

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF OHIO ADM.CODE CHAPTER
4901:1-3, CONCERNING ACCESS TO
POLES, DUCTS, CONDUITS, AND RIGHT-
OF-WAY.

CASE NO. 19-834-AU-ORD

ENTRY

Entered in the Journal on July 17, 2019

I. SUMMARY

{¶ 1} The Commission invites interested persons or entities wishing to file comments or reply comments with the Commission regarding the proposed modifications in Ohio Adm.Code Chapter 4901:1-3 to do so no later than August 15, 2019, and August 30, 2019, respectively.

II. DISCUSSION

{¶ 1} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review of their rules every five years to determine whether the rules should be continued without change, amended, or be rescinded. The Commission has opened this docket to review the rules regarding pole attachments in Ohio Adm.Code Chapter 4901:1-3.

{¶ 2} R.C. 106.03(A) requires that the Commission determine whether the rules:

- (a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;
- (b) Need amendment or rescission to give more flexibility at the local level;
- (c) Need amendment or rescission to eliminate unnecessary paperwork;

- (d) Incorporate a text or other material by reference and, if so, whether the text or other material incorporated by reference is deposited or displayed as required by R.C. 121.74, and whether the incorporation by reference meets the standards stated in R.C. 121.72, 121.75, and 121.76;
- (e) Duplicate, overlap with, or conflict with other rules;
- (f) Have an adverse impact on businesses, as determined under R.C. 107.52;
- (g) Contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and,
- (h) Require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 2} In accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative office the draft rules and the BIA.

{¶ 3} On May 21, 2019, the Commission held a workshop in this proceeding to afford interested stakeholders an opportunity to propose revisions to the rules in Ohio Adm.Code Chapter 4901:1-3 for the Commission's consideration. Approximately 21 interested stakeholders attended the workshop. Representatives from the Ohio Cable Telecommunications Association provided comments.

{¶ 4} The Commission Staff (Staff) evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-3, all stakeholder feedback provided at the May 21, 2019 workshop, and

recommends amendments to several rules, as shown in the attachment to this Entry (Attachment A). The proposed revisions are summarized as follows:

- (a) Ohio Adm.Code 4901:1-3-01 – Staff recommends adding a definition for overlashing as the term is used in Ohio Adm.Code 4901:1-3-03.
- (b) Ohio Adm.Code 4901:1-3-02 – Staff recommends this rule incorporate language regarding full and partial suspension during the application for the tariff approval process.
- (c) Ohio Adm.Code 4901:1-3-03 – Staff recommends the implementation of overlashing language pertaining to the applicable procedure when dealing with an existing attaching entity.
- (d) Ohio Adm.Code 4901:1-3-04 – Staff recommends that initial tariffs or any subsequent changes in tariff rates, terms, and conditions, for access to poles, ducts, conduits, or rights-of-way filed pursuant to R.C. 4905.71 shall be filed as an application for tariff amendment and be subject to an automatic approval process. Additionally, Staff recommends that when calculating a just and reasonable rate for pole attachments and conduits, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.
- (e) Ohio Adm.Code 4901:1-3-05 – Staff recommends that in joint use agreement complaint proceedings challenging pole attachment or conduit occupancy rates, terms, and conditions, a rebuttable

presumption exists that an incumbent local exchange carrier should be treated as a non-utility attaching entity.

{¶ 5} Attached to this Entry are the proposed Ohio Adm.Code Chapter 4901:1-3 (Attachment A) and the BIA for this chapter (Attachment B), which are also posted on the Commission's Docketing Information System website at <http://dis.puc.state.oh.us>. To minimize the expense of this proceeding, the Commission will serve only a paper copy of this Entry. All interested persons are directed to input case number 19-834-AU-ORD into the Case Lookup box to view this Entry, as well as the proposed changes, or to contact the Commission's Docketing Division to request a paper copy.

