BEFORE 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 Rights-of-Way	**)** **)** **)** **)**	**Case No. 19-834-AU-ORD**

INITIAL COMMENTS OF DUKE ENERGY OHIO, INC. AND THE OHIO POWER COMPANY

Duke Energy Ohio, Inc. ("Duke") and the Ohio Power Company ("AEP) respectfully submit the following initial comments regarding the July 17, 2019 Entry by the Public Utilities Commission of Ohio (the "Commission") and the draft proposed changes to the Commission's pole attachment rules (Ohio Admin. Code 4901:1-3).

Respectfully submitted,

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EXECUTIVE SUMMARY

The Commission should not adopt draft Rule 4901:1-3-05(B) (the ILEC complaint rule):

- Telephone and electric utilities frequently share space on each other's poles in their overlapping service areas pursuant to "joint use agreements." These joint use agreements reduce costs for telephone and electric utility customers while at the same time avoiding the public nuisance of redundant pole lines. Draft rule 4901:1-3-05(B) would undermine these long-standing agreements, create a regulatory presumption at odds with the facts, and conflict with the Commission's existing rules.

- The presumption embedded within draft Rule 4901:1-3-05(B)—that telephone utilities are similarly situated to other attaching entities—is incorrect as a matter of history, fact and law. The joint use agreements pursuant to which telephone and electric utilities have made (and continue to make) attachments on each other's pole are remarkably different from the terms set forth in the pole attachment tariffs pursuant to which other entities make their attachments. For example, telephone and electric utilities each construct their pole networks with sufficient height and strength to accommodate the other's standard service needs. Entities who make attachments pursuant to the tariff take the pole as they find it—often in need of costly make-ready.

- The Commission's existing rules reflect the fact that joint use agreements are different than pole attachment tariffs. Rule 4901:1-3-04(B) and (D)(5) expressly state that rates, terms and conditions in these agreements "shall be established through negotiated agreements" and that "[r]elative to joint use agreements, the default rates may be negotiated or determined by the commission in the context of a complaint case."

- These long-standing joint use agreements have been subject to the Commission's jurisdiction for many decades. The fact that very few complaints have been filed by either telephone or electric utilities relating to these agreements indicates that draft Rule 4901:1-3-05(B) is a solution in search of a problem.

The Commission should adopt a modified version of draft Rule 4901:1-3-03(A)(7) (the overlashing rule):

- Overlashing is the practice of attaching additional fiber or cable to existing messenger strand for purposes of increasing capacity or functionality of a communications network. Duke and AEP support this practice so long as it is performed with appropriate advance notice, so long as the incremental costs associated with evaluating an overlash proposal are paid by the overlasher, and so long as Duke and AEP retain the right to deny the overlash proposal where there is insufficient capacity or for reasons of safety, reliability or generally applicable engineering purposes.

- Draft Rule 4901:1-3-03(A)(7) is a mixed bag. Though it correctly allows a public utility to require advance notice of overlashing, the rule also glosses-over the right to deny access. Further, the draft rule includes language that could be misinterpreted as absolving overlashers for the engineering costs associated with the proposed overlash. For these reasons, Duke and AEP are proposing herein a modified version of draft Rule 4901:1-3-03(A)(7) which would correct these shortcomings.

- In addition to the proposed revisions to draft Rule 4901:1-3-03(A)(7), the Commission should also modify the proposed definition of "overlashing" in draft Rule 4901:1-3-01(N) to ensure that it is not over-inclusive, and that this exception to the normal permitting rule is not abused to the detriment of electric system safety and reliability

The Commission should consider adopting a one-touch make-ready ("OTMR") rule similar to the FCC's OTMR rule:

- The FCC's recently effective OTMR rule applies only to simple make-ready within the communications space. It does not apply to complex make-ready (such as make-ready involving splices) or to any work above the communications space. This rule appropriately targets the main culprit in access delays—dilatory and/or anti-competitive incumbents.

- Further, in the experience of Duke and AEP, a significant number of poles requiring make-ready require make-ready only in the communications space. OTMR matches the problem with the solution and is a low risk proposition with significant potential benefits to broadband deployment.

- Though the FCC's OTMR rule is not perfect, and there are opportunities for the Commission to improve upon it, it is a good place to start the discussion a potential game-changer for broadband deployment.

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I. The Commission Should Not Adopt Draft Rule 4901:1-3-05(B) Because it Would Create a Presumption that is Inconsistent with the Facts and that Conflicts with the Commission's Existing Rules and Precedent.

Draft Rule 4901:1-3-05(B) provides:

> (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.

