BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review Of Chapter 4901:1-3, of the Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, And Right-Way.	)))))	Case No. 19-834-AU-ORD

REPLY COMMENTS OF OHIO TELECOM ASSOCIATION

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SEPTEMBER 9, 2019 **ATTORNEYS FOR THE OHIO TELECOM ASSOCIATION**

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I. Introduction

On July 17, 2019, the Public Utilities Commission of Ohio ("Commission") issued an entry with proposed amendments to Chapter 4901:1-3 of the Ohio Administrative Code, the chapter that addresses terms and conditions of access to poles, conduit, and rights of way by both utilities and others under R.C. 4905.51 and R.C. 4905.71. In part, the rules appear to be an effort to align Chapter 4901:1-3 with amendments to rules adopted by the Federal Communications Commission ("FCC"), particularly those regarding overlashing. However, the proposed rules retain some timing differences and do not address the availability of a one-touch make-ready ("OTMR") process for simple attachments provided by FCC rules. In Initial Comments filed on August 15, 2019, Ohio Telecom Association supported the efforts of the Commission to align its rules with those of the FCC and urged the Commission to include additional changes to its rules that would incorporate provisions similar to federal timelines, expand the resources needed to make attachments, and establish an OTMR process identical to the one

adopted by the FCC. Initial Comments of Ohio Telecom Association (Aug. 15, 2019) ("OTA Comments").

Several commenters also support the inclusion of OTMR and methods to supplement the contractor list. See, e.g., Initial Comments of Crown Castle Fiber LLC at 5-6 (Aug. 15, 2019), Initial Comments of the Ohio Cable Telecommunications Association at 8 (Aug. 15, 2019) ("OCTA Comments"), and Initial Comments of Duke Energy Ohio, Inc. and the Ohio Power Company at 21-22 (Aug. 15, 2019) ("Duke/AEP-Ohio Comments"). Given that support, the Commission should incorporate the recommendations into the rules addressing access to poles and rights of way.

The electric distribution utilities, however, raise objections to the Commission's proposal to address overlashing in its rules unless the Commission imposes varied additional requirements. Comments of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company at 3-9 (Aug. 15, 2019) ("FE Comments"); Duke/AEP-Ohio Comments at 15-21; and Initial Comments of the Dayton Power and Light Company at 2-13 (Aug. 15, 2019) ("DPL Comments"). Additionally, several argue that the incumbent local exchange companies should not benefit from a presumption that the cost to attach similar devices to utility poles should be priced on terms equal to that provided to competitive local exchange carriers. FE Comments at 9; DP&L Comments at 16; Duke/AEP-Ohio Comments at 1-11. Because the suggested changes preferred by the electric utilities would not advance the deployment of broadband, the Commission should reject them.

II. Overlashing

In this proceeding, one of the significant changes the Commission has proposed is the incorporation of a rule regarding overlashing that largely parallels the federal rule. Compare Proposed Rule 4901:1-3-03(A)(7) with 47 C.F.R. § 1.1415. OTA supports the Commission's recommended inclusion of the new provision.

The electric distribution utilities seek to either ban or have the Commission heavily regulate the use of overlashing based on alleged safety concerns. In an FCC proceeding that addressed impediments to the expansion of broadband facilities, electric utilities raised these same concerns and urged the FCC to overregulate overlashing by requiring extensive studies, assessing permitting fees, and allowing pole owners to otherwise unreasonably impede the use of overlashing. In response, the FCC refused to constrain the use of overlashing. *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Declaratory Ruling ¶ 115-20 (Aug. 2, 2018) ("FCC Third Report"). In support of that decision to permit overlashing without the burdens of applications, fees, and other impediments, the FCC concluded that safety concerns could be addressed by advance notice of an overlash and the opportunity to inspect. *Id*. ¶ 117.

Overlashing has been a common practice for years with no apparent signs that the communications system has fallen into disrepair. It is time to recognize the benefits afforded by overlashing in terms of timely implementation of advanced services and to leave behind the rejected claims that the poles will collapse if overlashing is not banned or so over-regulated as to be unusable. FCC Third Report and Order ¶ 115. Simply

put, the Commission should treat the concerns presented by the electric distribution utilities for what they are: another attempt to litigate the issues they lost at the FCC.

