T”) suggestions and Electric Utilities where referenced. While conceptually supportive of elements of the applications for rehearing and requests for clarification put forth by Fiber Technologies Networks, L.L.C. (“Fibertech”), PCIA refrains from addressing these questions and instead relies on its initial comments and reply comments.<sup>4</sup>

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<sup>1</sup> PCIA – The Wireless Infrastructure Association is the principal organization representing the companies that build, design, own and manage telecommunications facilities throughout the world. Its over 200 members include carriers, infrastructure providers, and professional services firms.

<sup>2</sup> The HetNet Forum, formerly The DAS Forum, is dedicated to the advancement of heterogeneous networks. HetNets provide increased network coverage, capacity and quality through the use of a variety of infrastructure and technology, enabling seamless voice and data communications. The HetNet Forum is a membership section of PCIA – The Wireless Infrastructure Association.

<sup>3</sup> Application for Rehearing of Ohio Pwr. Co., Ohio Edison Co., The Cleveland Elec. Illuminating Co., The Toledo Edison Co., The Dayton Pwr. & Light Co, & Duke Energy Ohio, Inc. (“Electric Utilities”), Case No. 13-579-AU-ORD (filed Aug. 29, 2014) (“Electric Utilities Rehearing”).

<sup>4</sup> See Initial Comments of PCIA, Case No. 13-579-AU-ORD (filed Jul. 12, 2013) (“PCIA Initial Comments”); Reply Comments of PCIA, Case No. 13-579-AU-ORD (filed Aug. 29, 2013) (“PCIA Reply Comments”).

## II. The Electric Utilities' Application for Rehearing

Electric Utilities raise the following items for rehearing:

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

Electric Utilities claim that the Public Utilities Commission of Ohio (“Commission”) lacks the necessary jurisdiction to adopt pole attachment rules.<sup>5</sup> The Commission’s Finding and Order (“Order”) properly rejected this claim.<sup>6</sup> Pursuant to 47 U.S.C. 224(c)(2), the Commission certified its regulation of the rates, terms, and conditions for pole attachments to the Federal Communications Commission (“FCC”).<sup>7</sup> Further, the Commission has broad statutory jurisdiction over Electric Utilities including the rights to supervise, regulate, protect, inspect, and prescribe any rule the Commission finds necessary for the protection of public safety and welfare.<sup>8</sup>

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<sup>5</sup> Electric Utilities Rehearing at 1-4.

<sup>6</sup> *In re* Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities, *Finding and Order*, Case No. 13-579-AU-ORD (Jul. 30, 2014) (“Order”).

<sup>7</sup> See Ohio Admin. Code 4901:1-7-23; *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010), App. C.

<sup>8</sup> The Commission has found its authority under R.C. 4905.71 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. Further, the Ohio General Assembly has granted the Commission other plenary and specific powers as noted here: “The [Commission] is hereby vested with the power and jurisdiction to supervise and regulate public utilities . . . to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of . . . the traveling public . . . (R. C. § 4905.04; The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad. . . (R. C. § 4905.05); The [Commission] has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code; The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. (R. C. § 4905.06).

Electric Utilities improperly rely on *Akron & Barberton Belt Rd. Co. v. Public Utils. Comm'n of Ohio* to infer a limitation on the Commission's rulemaking power and procedural rules.<sup>9</sup> This case, from nearly six decades ago, focuses on an evidentiary question rather than on the question of agency jurisdiction.<sup>10</sup> In *Akron & Barberton*, the court found that the “commission presented no evidence in support of its proposed order and took the position that it was not bound to do so.”<sup>11</sup> In the instant case, not only does the Commission have ample authority to regulate under federal law and state enabling statutes, but the Commission has also cultivated a full record of public comments and substantiated its decisions throughout the Order. Electric Utilities request should be rejected.

- II. 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.

Electric Utilities claim is unsubstantiated. The referenced forfeiture statute is permissive rather than prescriptive. The Commission *may* issue forfeiture. Further, the amount per violation of \$10,000 is the *maximum* allowable forfeiture not the default. In practice, the Commission has exercised discretion when applying the assessed penalties.

The Commission properly relied on the record established in this proceeding as well as the FCC's conclusions of before adopting its rules.<sup>12</sup> The record included the participation of electric utilities, wireless carriers, telecommunications infrastructure providers, and cable

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<sup>9</sup> *Akron & Barberton Belt Rd. Co. v. Public Utils. Comm'n of Ohio*, 135 N.E.2d 400, 403 (Ohio 1956).

<sup>10</sup> *Id.* at 402.

<sup>11</sup> *Id.*

<sup>12</sup> See *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5230 (April 7, 2011) *aff'd sub nom. American Electric cert den.* 134 S. Ct. 118 (2013).

companies. Additionally, the Commission also hosted a public workshop.<sup>13</sup> The record is complete and the Commission's conclusions are sound.

- III. 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.