{¶ 6} At this time, the Commission requests comments from interested persons regarding the proposed changes to this chapter and the BIA. Comments should be filed, via electronic filing or in hard copy, by August 15, 2019. Reply comments should be filed by August 30, 2019.

III. ORDER

{¶ 7} It is, therefore,

{¶ 8} ORDERED, That all interested persons or entities wishing to file comments or reply comments with the Commission regarding the proposed rules do so no later than August 15, 2019, and August 30, 2019, respectively. It is, further,

{¶ 9} ORDERED, That a copy of this Entry, with the rules and the BIA, be submitted to Common Sense Initiative office, in accordance with R.C. 121.82. It is, further,

{¶ 10} That a copy of this Entry be served upon all certified telephone companies, including all certified commercial mobile radio service providers; regulated electric distribution companies; the Ohio Cable Telecommunications Association; the Ohio Telecom Association; and, all other interested persons of record. It is, further,

{¶ 11} ORDERED, That notice of this Entry be sent to the Telephone and Electric list-serves.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

LLA/hac

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AMENDED

4901:1-3-01 Definitions.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

As used within this chapter, these terms denote the following:

- (A) "Attaching entity" means cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities and other entities with either a physical attachment or a request for attachment to the pole, duct, conduit, or right-of-way and that is authorized to attach pursuant to section 4905.51 or 4905.71 of the Revised Code. It does not include governmental entities with only seasonal attachments to the pole.
- (B) "Cable operator" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(5), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.
- (C) "Cable service" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(6), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.
- (D) "Cable system" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(7), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.
- (E) "Commission" means the public utilities commission of Ohio.
- (F) "Communications space" means that portions of the pole typically used for the placement of communications conductors beginning below the bottom point of the communications workers safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached.
- (G) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.
- (H) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.
- (I) "Days" means calendar days for the purposes of these rules.
- (J) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.

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- (K) "Electric company" for purposes of this chapter, shall have the same meaning as defined in division (A)(3) of section 4905.03 of the Revised Code.
- (L) "Inner-duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.
- (M) "Local exchange carrier" (LEC) for purposes of this chapter, shall have the same meaning as defined in division (A)(7) of section 4927.01 of the Revised Code.
- (N) "Overlashing" means the tying or lashing of an attaching entity's additional fiber optic cables or similar incidental equipment such as fiber-splice closures to the attaching entity's own existing communications wires, cables, or supporting strand already attached to poles.
- (O) "Pole attachment" means any attachment by an attaching entity to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.
- ~~(P)~~ "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.
- ~~(Q)~~ "Telecommunications" for purposes of this chapter, shall have the same meaning as defined in division (A)(10) of section 4927.01 of the Revised Code.
- ~~(R)~~ "Telecommunications carrier" for purposes of this chapter, shall have the same meaning as defined in division (A)(11) of section 4927.01 of the Revised Code.
- ~~(S)~~ "Telecommunications services" for purposes of this chapter, shall have the same meaning as defined in division (A)(12) of section 4927.01 of the Revised Code.
- ~~(T)~~ "Telephone company" for purposes of this chapter, shall have the same meaning as defined in division (A)(13) of section 4927.01 of the Revised Code and includes the definition of "telecommunications carrier" incorporated in 47 U.S.C. 153(44), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.
- ~~(U)~~ "Unusable space" with respect to poles, means the space on a public utility pole below the usable space, including the amount required to set the depth of the pole.
- ~~(V)~~ "Usable space" with respect to poles, means the space on a public utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the public utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable,

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and associated equipment for telecommunications or cable services, and which includes capacity occupied by the public utility.