III. Proposed Rule 4901-3-05(B)

Proposed Rule 4901-3-05(B) provides for two rebuttable presumptions that will guide the review of joint use agreements. The first provides that an incumbent local exchange carrier is similarly situated to an attaching entity that is not a public utility. The second is that an incumbent local exchange carrier may be charged a rate no higher than the rate determined in accordance with Rule 4901:1-3-04(D). Either presumption may be rebutted by clear and convincing evidence.

The comments filed by the electric utilities condemn this rule as unfair (FirstEnergy Comments at 9; DP&L Comments at 16) and unwarranted due to differences between the access provided to incumbent local exchange carriers and that provided to other non-utility attachers (DP&L Comments at 18-19; Duke/AEP-Ohio Comments at 1-8). Duke and AEP also allege that proposed Rule 4901-3-05(B) conflicts with Rule 4901-3-04(A) and that the latter should control. Duke/AEP-Ohio Comments at 4.

The first complaint concerning fairness is unwarranted. For example, FirstEnergy suggests that the rule is unfair because the burden of proof has been shifted. FirstEnergy Comments at 9. That is not the case. The rule creates rebuttable presumptions. While a rebuttable presumption may affect the obligation of going forward with evidence, it does not shift the burden of proof. Ohio Evid.R. 301; Richard Markus, Trial Handbook for Ohio Lawyers at 419 (2d ed. 1982). See, also, R.C. 4905.26.

DP&L takes a different tack and argues that the presumptions are one-sided in part because several of Ohio's incumbent local exchange companies are huge entities. DP&L Comments at 16-17. Overstatement does not necessarily make for good argument, however. While several of the 41 incumbent local exchange carriers serve substantial numbers of customers, most are small and serve from a few hundred to a few thousand customers. If there is a "size" imbalance, it favors the electric utility in many instances.

DP&L also asserts that the rule provides a huge evidentiary advantage to the incumbent local exchange carrier. *Id*. at 17. This position, however, ignores that the real issue in a pricing challenge is whether the difference between the price in the joint use agreement and that produced by the rate formula is unreasonable price discrimination. In most instances, to borrow from Gertrude Stein, an attachment is an attachment.[1] If there are differences in the value being received, the electric utility is probably in the best position to demonstrate that and should have the burden of going forward with evidence of those differences. Markus, *supra*, at 421. The use of presumptions, thus, makes sense.

Although Duke and AEP-Ohio state that "the proposed presumption would, in essence, presume that electric ratepayers should bear a high portion of the cost of jointly used infrastructure," Duke/AEP-Ohio Comments at 10, that argument confuses outcome with process. If there is a rationale for assigning more pole cost to the attaching party, the proposed rule permits the electric utility to advance proof of that

[1] Gertrude Stein, Sacred Emily, in Geography and Plays (1922) ("Rose is a rose is a rose is a rose").

rationale because it is in the better position to do so. Under the proposed rule, the Commission will have a record to judge whether there is a proper assignment of costs.

The Duke and AEP-Ohio objection that proposed Rule 4901:1-3-05(B) conflicts with Rule 4901:1-3-04(A) does not bear up either. The apparent concern is that current agreements may be challenged. Duke/AEP-Ohio Comments at 4-5. This concern is hardly an adequate basis for rejecting the proposed rule. First, there is no apparent conflict between the rules. The proposed rule addresses complaints when agreement has failed; the current rule simply states that parties shall attempt to reach agreement. Second, the rates embedded in current agreements may be proven over time to be too high and adversely affect deployment without justification. A complaint could be filed currently to challenge an unreasonable price. A challenge to a price that is too high, which can currently be done by complaint, thus does not conflict with a rule that makes explicit the right to file a complaint.

Finally, the use of presumptions is reasonable because the Commission is seeking to expand broadband facilities. Nationally, the difference between joint use agreement pricing and competitor pricing under the FCC rule is substantial while the differences in pole ownership between incumbent local exchange carriers and electric utilities has increased. FCC Third Report ¶ 125.[2] Due to this change in relative negotiation leverage, "applying the presumption in these circumstances will promote broadband deployment and serve the public interest. *Id*. ¶ 126.

[2] The electric utilities' comments are similar to those the FCC rejected when it adopted a similar presumption applicable to joint use agreements subject to its regulation. See Attachment A.

IV. Conclusion

The amendments proposed in the July 17, 2019 Entry substantially improve Chapter 4901:1-03. In particular, the proposal to streamline the process for overlashing will offer parties seeking to invest in new and expanded infrastructure a better opportunity to advance those outcomes. Additionally, the Commission should seek to reduce barriers to expanding infrastructure by opening up the attachment process through OTMR, expanding contractor lists, and rejecting unreasonable price discrimination.