ILECs, like AT&T, Frontier and Cincinnati Bell, and electric utilities, like Duke and AEP, are public utilities in Ohio subject to the full array of Commission powers. They both have franchise rights and obligations; they both have privileges to site facilities along the public right-of-way; they both have rights to condemn private property as needed for public utility use. Their rights and obligations vis-à-vis each other's poles are spelled out in detailed joint use agreements that have long been the subject of Commission oversight. Although these contracts have existed (and been subject to Commission oversight) for many decades, there have only been only a handful of disputes that have been taken to the Commission for resolution. The absence of a significant number of such disputes indicates that the existing regulatory and contractual approach has worked well. In the rare circumstance where a dispute does arise between these two types of public utilities, the Commission has the authority to resolve those disputes pursuant to Ohio Rev. Code §§ 4905.48 and 4905.51. The lack of complaint proceedings regarding joint use agreements in Ohio is in contrast to the FCC's stated (though incorrect) justification for its new ILEC complaint rule upon which draft Rule 4901:1-3-05(B) is based, which was that the FCC's

previous precedent on ILEC rates "led to repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates." (*Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd. 3266, ¶ 44 (April 21, 2017)).

The joint use relationship between electric utilities and ILECs is fundamentally different from the relationship between electric utilities and attaching entities who make attachments under an electric utility's pole attachment tariff—a fact recognizes by the Commission's existing rule 4901:1-3-04(B) (stating that "[r]ates, terms and conditions for nondiscriminatory access to public utility poles…by another public utility shall be established through negotiated agreements."). Most notably, the ILECs and electric utilities share space on each other's poles in their overlapping service areas to avoid the cost and public nuisance of redundant pole lines. These agreements frequently require each party to own a certain percentage of the jointly used network, or to pay an annual amount to offset the additional cost of pole ownership carried by the party owning more than its contractual share of the jointly used network.

Duke owns 156,453 poles in Ohio to which ILECs are attached pursuant to its joint use agreements; and Duke is attached to 74,644 ILEC-owned poles in Ohio pursuant to these agreements. AEP owns 359,890 poles in Ohio to which ILECs are attached pursuant to its joint use agreement; and AEP is attached to 132,553 ILEC-owned poles in Ohio pursuant to these agreements. The rates, terms and conditions in these agreements vary considerably. For example, one of Duke's joint use agreements with a major ILEC partner currently involves no annual "rental" payments at all, but instead an obligation for each party to remain in parity (including the obligation to purchase poles to return to parity of ownership). The joint use agreements also stand

in stark contrast to the provisions of the pole attachment tariffs. For example, the Duke and AEP pole attachment tariffs establish a per attachment charge. See Duke Energy Ohio, Rate PA, Sheet No. 1.7, Page 1 of 8 (Effective April 12, 2017) ("Duke Pole Attachment Tariff") ("An annual rental of $9.81 per wireline attachment shall be charged for use of Company's poles."); Ohio Power Company, Schedule OAD-PA, 2nd Revised Sheet No. 443-1D (Effective April 12, 2017) ("AEP Pole Attachment Tariff") (establishing an "Annual Attachment Charge" of $9.59 applicable to "each additional attachment"). In the Duke and AEP joint use agreements that include "rental" provisions at all, these provisions include a per pole charge—not a per attachment charge. Further, under each of these joint use agreements, and even though the ILEC may be allocated a specified amount of space, the ILEC is not restricted to any particular space usage. Thus, regardless of whether the ILEC has 1 or 3 attachments, and regardless of whether the ILEC occupies 1 or 8 feet of space, the ILEC pays the same amount on a per pole basis—not so for entities that make attachments under the tariffs.

As another example, the Duke and AEP pole attachment tariffs each require attaching entities to make an application for new or modified attachments, and to pay make-ready costs if necessary to accommodate a new attachment. *See* Duke Pole Attachment Tariff, Page 2 of 8 ("Before any wireline attachment to any pole other than a drop pole, is made by Licensee, or any occupancy is made on Licensee's behalf, Licensee shall make written application for permission to install such wireline attachments on any pole of the Company or occupy any conduit of the Company."); AEP Pole Attachment Tariff, Revised Sheet No. 443-2D ("Pole attachments shall be allowed only…upon the approval by the Company of a written application submitted by customer requesting permission to contact specific poles."). By contrast, the joint use agreements either require no application at all from the ILEC or, if an application is required, it is only for the

purposes of the counterparty exercising its right to exclude the pole from joint use. Further, the joint use agreements require each party to provide a "standard" or "normal" joint use pole which is of sufficient height and strength to accommodate the standard or normal needs of each party. By way of contrast, entities making attachment under the tariffs take the pole as they find it and frequently pay costly make-ready in order to replace the pole or to rearrange existing facilities in order to make room for their attachment. The differences between joint use agreements and pole attachment tariffs not only reflect inseverable bargained-for exchanges, but also reflect the fact that each party to the joint use agreement is a public utility with rights, powers, obligations and regulatory oversight that is not attendant to other attaching entities.

A. Draft Rule 4901:1-3-05(B) Conflicts with Existing Rule 4901:1-3-04(A) Providing that Joint Use Rates Are to Be Determined Through Negotiated Agreements.