AMENDED

4901:1-3-02 Purpose and scope.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

- (A) 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 ~~July~~October 1, 2019~~4~~.
- (B) This chapter establishes rules for the provision of attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility under rates, terms, and conditions that are just and reasonable. Ohio has elected to regulate this area pursuant to 47 U.S.C. 224(c)(2).
- (C) The obligations found in this chapter, shall apply to:
 - (1) All public utilities pursuant to 47 U.S.C. 224(c) through (i), 47 U.S.C. 253(c), as effective in paragraph (A) of this rule, and section 4905.51 of the Revised Code; and
 - (2) A telephone company and electric light company that is a public utility pursuant to section 4905.71 of the Revised Code.
- (D) The commission may, upon an application or motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.
- (E) Any party seeking a waiver(s) of rules contained in this chapter shall specify the period of time for which it seeks such a waiver(s), and a detailed justification in the form of a motion filed in accordance with rule 4901-1-12 of the Administrative Code.
- (F) All of the automatic time frames set forth in this chapter may be suspended pursuant to directives of the commission or an attorney examiner.
- (G) Unless the law specifically precludes suspension of an automatic approval process, a pending application under full or partial suspension will be automatically approved thirty days from the date of suspension if all issues are resolved. If all issues are not resolved by the thirtieth day, the application will be either dismissed by entry or suspended a second time. Any such second

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suspension shall be accompanied by notice to the applicant explaining the rationale for the additional suspension. Applications under a second suspension cannot be approved without a commission entry or order.

- (1) Under this paragraph, an application under full suspension is entirely precluded from taking effect.
- (2) Under this paragraph, an application under partial suspension is permitted to take effect, in part or in its entirety, under the proposed terms and conditions, subject to further review by the commission. The applicant is put on notice that the commission, subsequent to further review, may modify the rates and/or terms and conditions of tariffed pole, duct, conduit, and rights-of-way access affected by the applications.
- (H) A full or partial suspension of tariffed pole, duct, conduit, and rights-of-way access may also be imposed, after an application is approved under the automatic approval process, if an ex post facto determination is made that the tariff is in violation of law or commission rules.

AMENDED

4901:1-3-03 Access to poles, ducts, conduits, and rights-of-way.

(A) Duty to provide access and required notifications

- (1) A public utility shall provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it under rates, terms and conditions that are just and reasonable. Notwithstanding this obligation, a public utility may deny an attaching entity access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.
- (2) Requests for access to a public utility's poles, ducts, conduits, or rights-of-way must be in writing. A complete application is an application that provides the public utility with the information reasonably necessary under its procedures to begin to survey the poles.
- (3) If the public utility establishes or adopts an electronic notification system, the attaching entity must participate in the electronic notification to qualify under this chapter.
- (4) A public utility shall notify the attaching entity in a timely manner if the application to attach facilities to its poles is deemed to be incomplete. If access is not granted within forty-five days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day [or by the sixtieth day in the case of larger orders as described in paragraph

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(B)(6) of this rule]. The public utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards. 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 [or by the sixtieth day in the case of larger orders as described in paragraph (B)(6) of this rule] of the request shall be deemed to be granted.

- (5) 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;
 - (b) Any increase in pole attachment rates; or
 - (c) Any modification of facilities other than routine maintenance or modification in response to emergencies.
- (6) An attaching entity may file with the commission a petition for temporary stay of the action contained in a notice received pursuant to paragraph (A)(5) of this rule within fifteen days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of service and a copy of the notice. The public utility may file an answer within seven days of the date the petition for temporary stay was filed. No further filings under this rule will be considered unless requested or authorized by the commission. If the commission does not rule on a petition filed pursuant to this paragraph within thirty days after the filing of the answer, the petition shall be deemed denied unless suspended.

(7) Overlapping

(a) A public utility shall not require approval for:

(i) An existing attaching entity that overlaps its existing wires on a pole; or

(ii) For the third party overlapping of an existing attachment that is conducted with the permission of an existing attaching entity.

(b) A public utility may not prevent an existing attaching entity from overlapping because another existing attaching entity has not fixed a preexisting violation. A public utility may not require an existing attaching entity that overlaps its existing wires on a pole to fix preexisting violations caused by another existing attaching entity.