PCIA strongly supports the Commission's efforts to encourage parties to timely communicate and provide written explanations for denial should an electric utility refuse an attachment request. In addressing Electric Companies concern, PCIA supports AT&T's suggested solution whereby, "[t]he parties mutually agree to a reasonable extension of the time limits on a case-by-case basis."<sup>14</sup>

Electric Utilities concern that an automatic approval process would allow for overloaded poles and a compromised electric distribution system is unfounded. As was noted throughout this proceeding, attachers must comply with engineering and safety standards that prevent the overloading of the poles that Electric Utilities envision.<sup>15</sup>

- 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.

PCIA agrees that the clarification requested by Electric Utilities would be appropriate.<sup>16</sup> The disconnection of electric power to an attaching party's facilities should be governed by the

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<sup>13</sup> See Transcript of April 17, 2013 Workshop on Case No. 13-579-AU-ORD available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13E02B64255177807.pdf>.

<sup>14</sup> Application for Rehearing of AT&T, Case No. 13-579-AU-ORD ("AT&T Rehearing") (filed Aug. 29, 2014) at 4-5 (emphasis removed).

<sup>15</sup> See PCIA Initial Comments at 17 ("all pole attachers comply with objective safety standards such as the National Electric Safety Code ('NESC'), which is considered to be authoritative on sound electrical engineering practices, as well as the Bellcore Blue Book – Manual of Construction Procedures, which also offers guidance on safety standards and compliance"); PCIA Reply Comments at 10.

<sup>16</sup> Electric Utilities Rehearing at 8-10.

disconnection rule and its timeframes, as reflected in Electric Utilities tariffs. The removal of any facilities, in contrast, should be governed by the rules adopted here. Clarification would be beneficial though questions remain regarding an area generally reserved for consumer protection and the present situation involving commercial parties.

- V. 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.

PCIA understands the necessity of providing flexibility to account for weather or other *force majeure* events. However, PCIA remains uncertain regarding the process of defining such events, how to determine when such an event has begun or concluded, and the potentially conflicted position of the party defining the existence and scope of such events.<sup>17</sup> As such, and in contemplation of said events, PCIA recommends the adoption of the above referenced AT&T proposal that allows for the extension of timelines on a mutually agreeable, case-by-case basis.<sup>18</sup> Such a process encourages early and ongoing communication between parties and would provide the flexibility requested by Electric Utilities.

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

PCIA agrees with the Commission that any safety violations “should be promptly inspected and that the cause of the violation be determined at such inspection.”<sup>19</sup> The responsibility for correcting a safety violation resulting from an attachment should lie with the attaching party responsible for the violation. Only if the party in violation fails to correct the

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<sup>17</sup> PCIA Reply Comments at 7-9.

<sup>18</sup> AT&T Rehearing at 4-5 (emphasis removed...)

<sup>19</sup> Order at 32.

safety violation within a reasonable timeframe should the responsibility to correct the safety violations shift to the pole owner to correct the violation at the attaching party's expense.

The Commission notes that the correction of the violation should be performed by the pole owner "since the violation is located on its pole."<sup>20</sup> Similarly, since it is the pole owner's pole, up-to-date records of attaching entities should be maintained by the pole owner so that notice of safety violations are swiftly communicated, costs for correction properly apportioned, and timelines maintained.

- VII. 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.

In the present proceeding, the Commission considered several policy choices regarding fee structures including market-based and cost-based recovery models.<sup>21</sup> Ultimately, the Commission independently analyzed and promulgated the FCC's CATV rate formula after careful consideration of the administrative record. The Commission is within its jurisdictional power and Electric Utilities assessment should be rejected.

### **The AT&T Entities' Application for Rehearing and Request for Clarification**

The AT&T Entities ("AT&T") raise three items in its Application for Rehearing and Request for Clarification:

- I. The text of the Order adopted July 1, 2014 as the reference date for federal law and the FCC rules, but the rule that was adopted has an April 1, 2014 reference date.

PCIA supports AT&T's request that the Order be amended to the reference date of July 1, 2014 to reflect the Commission's conclusion that was adopted in its Order.

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<sup>20</sup> *Id.*

<sup>21</sup> Order at 37-42.

II. The time frames for pole attachments do not uniformly reflect the 60-day time frame adopted for larger orders.

PCIA agrees with AT&T's proposed modification that would amend 4901:1-3-03 to include uniformity for larger orders.<sup>22</sup> Without this modification, the automatic approval process would not apply to orders that are on the 45-day time line.

III. The time frames for pole attachments do not allow the parties to mutually agree to longer time frames on a case-by-case basis, thus imparting much-needed flexibility to the process.

As addressed throughout, PCIA agrees that it is beneficial to provide allowances for a case-by-case extension of timelines when parties mutually agree to such an extension. PCIA further suggests that text be added to ensure parties enter into such agreements in good faith. This mutually agreed upon extension provides for greater flexibility for larger order sizes, and also addresses Electric Utilities concerns regarding weather events and other *force majeure*.<sup>23</sup>

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<sup>22</sup> AT&T Rehearing at 4.

<sup>23</sup> Electric Utilities Rehearing at 10-12.

**CONCLUSION**

For the foregoing reasons, the Commission should rule on the applications for rehearing discussed above in the manner suggested by PCIA.

Respectfully submitted,

PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION  
and  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the parties of record via electronic mail on this 29<sup>th</sup> day of August, 2013.



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