Existing rule 4901:1-3-04(A), adopted on a complete record following a full rule-making proceeding just five years ago, provides "[r]ates, 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 agreement." In the Order adopting that rule, the Commission reasoned:

> Finally, regarding the application of the default cost allocation mechanism provided for in proposed Ohio Adm. Code 4901:1- 3-04(D)(2) and (D)(3), the Commission finds that **the default rate formulas may be negotiated among the parties to a joint use agreement but may not be unilaterally insisted upon due to the unique nature of joint use agreements.** Instead, in the event of a dispute, the applicable rate shall be determined by the Commission in the context of a complaint case. The proposed rule has been amended accordingly.

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. 13-5779-AU-ORD Finding and Order, 42 (July 30, 2014). The proposed presumption, if adopted, would immediately

cast doubt upon the very negotiated agreements the Commission expressly condoned just five years ago.

B. ILECs Enjoy Numerous Advantages Under Joint Use Agreements That Are Not Available to Their Competitors.

With respect to existing ILEC attachments made pursuant to joint use agreements, the Commission's proposed presumption is contrary to the facts—and thus unreasonable. As stated by the United States Supreme Court in *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979), "[i]t is, of course, settled law that a presumption adopted and applied by [a regulatory agency] must rest on a sound factual connection between the proved and inferred facts." *See also Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 804-05 (1945) ("Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred."); *Wilson v. Cincinnati*, 46 Ohio St. 2d 138, 145-46, 346 N.E.2d 666, 671 (1976) ("For a presumption to be sustained, there must be a natural and logical connection, in light of common experience, between the fact proved and the ultimate fact presumed.").

The presumption in draft Rule 4901:1-3-05(B) that ILECs are "similarly situated" to "an attaching entity that is not a public utility" does not bear a "sound factual connection" to the facts here. *See, e.g.* pages 1-4, *supra.* Even the FCC has expressly recognized distinctions between ILECs and other entities that make attachments to electric utility poles:

- "As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities. These joint use agreements may provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits." (*Accelerating Wireline Broadband*

Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705, ¶ 124 (Aug. 3, 2018) (the "2018 Order")).

- "Given that incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership, we conclude that it would not be appropriate to treat them identically to telecommunications carrier or cable operator attachers in all circumstances." (Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09- 51, Report and Order and Order on Reconsideration, 26 FCC Rcd. 524, ¶ 203 (April 7, 2011) (the "2011 Order")).

- "Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers… incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through 'joint use' or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis." (2011 Order, ¶ 214).

- ". . .some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. . . As examples of incumbent LEC advantages, these parties cite: '**Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed**.' Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today. . . **A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators**. . . As discussed below, incumbent LECs have the opportunity to demonstrate that they are

comparably situated to telecommunications carriers or cable operators in a particular instance." (2011 Order at 216, n. 654 (emphasis added)).

- "As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators." (2011 Order, ¶ 217).

The FCC has also noted that joint use agreements typically provide ILECs with a number of advantages not afforded to other types of attaching entities. *See In the Matter of Verizon Virginia, LLC v. Virginia Electric and Power Company*, 32 FCC Rcd. 3750, 3751 (May 1, 2017) (citing 2011 Order, 26 FCC Rcd. at 5335, ¶ 216 n.654); *Verizon Florida LLC v. Florida Power and Light Co.*, 30 FCC Rcd. 1140, 1148, ¶ 21 (Feb. 11, 2015) ("In the *Pole Attachment Order*, the Commission repeatedly noted that joint use agreements are not analogous to lease agreements between competitive LECs and electric utilities because…incumbent LECs receive unique benefits under joint use agreements that are not available to competitive LECs").

Though the FCC, in 2018, subsequently adopted a presumption similar to the presumption in draft Rule 4901:1-3-05(B), it did so based upon the alleged "repeated disputes" between ILECs and electric utilities (a circumstance not present here). Further, both Duke and AEP believe that the FCC's new presumption is unlawful, and have challenged this portion of the FCC's 2018 order. See *Am. Elec. Power Service Corp. et al v. FCC*, Docket Nos. 18-72689(L), Joint Opening Brief for Petitioners, 19-70490 (9th Cir. June 24, 2019). Whether the FCC's presumption is ultimately adjudicated as unlawful or not, it is still bad policy that ignores the facts. The Commission should not follow suit.