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- (c) A public utility may require no more than fifteen days' advance notice of planned overlashing. If a public utility requires advance notice for overlashing then the public utility must provide existing attaching entities with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attaching entity. If after receiving advance notice the public utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the attaching entity seeking to overlash within the fifteen day advance notice period and the attaching entity seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the attaching entity's view, a modification is unnecessary. A public utility may not charge a fee to the attaching entity seeking to overlash for the public utility's review of the proposed overlash.
- (d) An existing attaching entity or third party overlashing with permission from an existing attaching entity (overlashing party) that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.
- (e) An overlashing party shall notify the affected public utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected public utility at least 90 days from receipt in which to inspect the overlash. The public utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the public utility discovers damage or code violations caused by the overlash on equipment belonging to the public utility, then the public utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The public utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

(B) Timeline for access to public utility poles

(1) Survey

Not longer than forty-five days after receipt of a complete application to attach facilities to its poles (or within sixty days, in the case of larger orders as described in paragraph (B)(6) of this rule), a public utility must perform a survey which provides identification of present

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attachments and any modification to the pole, duct, conduit, or right-of-way that must be performed to accommodate the requested attachment.

(2) Estimate

Where a request for access is not denied, a public utility shall present to the attaching entity an estimate of charges, if any, to perform all necessary make-ready work within fourteen days of providing the response required by paragraph (B)(1) of this rule, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this rule, within fourteen days of receipt by the public utility of such survey.

- (a) A public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning twenty-two days after the estimate is presented.
- (b) An attaching entity may accept a valid estimate and make payment within twenty-one days from receipt of the estimate.
- (c) Upon receipt of a written dispute or request for additional information regarding the scope of work or allocation of costs of the work from the attaching entity, the twenty-one day period to accept a valid estimate and make payment will be held in abeyance pending resolution of the dispute or inquiry to the public utility.

(3) Make-ready

Upon receipt of payment specified in paragraph (B)(2)(b) of this rule, the public utility shall promptly notify the requesting attaching entity and all known entities with existing attachments that may be affected by the make-ready.

- (a) For attachments in the communications space, the notice shall:
 - (i) Identify the individual pole(s) and specify make-ready to be performed on such pole(s).
 - (ii) Set a date for completion of make-ready that is as prompt as possible, but not longer than sixty days after notification is sent (or one-hundred and five days in the case of larger orders, as described in paragraph (B)(6) of this rule).
 - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

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- (iv) State that if make-ready is not completed by the completion date set by the public utility, the attaching entity requesting access may complete the specified make-ready pursuant to paragraph (B)(4) of this rule.
 - (v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.
 - (vi) State any applicable engineering and construction standards.
- (b) For wireless attachments above the communications space, including those on pole tops, the notice shall:
- (i) Specify where and what make-ready will be performed.
 - (ii) Set a date for completion of make-ready as promptly as possible, but no longer than ninety days after notification is sent (or one-hundred thirty-five days in the case of larger orders, as described in paragraph (B)(6) of this rule).
 - (iii) State that any entity with an existing attachment may, consistent with paragraph (B)(5) of this rule, modify the attachment consistent with the specified make-ready before the date set for completion.
 - (iv) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.
 - (v) State any applicable engineering and construction standards.
- (c) Public utilities may deny access where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.
- (4) If a public utility fails to respond as specified in paragraph (B)(1) of this rule, an attaching entity requesting attachment in the communications space may, as specified in paragraph (C) of this rule, hire at its own expense a contractor to complete a survey. If a public utility fails to provide an estimate pursuant to paragraph (B)(2) of this rule or does not complete make-ready pursuant to paragraph (B)(3)(a)(ii) of this rule, the attaching entity requesting attachment in the communications space may, as specified in paragraph (C) of this rule, hire a contractor at its own expense to complete the make-ready.
- (5) For wireless attachments above the communications space, a public utility shall ensure that make-ready is completed by the date set by the public utility in paragraph (B)(3)(b)(ii) of this rule. Only the public utility or its direct contractor may perform make-ready work above the communications space.