Respectfully submitted,

/s/ Frank P. Darr

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties, this 9th day of September 2019.

/s/ Frank P. Darr
Frank Darr (Reg. No. 0025469)

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Accelerating Wireline Broadband Deployment	**)**	**WC Docket No. 17-84**
by Removing Barriers to Infrastructure	**)**	
Investment	**)**	

AT&T's Opposition to Petition for Reconsideration

AT&T files this opposition to the Petition for Reconsideration ("Petition") filed by the Coalition of Utilities ("Coalition")[1] as applied to the pole attachment rate reforms adopted by the Federal Communications Commission's ("Commission") in its Third Report and Order.[2]

I. INTRODUCTION AND SUMMARY.

The Commission initiated this docket to explore ways to "better enable broadband providers to build, maintain, and upgrade their networks" in a manner that "will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike."[3] After nearly 18 months, hundreds of filings, meetings with stakeholders, and considered and reasoned analysis, the Commission met that goal in part by "eliminat[ing] outdated disparities between the pole attachment rates incumbent local exchange carriers [ILECs] must pay

[1] Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84 (filed Oct. 15, 2018) ("*Petition*").

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling (rel. Aug. 3, 2018) ("*2018 Pole Attachment Order"*).

[3] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3267 (2017).

compared to other similarly-situated telecommunications attachers."[4] The Coalition asks the Commission to reconsider and modify these findings because it believes that ILECs are not similarly situated to other telecommunications attachers. The Commission should deny this request because the Coalition fails to identify any material error, omission, or reason warranting reconsideration and relies on arguments that the Commission has considered and rejected.[5]

II. DISCUSSION.

The Coalition asks the Commission to reconsider its rulings that resolve long-standing disparities between the pole attachment rates that investor-owned electric utilities ("IOUs") charge ILECs compared to other telecommunications attachers. Specifically, the Coalition seeks reversal of the presumption that ILECs are similarly situated to other telecommunications attachers and thus entitled to just, reasonable, and nondiscriminatory rates under the Telecom Rate formula under "renewed" joint-use agreements ("JUAs"), reversal of the Commission's decision to cap IOU pole attachment rates at the pre-2011 Telecom Rate when the presumption is rebutted, and a corresponding reduction in ILEC pole attachment rates under JUAs. The Commission should deny the Coalition's Petition for the specific reasons below.

A. The Commission's rate presumptions are built on an abundant record and reasoned decision-making.

1. The record demonstrates a need for the Commission to offset IOU leverage.

The Coalition argues that lowering the pole attachment rates that ILECs pay to IOUs is unjustified because the Commission has not fully analyzed whether IOUs have bargaining

[4] *2018 Pole Attachment Order* ¶3.

[5] 47 C.F.R. §1.429(l)(1), (3).

leverage.[6] To the contrary, the Commission has an abundant record in this proceeding on the disparity in pole ownership and reached a reasoned and fact-based conclusion that this disparity has contributed to an increase in IOU pole attachment rates charged to ILECs, a troubling development considering the substantially lower rates paid by ILEC competitors.[7] As the Commission observed:

> USTelecom provides the results of a recent member survey showing that its incumbent LEC members "pay an average of $26.12 [per year] to [investor-owned utilities] today in Commission-regulated states (an *increase* from $26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average $3.00 and $3.75 [per year], respectively (a *decrease* from $3.26 and $4.45, respectively, in 2008).[8]

The IOUs had ample time to refute this evidence but failed to do so in this docket or their Petition. Moreover, the Commission did not come to these decisions in a vacuum. At least as far back as 2011, the pole ownership disparity led the Commission to question whether "market forces and independent negotiations . . . alone [are] sufficient to ensure just and reasonable rates, terms, and conditions for [ILEC] pole attachments."[9] Seven years later, faced with a growing disparity in pole ownership between ILECs and IOUs and increased IOU pole attachment rates, the Commission concluded that these changed circumstances justified action. The Commission determined that "applying the presumption to new and newly-renewed agreements, [] will . . .

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[6] Petition at n.15.

[7] *2018 Pole Attachment Order* ¶126 ("[T]he record evidence show[s] that, since 2008, [ILEC] pole ownership has declined and [ILEC] attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased).")

[8] *Id. at* ¶125.