One proceeding before this Commission that illustrates the differences between ILECs and other attaching entities is *In the Matter of the Complaint of the Ohio Telecommunications Association, et al v. Columbus So. Power Co. d/b/a American Electric Power and Ohio Power*

Company dba American Electric Power, Case No. 96-1309-EL-CSS, Opinion and Order (Oct. 16, 1997). There, certain cable operators in Ohio filed a complaint against Columbus Southern Power Company and Ohio Power Company (both AEP operating companies), alleging that they had violated Ohio Rev. Code § 4905.71(A) by allowing another cable television operator, Ameritech New Media, Inc. ("New Media") to make its attachments pursuant to a joint use agreement between New Media's affiliate, Ameritech Ohio, rather than the pole license agreement between New Media and the AEP entities. *Id.* at 1-2. The Commission granted the complaint in part, finding that the fact that the AEP entities allowed New Media to attach pursuant to its affiliate's joint use agreement, rather New Media's pole license agreement with the AEP entities, constituted preferential treatment of New Media vis-a-vis other cable operators attaching to AEP poles pursuant to pole license agreements. *Id.* at 17. The Commission identified the following examples of such benefits enjoyed under the joint use agreement versus the AEP entities' pole license agreements: (1) New Media was not required to comply with the requirement of 12 inches of vertical clearance between installations, (2) New Media was not required to participate in joint ride-outs, and (3) New Media was not required to make advance make-ready payments prior to attachment. *Id.* at 17-18.

C. ILECs Place a Greater Burden on Poles than Their Competitors.

Further, ILECs place a greater burden on poles than their competitors. While entities that make pole attachments under the tariff are presumed to occupy one foot of space (Ohio Admin. Code 4901:1-3-04(D(4)), the minimum number of feet of space reserved for ILECs in Duke's and AEP's major joint use agreements ranges from 2 to 3 feet for standard 40-foot poles. And, in fact, ILECs generally occupy at least this amount of space, if not more.

In addition to often having more than one attachment per pole, the ILECs' heavier, bundled lines, unlike a single fiber lashed to a steel messenger, have significant mid-span sag. As a result, an ILEC's attachment must be made higher on the pole to satisfy minimum grade clearance at mid-span, which in turn "occupies" a greater amount of space. For example, if minimum grade clearance is 18 feet, and mid-span sag is 3 feet, the attachment would need to be made at 21 feet on the pole. This sag—even though resulting from a single attachment—displaces significant space because no other communications attachment can be made either below the attachment or within the 12 inches above the attachment.

D. Placing the Burden of Proof in ILEC Rate Complaints on Electric Utilities is Unjust and Unreasonable.

Draft Rule 4901:1-3-05(B) would also place the burden on an electric utility to disprove the faulty presumption contained therein by clear and convincing evidence. There are at least two flaws with this misplaced burden of proof. First, this rule would place the burden of proof on the party seeking to uphold the voluntary, and heretofore presumptively reasonable, joint use agreement between the parties, rather than on the party seeking to "get out" of the express terms of the contract. Draft Rule 4901:1-3-05(B). This is exactly backwards, especially in light of the fact that the Commission has long exercised jurisdiction over such agreements (thus affording them a presumption of validity in Ohio). Second, the rule purports to require an electric utility to meet its misplaced burden of proving an incorrect presumption by "clear and convincing evidence" standard. Draft Rule 4901:1-3-05. The clear and convincing evidence standard is a higher burden of proof than the "preponderance of the evidence" standard that ordinarily governs civil litigation. *Ohio State Bar Ass'n v. Reid,* 708 N.E.2d 193, 197 (Ohio 1999).

E. Draft Rule 4901:1-3-05(B) Is Irrational in Light of the Commission's Long-Standing Jurisdiction over Joint Use Agreements.

Draft Rule 4901:1-3-05(B) makes even less sense in the context of the Commission' jurisdiction in Ohio than it does in states under FCC jurisdiction. In Ohio, the Commission has had jurisdiction over joint use agreements for decades. The Commission has never found a rate contained in any of Duke's or AEP's joint use agreements to be unjust or unreasonable. And in the case of at least one of those agreements—the Ohio Power Company's January 1, 1994 joint use agreement with AT&T—the joint use agreement was specifically filed with the Commission in *Application of Columbus Southern Power Company Relative to the Joint Use of Poles with Ameritech*, Case No. 97-1161-EL-UNC. The presumption in Draft Rule 4901:1-5-05(B) would be tantamount to the Commission presuming that existing joint use agreements over which it has had jurisdiction for decades are presumed to be unjust and unreasonable. There is simply no factual predicate upon which to make such a presumption. In fact, the existing factual predicate—the Commission's long-standing oversight over such agreements to ensure they are just and reasonable—is directly contrary to the proposed presumption.

Further, the proposed presumption would, in essence, presume that electric ratepayers should bear a higher portion of the cost of jointly used infrastructure. The FCC has no jurisdiction over electric utility rates, and has shown time and again its apathy (if not eagerness) towards shifting costs to electric ratepayers. However, this Commission <u>does</u> have jurisdiction over both ILECs and electric utilities, and has an obligation to consider the justness of imposing costs fairly borne by ILECs upon electric utility ratepayers.

In light of the forgoing, AEP and Duke propose deleting Draft Rule 4901:1-3-05(B) and adding the following:

> <u>(B). In complaint proceedings challenging the rates, terms and conditions of existing joint use agreements between public utilities, there is a presumption that such rates, terms and conditions are just and reasonable. A public utility can rebut</u>

this presumption with clear and convincing evidence demonstrating that a rate, term or condition is not just and reasonable.