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(6) For the purposes of compliance with the time periods in this rule:

- (a) A public utility shall apply the timeline described in paragraphs (B)(1) to (B)(3) of this rule to all requests for pole attachments up to the lesser of three hundred poles or one-half per cent of the public utility's poles in the state.
- (b) A public utility may add fifteen days to the survey period described in paragraph (B)(1) of this rule to larger orders up to the lesser of three thousand poles or five per cent of the public utility's poles in the state.
- (c) A public utility may add forty-five days to the make-ready periods described in paragraph (B)(3) of this rule to larger orders up to the lesser of three thousand poles or five per cent of the public utility's poles in the state.
- (d) A public utility shall negotiate in good faith the timing of all requests for pole attachments larger than the lesser of three thousand poles or five per cent of the public utility's poles in the state.
- (e) A public utility may treat multiple requests from a single attaching entity as one request when the requests are filed within thirty days of one another.

(7) A public utility may not deviate from the time limits specified in this rule unless:

- (a) Before offering an estimate of charges, the parties have a pole attachment agreement specifying time frames for an estimate and acceptance that exceed those set forth in this rule.
- (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 rule.
 - (i) Good and sufficient cause for deviation from the time limits may allow utilities to cope with an emergency declared by a governmental entity or for a major event as defined in paragraph (T) of rule 4901:1-10-01 of the Administrative Code, but not for routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.
 - (ii) A public utility that so deviates shall promptly notify, in writing, the attaching entity requesting attachment and other affected entities with existing attachments, and shall include the reason for, and date and duration of the deviation. The public utility

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shall deviate from the time limits specified in this rule for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

- (8) 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.

(C) Contractors for survey and make-ready

- (1) A public utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its poles in cases where the public utility has failed to meet deadlines specified in paragraph (B) of this rule.
- (2) If an attaching entity hires a contractor for purposes specified in paragraph (B) of this rule, it shall choose from among the public utility's list of authorized contractors.
- (3) An attaching entity that hires a contractor for survey or make-ready work in the communications space shall provide the public utility with a reasonable opportunity for a public utility representative to accompany and consult with the authorized contractor and the attaching entity.
- (4) The consulting representative of an electric utility or telephone company may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(D) Rights-of-way

- (1) Public utilities are subject to all constitutional, statutory, and administrative rights and responsibilities for use of public rights-of-way.
- (2) Private rights-of-way for all public utilities are subject to negotiated agreements with the private property owner, exclusive of eminent domain considerations.
- (3) Public utilities are prohibited from entering into exclusive use agreements of private building riser space, conduit, and/or closet space.
- (4) Public utilities shall coordinate their right-of-way construction activity with the affected municipalities and landowners. Nothing in this rule is intended to abridge the legal rights and obligations of municipalities and landowners.

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- (E) The commission reserves the right to require any or all arrangements between public utilities and between public utilities and private landowners to be submitted to the commission for its review and approval, pursuant to sections 4905.16 and 4905.31 of the Revised Code.
- (F) The public utility is required to allow attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity on the pole, consistent with the utility's then-current engineering practices and standards.

AMENDED

4901:1-3-04 Rates, terms, and conditions for poles, ducts, and conduits.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

- (A) Rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and right-of-way of a telephone company or electric light company by an entity that is not a public utility are established through tariffs pursuant to section 4905.71 of the Revised Code. Initial implementation of such tariff or any subsequent change in the tariffed rates, terms, and conditions for access to poles, ducts, conduits, or rights-of-way shall be filed ~~in the appropriate proceedings~~ as an application for tariff amendment and will be approved in accordance with a sixty-day automatic approval process. The tariffed rates, terms and conditions must be consistent with parameters established in rule 4901:1-3-03 of the Administrative Code. Nothing in this chapter prohibits an attaching entity that is not a public utility from negotiating rates, terms, and conditions for access to poles, ducts, conduits, and rights-of-way of a telephone company or electric light company through voluntarily negotiated agreements.
- (B) Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and rights-of-way by another public utility shall be established through negotiated agreements.
- (C) Access to poles, ducts, conduits, and rights-of-way as outlined in paragraphs (A) and (B) of this rule shall be established pursuant to 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.
- (D) Pole attachment and conduit occupancy rate formulas
 - (1) The commission shall determine whether a rate, term, or condition is just and reasonable in complaint proceedings or in tariff filings. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing

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pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole, duct, conduit, or right-of-way. When calculating the pole attachment and conduit occupancy rates, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total.

- (2) 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.
 - (3) The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(3), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for conduit occupancy.
 - (4) With respect to the formula referenced in paragraph (D)(2) of this rule, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be thirteen and one-half feet. The amount of unusable space is presumed to be twenty-four feet. The pole height is presumed to be thirty-seven and one-half feet. These presumptions may be rebutted by either party.
 - (5) Relative to joint use agreements, the default rates may be negotiated or determined by the commission in the context of a complaint case.
- (E) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in paragraph (B)(3) of rule 4901:1-3-03 of the Administrative Code, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

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- (F) A public utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this rule, pursuant to 47 U.S.C. 224(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

AMENDED

4901:1-3-05 Complaints.

[Comment: For dates of references to a section of either the United States Code or a regulation in the code of federal regulations see rule 4901:1-3-02 of the Administrative Code.]

- (A) Any attaching entity may file a complaint against a public utility pursuant to section 4905.26 or 4927.21 of the Revised Code, as applicable, to address claims that it has been denied access to a public utility pole, duct, conduit, or right-of-way in violation of section 4905.51 of the Revised Code or 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code; and/or that a rate, term, or condition for a pole attachment are not just and reasonable. The provisions and procedures set forth in sections 4905.26 and 4927.21 of the Revised Code, and Chapters 4901-1 and 4901-9 of the Administrative Code, shall apply. The commission shall issue a decision resolving issue(s) presented in a complaint filed pursuant to this rule within a reasonable time not to exceed three hundred sixty days after the filing of the complaint.
- (B) In complaint proceedings challenging pole attachment or conduit occupancy rates established in joint use agreements, there is a presumption that an incumbent local exchange carrier (ILEC) is similarly situated to an attaching entity that is not a public utility for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that ILECs may be charged no higher than the rate determined in accordance with paragraph (D) of rule 4901:1-3-04 of the Administrative Code. A public utility can rebut either or both of the two presumptions in this paragraph with clear and convincing evidence that the ILEC receives benefits under its joint use agreement with a public utility that materially advantages the ILEC over an attaching entity that is not a public utility on the same pole.

*****DRAFT - NOT FOR FILING*****

NO CHANGE

4901:1-3-06 Mediation and arbitration of agreements.

All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way consistent with paragraph (A)(1) of rule 4901:1-3-03 of the Administrative Code. If parties are unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, and rights-of-way, either party may petition the commission to mediate or arbitrate such agreement according to procedures established in rules 4901:1-7-08 to 4901:1-7-10 of the Administrative Code.



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

Business Impact Analysis

Agency Name: Public Utilities Commission of Ohio (PUCO)

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Regulation/Package Title: Ohio Adm.Code Chapter 4901:1-3, Access to Poles, Ducts, Conduits, and Rights-of-Way – Case No. 19-834-AU-ORD

Rule Number(s): 4901:1-3-01, 4901:1-3-02, 4901:1-3-03, 4901:1-3-04, and 4901:1-3-05

Date: July 17, 2019

Rule Type:

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

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Ohio Adm.Code Chapter 4901:1-3 establishes the rates, terms, and conditions by which public utilities and non-public utilities (attachees) attach facilities to a pole or in the conduit of an electric company or a telephone company.