[9] *Implementation of Section 224; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327, para. 199 (2011).

encourage infrastructure deployment by addressing [ILECs'] bargaining power disadvantage."[10] The Commission further adopted the pre-2011 pole attachment rate as an upper bound rate where the presumption is rebutted, finding that it would eliminate uncertainty by "enabl[ing] better informed pole attachment negotiations . . . [and] reduc[ing] the number of disputes' regarding pole attachment rates."[11] Contrary to the Coalitions claims, these Commission decisions were built on an abundant record, follow substantial history and a reasoned analysis, and do not warrant reconsideration.

2. JUAs confer no net benefits that materially advantage ILECs.

The Coalition further argues that ILECs receive unique benefits under the terms of renewed JUAs. The Commission rightly rejected that very argument in its Report and Order.[12] The Coalition provides a list of alleged benefits received by ILECs under JUAs. That list is unconvincing. Many of the listed benefits are illusory. For example, AT&T's make-ready costs are not generally lower than other attachers; AT&T does not generally avoid the costs to relocate its facilities; AT&T's JUAs do not generally preclude IOUs from performing post-construction inspections; IOUs assign pole space on a first-come first serve basis, regardless of how much space the JUA designates for the ILEC, whose footprint on IOU poles has continued to shrink over the last decade with the proliferation of fiber and removal of copper in their networks; and AT&T's JUAs do not allow AT&T to collect rent from communications attachers occupying such space in those situations.

[10] *2018 Pole Attachment Order* ¶127.

[11] Id. at ¶128.

[12] Id. at ¶127 ("We disagree with utilities that argue that we should not apply the presumption to any existing agreements . . . because [ILECS] receive unique benefits under joint use agreements.")

Other allegedly favorable terms provide no net benefits that give ILECs a material advantage over other attachers. For example, some "benefits" are reciprocal with the electric utility (e.g., pay less for pole replacements) or are no longer advantageous due to changes in circumstances or increased risks (e.g., attaching without advance approval, lower pole placement). Simply put, to the extent that benefits may exist, they do not provide a net benefit and certainly not a benefit that materially advantages the ILEC, as any perceived benefits cannot offset the huge disparity in the pole attachment rates ILECs pay to IOUs relative to cable and other telecommunications attachers.

3. IOUs can challenge whether a JUA provides net benefits that materially advantage ILECs.

To the extent that an IOU believes that an ILEC with which it has a JUA—including one that has been renewed—is not similarly-situated to other telecommunications attachers, the IOU can rebut that presumption by demonstrating that the JUA confers on the ILEC net benefits that materially advantage the ILEC. IOUs are in the best position to know whether and how their JUAs with ILECs compare to access agreements with cable and other telecommunications attachers. In contrast, ILECs do not have and cannot readily obtain this information, which prevents ILECs from easily or effectively making those assessments and partially explains the lack of complaints against IOUs and the resulting trajectory of IOU pole attachment rates. Keeping the presumption on ILECs to demonstrate that their JUAs are NOT similarly situated to other telecommunications attachers, as the IOUs prefer, would retain the status quo, despite the changed circumstances identified by the Commission, and allow IOUs to continue charging ILECs artificially high attachment rates that deter infrastructure deployment.

B. The Coalition has not demonstrated a need to alter ILEC attachment rates.

The Coalition proposes that a reduction in IOU attachment rates be accompanied by a proportional reduction in ILEC attachment rates, ostensibly to prevent "price gouging."[13] But, the Coalition provides no evidence that ILECs are overcharging IOUs, much less engaging in price gouging, or any other legitimate basis why ILEC attachment rates should be altered. A tit-for-tat decision—lowering ILEC pole attachment rates merely because IOU pole attachment rates are lowered—would not be reasoned decision-making. And there is simply no record demonstrating that ILEC pole attachment rates are too high. To the contrary, the USTelecom Pole Attachment Survey reveals that IOUs pay ILECs the same rates on average as ILECs pay IOUs despite occupying at least five times the average amount of space occupied by ILECs.[14] An automatic reduction of ILEC rates to correspond with substantially inflated IOU rates would be arbitrary, bear no relationship to the amount of space used, and undercompensate ILECs for IOU attachments on ILEC poles.

November 9, 2018

Respectfully submitted,

By:_____

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[13] *Petition* at 7.

[14] USTelecom Pole Attachment Rate and Pole Ownership Report at 8-9, attached to Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 21, 2017).

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