II. The Commission Should Adopt A Modified Version of Draft Rule 4901:1-3-03(A)(7)(c) that (1) Prohibits Overlashing into Existing Violations (2) Confirms that Overlashing May be Denied for Capacity, Safety, Reliability, and Engineering Reasons, and (3) Confirms that Overlashers are Responsible for the Cost of Evaluating the Proposed Overlashing.

A. Duke and AEP Support the Portions of the Draft Rule that (1) Expressly Allow a Pole Owner to Require Up to 15 Days' Advance Notice of Overlashing, and (2) Expressly Provide for Post-Inspections and Correction of Code Violations and Equipment Damage.

1. Advance Notice of Overlashing.

Draft Rule 4901:1-3-03(A)(7)(c) provides in part that "A public utility may require no more than fifteen days' advance notice of planned overlashing." Duke and AEP support the proposed rule insofar as it would expressly allow electric utilities to require advance notice of overlashing. Such advance notice of overlashing is essential to ensure the safety and reliability of electric utilities' infrastructure, personnel, and the public at large. Advance notice of overlashing is the only way an electric utility can (1) determine whether the proposed overlashing meets the electric utility's engineering standards for loading and clearance, or (2) exercise its right under Rule 4901:1-3-03 to "deny an attaching entity access to its poles…on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."

Overlashing presents engineering and safety concerns similar to any other new burden on a pole line. It is critical, as with a new attachment, that electric utilities know about proposed overlashing in advance so that they have a reasonable opportunity to engineer the new load. This is particularly true as overlashing becomes more common and as the fiber count of a typical

overlash increases. As stated by the FCC in adopting the overlashing rule upon which draft Rule 4901:1-3-03(A)(7)(c) is based:

> Commenters express the concern that poles may not always be able to reliably support additional weight due to age and environmental factors, such as ice and wind, and as a result, overlashing even one additional cable on a pole may cause an overloading. Such pole overloading could "hamper the installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations." **We find these concerns to be valid and supported by the record. Thus, we agree with commenters that allowing utilities to require advance notice will promote safety and reliability and allow the utility to protect its interests without imposing unnecessary burdens on attachers**…. Providing the utility with advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed without overburdening overlashers or requiring multiple trips to the pole.

(2018 Order, ¶¶ 116, 118) (emphasis added).

The Commission's proposal to support advance notice of overlashing conforms with the decisions of the vast majority of state commissions to address this issue within the past five years.

a) **Arkansas** [1]

In 2016, the Arkansas Public Service Commission adopted new pole attachment rules which provide that "[r]equests to a Pole Owner for a Pole Attachment or Overlashing permit shall be in writing." *See* Arkansas Public Service Commission Pole Attachment Rules, Rule 2.02(a).[2] Further, Rule 2.02(b) of the Arkansas Pole Attachment Rules provides, "[a]n Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlashed, the size and type of facilities to be added, the poles over

[1] AEP's affiliate, Southwestern Electric Power Company ("SWEPCO"), operates in Arkansas.

[2] *Available at:* http://www.apscservices.info/Rules/pole_attachment_rules.pdf.

which such facilities will be overlashed, and when such facilities will be overlashed. . . ." And Rule 2.02(f) provides:

> **The Pole Owner shall approve, deny, or conditionally approve** with Make-Ready Work provisions, **the request for** a Pole Attachment or **Overlashing** in writing as soon as practicable, but in no event later than:
>
> (1) **45 days after receipt of a complete permit request**, for requests including no more than 300 poles or 20 manholes; or
>
> (2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

(emphasis added). Attaching entities sought reconsideration of this rule, arguing that a "permit for fiber optic overlashing is unnecessary" but the Arkansas PSC rejected the request, holding:

> The Commission finds that the TelCos have raised no new issues which support a revision to Rule 2.01 on overlashing. **The evidence continues to support the need for a permit for overlashing because of safety and reliability concerns.**

In the Matter of a Rulemaking Proceeding to Consider Changes to the Arkansas Public Service Commission's Pole Attachment Rules, Docket No. 15-019-R; Order No. 7, 2016 Ark. PUC LEXIS 360, *10 (Oct. 12, 2016) (emphasis added). The Arkansas PSC, in essence, treats overlashing the same as any other new attachment, in recognition of the safety and reliability concerns presented by overlashing.

b) Washington

In 2015, the Washington Utilities and Transportation Commission ("WUTC") adopted a rule requiring that attachers provide 15 days' advance notice of overlashing, along with specific information in the advance notice of overlashing:

> The occupant must provide the owner with written notice fifteen business days prior to undertaking the overlashing. The notice must identify no more than one hundred affected poles and describe the additional communications wires or cables to be overlashed so that the owner can determine any impact of the overlashing on the poles or other occupants' attachments. The notice period does not begin until

> the owner receives a complete written notice that includes the following information:
>
> (i) The size, weight per foot, and number of wires or cables to be overlashed; and
>
> (ii) Maps of the proposed overlash route, including pole numbers if available.