The revision of the rules in Ohio Adm.Code Chapter 4901:1-3 are made in accordance with R.C. 119.032, which requires all state agencies to conduct a review of their rules at least once every five years. In this five-year review of the rules, Commission Staff (Staff) recommends amendments to: add a definition for overlashing to Ohio Adm.Code 4901:1-3-01, as the term is used within Ohio Adm.Code 4901:1-3-03; incorporate language regarding full and partial suspension during the application for the tariff approval process in Ohio Adm.Code 4901:1-3-02; and implement overlashing language pertaining to the applicable procedure when dealing with an existing attaching entity in Ohio Adm.Code 4901:1-3-03. Additionally, pursuant to Ohio Adm.Code 4901:1-3-04, Staff recommends that initial tariffs or any subsequent changes in tariff rates, terms, and conditions, for access to poles, ducts, conduits, or rights-of-way filed pursuant to R.C. 4905.71 shall be filed as an application for tariff amendment and be subject to an automatic approval process. Also within Ohio Adm.Code 4901:1-3-04, Staff recommends that when calculating a just and reasonable rate for pole attachments and conduits, any unamortized excess accumulated deferred income tax resulting from the Tax Cut and Jobs Act of 2017 shall be deducted from the gross plant and gross pole investment total. Lastly, Staff recommends that that in joint use agreement complaint proceedings challenging pole attachment or conduit occupancy rates, terms, and conditions, a rebuttable presumption exists that an incumbent local exchange carrier should be treated as a non-utility attaching entity

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

R.C. 4901.13, 4927.03, and 4927.15.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

The amendments to Ohio Adm.Code Chapter 4901:1-3 are being proposed consistent with the Commission's regulation of rates, terms, and conditions of pole attachments, ducts, conduits, and rights-of-way as authorized under federal law in 47 USC 224(c). The Commission has certified to the Federal Communications Commission (FCC), in accordance with 47 USC 224, that Ohio, through the Commission, regulates such attachments.

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- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The regulations in Ohio Adm.Code Chapter 4901:1-3 generally follow the pole attachment and conduit occupancy rules adopted by the FCC in 47 Code of Federal Regulations (CFR) Subpart J, 1.1401 through 1.1424.

- 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The Commission has had statutory authority over utility-to-utility pole attachments through R.C. 4905.51 since 1953 and over non-utility-to-utility pole attachments through R.C. 4905.71 since 1981. Additionally, the Commission has had a guideline or Ohio Administrative Code rule in place covering pole attachments since 1995, thus, this is not a new area of regulation by the Commission; however, in recent years and with the advent of more competition, the Commission is seeing more disputes between attachées and pole and conduit owners. These rules balance the need for just, reasonable, and timely attachment by attachées against safety, reliability, and insufficient capacity concerns of owners of poles and conduits.

- 6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

The Commission will be able to monitor complaints and mediate resolutions of pole and conduit occupancy disputes.

Development of the Regulation

- 7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Commission conducted a workshop on May 21, 2019, at the offices of the Commission, to receive feedback from interested stakeholders and the general public as part of the review of Ohio Adm.Code Chapter 4901:1-3. The case number for the Commission's review of Ohio Adm.Code Chapter 4901:1-3 is 19-834-AU-ORD. The Entry providing notice of the workshop was served upon all certified telephone companies, including all certified commercial mobile radio service providers; regulated electric distribution companies; the Ohio Cable Telecommunications Association; the Ohio Telecom Association; the Telephone and Electric listserves; and all other interested persons of record. The workshop was held as scheduled.

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8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

By Entry issued April 11, 2019, stakeholders were invited to the Commission for the purpose of receiving comments and feedback regarding Ohio Adm.Code Chapter 4901:1-3. The May 21, 2019 workshop was attended by Charter, the Ohio Telecom Association, AEP-Ohio, FirstEnergy, AT&T, Ohio Cable Telecommunications Association (OCTA), CL&L, Cincinnati Bell, Spectrum, and Facebook. During the workshop, OCTA provided comments regarding their opposition to the one touch-make-ready provision, and suggested that the Commission incorporate amendments regarding overlashing, audits, the Tax Cuts and Jobs Act of 2017, the filing and approval of tariff revisions, and joint-use agreement complaint proceedings.