See Washington Admin. Code § 480-54-030(11)(a). Under the WUTC's rule, the advance notice specifically allows the pole owner "to inspect the proposed route and provide a written response and explanation if the owner prohibits the noticed overlashing." *In the Matter of Adopting Chapter 480-54 WAC Relating to Attachment to Transmission Facilities*, 2015 Wash. UTC LEXIS 824, *15 (Oct. 21, 2015).

c) Louisiana[3]

In 2014, the Louisiana Public Service Commission ("LPSC") adopted an order (1) requiring advance notice of overlashing, and (2) requiring a pole owner to notify the attaching entity within 15 days if the request is denied. *See* Louisiana Public Service Commission, General Order, Docket No. R-26968, 2014 La. PUC LEXIS 263, *37-38 (Rule 7(a) - (c)) (Sept. 4, 2014). The LPSC overlashing rule provides, in most pertinent part:

> a. Any Attacher wishing to overlash facilities must provide a Pole Owner with reasonable notice of its intent to overlash facilities by filing a written request with the Pole Owner identifying what existing and proposed facilities are to be attached and/or overlashed, all entities served by the overlash, all design information to perform pole loading analysis, where such facilities will be attached and/or overlashed, and when such facilities will be attached and/or overlashed. . . .
>
> b. A Pole Owner shall conduct any pre-construction inspection reasonably necessary within a reasonable time of receipt of the Attacher's written request to overlash and provide the Attacher with a written estimate of the Make-Ready Costs, if any, associated with the overlash.

[3] AEP's affiliate, SWEPCO, operates in Louisiana.

> c. Where a Pole Owner does not wish to permit the attachment or overlashing of facilities because it has determined that a requested overlash cannot be performed in compliance with applicable engineering, construction and safety standards, the Pole Owner must identify, in writing, the reasons for the denial within 15 days of receipt of the Attacher's written request. . . .

Id.

2. Post-Inspections

Duke and AEP further support the proposed rule to the extent it expressly provides for post-inspection of overlashing by electric utilities and providing a process whereby electric utilities can require that attaching entities correct damage to the pole or code violations caused by overlashing. Post inspections are essential for electric utilities to ensure that the overlasher has performed the overlashing in the manner proposed in its advance notice, and that code violations or pole damage have not resulted from the overlashing. Further, setting forth the process by which electric utilities can require correction of pole damage or code violations caused by overlashing makes expectations clear about how such remediation will occur and incentivizes overlashers to perform their work properly the first time.

B. Allowing an Attaching Entity to Overlash Despite the Fact that an Overlash Would Create a Capacity, Safety, Reliability, or Engineering Issue Conflicts with Existing Rule 4901:1-3-03(A)(1) and Is Dangerous and Unreasonable.

While draft Rule 4901:1-3-03(A)(7)(c) would allow a utility to require advance notice of overlashing—presumably so that a utility can evaluate whether the proposed overlash would create a capacity, safety, reliability or engineering issue—the draft rule does *not* expressly allow a utility to deny access if such an issue is identified. Rather, the draft rule glosses-over this important step and purports to move directly to requiring a utility to provide specific documentation of the issue to the party seeking to overlash: "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." Draft Rule 4901:1-3-03(A)(7)(c) (emphasis added). Thus, on its face, the draft rule does not explicitly permit a utility to deny access to overlash pursuant to exiting Rule 4901:1-3-03(A)(1). Though the Commission likely does not intend to undermine a utility's right to deny access for reasons of insufficient capacity or safety, reliability or engineering concerns, the Commission should modify the above-referenced language to avoid any ambiguity and to avoid potential conflict with existing Rule 4901:1-3-03(A)(1), which expressly allows a utility to deny access "where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes."

C. The Commission Should Not Adopt the Portion of the Draft Rule Preventing a Public Utility from Recovering Its Costs of Performing an Engineering Review of a Proposed Overlash.

Draft Rule 4901:1-3-03(A)(7)(c) states that "[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." Though this provision does not expressly prohibit an electric utility from recovering the incremental costs incurred in connection with the engineering review of the proposed overlash, Duke and AEP are concerned that attaching entities would attempt to use this language to shift these costs to electric ratepayers.

A rule that even arguably undermines a utility's ability to recover pole attachments costs from the entity that caused those costs would run afoul of the Commission's existing cost causation rules and shift those costs to electric utilities and their ratepayers. Such a rule would conflict with existing Rule 4901:1-3-04(D)(1), which states that "a rate is just and reasonable it assures a utility the recovery of not less than the additional costs of providing pole attachments…." Further, such a rule would conflict with existing Rule 4901:1-3-04(E), which

provides that "[t]he 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." Collectively, these rules stand for the proposition that the "cost causer pays." When an engineering analysis is necessitated by a proposed overlash, the overlasher is the "cost causer" and the cost of that analysis should be borne by the overlasher. The Commission recently validated the necessity of such an analysis, stating in the context of approving Dayton Power & Light's tariff in 2016:

> The Commission finds that DP&L's voluntary proposed tariff language requiring advanced permission by DP&L for an attaching entity to overlash existing facilities is reasonable. Attachers may also negotiate separate agreements pertaining to the issue of overlashing. **The Commission agrees with DP&L that overlashing an existing facility increases the load on a pole and that it is necessary to determine whether a pole can safely accommodate the additional load before the facility is overlashed.**

In the Matter of the Application of Dayton Power and Light Company to Amend Its Pole Attachment Tariff, 2016 Ohio PUC LEXIS 821, ¶ 82 (September 7, 2016) (emphasis added).

AEP and Duke thus propose the following revisions to Draft Rule 4901:1-3-03(A)(7)(c):

> (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, the utility may either (i) deny the proposed overlashing by providing detailed, written notice of the denial, or (ii) provide an estimate of the cost necessary to resolve such issues, consistent with Rule 4901:1-3-03(B)(2). Where a public utility and an attaching entity disagree regarding whether a proposed overlash would create a capacity, safety, reliability, or engineering issue, the public utility may make the final decision, subject to review by the Commission through its complaint process. ~~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~~.~~ other than the reasonable and actual cost associated with reviewing a proposed overlash to determine whether the proposed overlash would create a capacity, safety, reliability or engineering issue.

D. The Commission Should Not Sanction Overlashing into Pre-existing Violations.

Draft Rule 4901:1-3-03(A)(7)(b) provides:

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

The Commission should strike the first sentence of draft Rule 4901:1-3-03(A)(7)(b) because it conflicts with 4901:1-3-03(A)(1) which allows a utility to deny access "where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes." A pre-existing violation may pose—in fact often poses—a capacity, safety, reliability or engineering issue that must be resolved prior to overlashing. Overlashing into an existing violation is a dangerous practice for at least three reasons: (1) it can endanger the safety of the communications worker performing the overlashing (for example, causing the communications worker to enter into the power space); (2) it can endanger the safety of the public by compounding existing violations (for example, low hanging wires over a roadway); and (3) it can threaten the reliability of the electric infrastructure by compounding an existing problem (for example, further overloading and already-overloaded pole).

With respect to the second sentence of draft Rule 4901:1-3-03(A)(7)(b), which states, "[a] public utility may not require an existing attaching entity that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attaching entity," Duke and AEP do not disagree with that concept as stated. Specifically, Duke and AEP agree that the new attacher to the pole should not be responsible for the cost of remedying existing violations caused by other

attaching entities. But there is more to it. This text, in combination with the proceeding sentence stating that public utilities cannot prevent an overlasher from attaching based on a third party pre-existing violation, seems to put the onus on the electric utility to push forward with correcting the violation and hope to recover the cost later. There are at least two problems with this approach. First, by allowing make-ready to proceed before the cost-causer is identified, the draft rule would deprive the existing attacher of its contractual right to be notified of the violation and pursue a less-costly remedy, such as removal of the attachment. Second, if the violation is corrected before the attacher is notified, there is no "evidence" to back-up the assignment of cost causation. This becomes particularly important when the corrective action is a pole change-out (which is often a situation where the existing violator will simply choose another aerial route or an underground solution). Further, such an approach would shift a tremendous cost-burden onto electric utilities and their ratepayers.

If the Commission is interested in addressing the real reason for the delay in correcting existing violations—that is, existing attachers' anticompetitive motive—the Commission should adopt a rule that existing attachers must correct violations identified by a utility within 15 days of notice to the existing attacher of same, and providing that where the existing attacher fails to do so, the new attacher can proceed with correcting the violation at the existing attacher's sole expense (and regardless of whether the existing attacher might have chosen a lower cost alternative such as removal of the existing attachers' attachment). Duke and AEP thus propose the following modifications to draft Rule 4901:1-3-03(A)(7)(b):

(b) Pre-Existing Violations

(i) A public utility may not prevent an existing attaching entity from overlashing because another existing attaching entity has not fixed a preexisting violation, except where the public utility reasonably determines that the proposed

> overlashing should be denied for capacity, safety, reliability, or generally applicable engineering purposes. A public utility may not require an existing attaching entity that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attaching entity.
>
> (ii) Existing attaching entities must correct violations identified by a public utility within 15 days of notice to the existing attaching entity. Where the existing attaching entity fails to correct the violation, an overlashing entity can perform such work (or cause such work to be performed) at the existing attaching entity's sole risk and expense.