In response to OCTA's comments, Staff proposes amendments relating to: overlashing consistent with 47 CFR 1.1415; the tax formula language reflecting the Tax Cuts and Jobs Act of 2017; the addition of procedural rules regarding the process for the filing and approval of revisions to pole attachment tariffs; and the manner in which rate disputes would be resolved. Furthermore, Staff did not recommend the incorporation of 47 CFR 1.1402 and 1.1411(j) relating to the one touch make-ready time frames. Additionally, the Commission will also consider all comments that are filed in the docket regarding the review of Ohio Adm.Code 4901:1-3.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

No scientific data was used to develop the rules; however, the rate formulas in the appendix of Ohio Adm.Code 4901:1-3-04 mirror the rate formulas adopted by the FCC in 47 CFR 1.1409. The FCC's stated purpose for adoption of these formulas is to assure a public utility the recovery of no less than the additional costs of providing pole attachments nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole, duct, conduit, or right-of-way.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

No alternatives were considered as the rules in Ohio Adm.Code Chapter 4901:1-3 implement rules adopted by the FCC.

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- 11. Did the Agency specifically consider a performance-based regulation? Please explain.**
Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The proposed rules are performance-based in the sense that the rules encourage pole owners and attachees to negotiate rates, terms, and conditions before seeking Commission intervention. Once negotiations break-down, however, the proposed rules are intended to provide a mechanism to balance the parties' interests in determining just and reasonable terms of attachment.

- 12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The Commission has reviewed other Ohio regulations and did not find any duplication of regulations.

- 13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Upon completion of the rule review process, any changes made to Ohio Adm.Code Chapter 4901:1-3 will be attached to the Commission's decision in Case No. 19-834-AU-ORD and served upon all certified telephone companies, including all certified commercial mobile radio service providers; regulated electric distribution companies; the Ohio Cable Telecommunications Association; the Ohio Telecom Association; the Telephone and Electric listserves; and all other interested persons of record.

Adverse Impact to Business

- 14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

- a. Identify the scope of the impacted business community;**

The scope of the business community impacted by the rules under review includes public utilities owning poles and conduit as well as any business engaged in providing electric service or cable, telecommunications, or broadband internet services in Ohio. Affected businesses will benefit by having predictable, measurable standards by which to approach negotiations.

- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

The proposed rules were drafted in an effort to minimize any adverse impact on

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business, while fulfilling the statutory obligation of encouraging pole and conduit occupancy through rates, terms, and conditions that are just and reasonable as required by R.C. 4905.51 and 4905.71.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

No new adverse impacts are expected from the adoption of these regulations.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

There is no additional recognized adverse impact to the regulated business community as public utilities have entered into arrangements with attachées for years pursuant to the obligations of R.C. 4905.51 and 4905.71.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The rules provide any impacted entity with the opportunity to seek a waiver of a provision of these rules. As part of the consideration of any waiver request, the Commission could explore alternative means of compliance to satisfy the intent of the statutory obligations.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The rules in Ohio Adm.Code Chapter 4901:1-3 do not impose fines or penalties for failure to comply.

18. What resources are available to assist small businesses with compliance of the regulation?

Commission Staff works with all affected entities, including small businesses, to assist such companies with compliance.

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in

Case No(s). 19-0834-AU-ORD

Summary: Entry that the Commission invites interested persons or entities wishing to file comments or reply comments with the Commission regarding the proposed modifications in Ohio Adm.Code Chapter 4901:1-3 to do so no later than August 15, 2019, and August 30, 2019, respectively. electronically filed by Docketing Staff on behalf of Docketing