E. The Draft Definition of Overlashing Should be Revised to Exclude Materials Other than Cables.

Draft Rule 4901:1-3-01(N) proposes to define "overlashing" as follows:

> "Overlashing" means the tying or lashing of an attaching entity's additional fiber optic cables or similar incidental equipment such as fiber-slice closers to the attaching entity's own exiting communications wires, cables or supporting strand already attached to poles.

The phrase "similar incidental equipment such as fiber slice closures" is vague and open ended, and thus subject to misinterpretation and/or abuse. For example, some attachers might argue that this language includes strand-mounted wireless antennas and associated radios and ancillary equipment. However, such equipment is quantitatively and qualitatively different than affixing additional fiber to the existing strand, and should be treated as such from a regulatory perspective.

Equipment mounted on the strand (wireless or otherwise) is significantly different from overlashing fiber to the existing messenger strand, and must be subject to the standard application process (rather than the 15 days' notice applicable to actual "overlashing"). Equipment deployed on the strand, including wireless antennas and radios, are significantly larger in terms of width, height and depth than a single, or even multiple, cables. This greater profile means that such strand mounted equipment is a much greater load on the pole from both a wind and ice loading perspective than standard fiber overlashing. The larger size of strand mounted equipment as

compared to overlashed fiber also means that it is more likely to cause clearance violations—including clearance to power, clearance to communications, and clearance to ground—than overlashed fiber, and thus to require additional make-ready. Further, strand mounted wireless equipment emits radio frequency that must be evaluated for potential danger to the public and contractors or employees working on electric utilities' poles.

III. The Commission Should Consider Adoption of a One-Touch Make-Ready Rule, which Would Speed Broadband Deployment More than Any Rule Currently Under Consideration.

If the Commission really wants to take action to promote broadband deployment with minimal impact to electric system safety, reliability, and cost, it should adopt a one-touch make-ready ("OTMR") rule similar to the OTMR rule adopted by the FCC. See 47 C.F.R § 1.1411(j). The FCC's OTMR rules allow a new attacher to perform simple make-ready work in the communications space. The draft rules, as proposed in the Entry, stand to benefit incumbents (phone and cable) at the expense of electric utilities and competitors to incumbents. A well-crafted OTMR rule, on the other hand, would encourage competition and broadband deployment while minimally burdening electric system safety and reliability.

The most significant barrier to the installation of new aerial, wireline communications facilities is the disinterest and/or anti-competitive motive of existing communications attachers. A significant portion of make-ready work involves solely the rearrangement of existing communications attachments. If the Commission can solve the delays in communications space make-ready, it will have removed the most significant deployment barrier. This is where the Commission should focus its efforts, as opposed to new rules that threaten electric system safety and reliability while shifting costs to electric ratepayers with minimal, if any, benefit to broadband deployment.

Though the OCTA stated in the May 21, 2019 workshop preceding the Entry that the Commission should not consider OTMR rules because those rules had only recently gone into effect, if the Commission fashions its OTMR rules after the FCC's so as only to apply to simple make-ready in the communications space, there is little downside to implementing this new, and potentially game-changing, approach. OCTA also stated in the workshop that "the [OTMR] rules are subject to review, I believe, before the Ninth Circuit Federal Court of Appeals…so the ultimate legality of the rules….is still in flux." *In the Matter of the Commission's Review of Chapter 4901:1-3 Ohio Admin. Code concerning Access to Poles, Ducts, Conduits, and Rights-of-Way*, Case No. 19-834-AU-ORD, Workshop Transcript, 11-12 (PUCO, May 21, 2019). Though there is a pending Ninth Circuit case challenging other portions of the FCC order that adopted the OTMR rules, the OTMR rules are not being challenged by **any** party on appeal.

This is not to suggest that the FCC's OTMR rule is perfect. There is undoubtedly opportunity for clarification. Duke and AEP expect that the Commission could (and should) draft an even better rule that clarifies certain engineering and cost allocation issues. But the FCC's OTMR rule is a good place to start the discussion.

CONCLUSION

Duke and AEP respectfully request that the Commission:

- decline to adopt draft Rule 4901:1-3-05(B) regarding ILEC complaints;
- modify the draft overlashing rule as proposed by Duke and AEP above, in order to make clear that (1) public utilities can deny access for overlashing for reasons of safety, reliability, insufficient capacity, and generally applicable engineering purposes; (2) public utilities can recover the cost of performing an engineering analysis of proposed overlashing; (3) public utilities are not responsible for the cost of correcting code or standards violations caused by third party attaching entities; and
- consider adopting OTMR rules similar to those adopted by the FCC.

AEP and Duke appreciate the Commission's attention to these matters and look forward to working further with the Commission and its Staff on these issues of great importance to the stakeholders and their customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically filed through the Docketing Information System of the Public Utilities Commission of Ohio on this 15th day of August, 2019. In accordance with Ohio Adm. Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

Respectfully submitted,

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Summary: Comments - Initial Comments of Duke Energy Ohio, Inc. and the Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company and Duke Energy Ohio, Inc.