BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMMENTS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

The Ohio Cable Telecommunications Association ("OCTA"), representing the members of Ohio's cable industry, files these comments in support of the efforts of the Public Utilities Commission of Ohio to update its rules governing access to the poles and conduits of Ohio's public utilities. Due to the crucial importance of such access to the cable industry, OCTA has proposed revisions that: i) clarify the obligations of public utilities to provide access to their poles and conduit in a timely and transparent manner; ii) properly allocate the costs of make-ready work; iii) preserve and clarify the Commission's regulatory oversight of pole attachments; and iv) ensure that the rates applicable for pole and conduit access are fair, reasonable, and determined and applied as part of a streamlined and straightforward regulatory regime.

I. Introduction and Background

The Ohio Cable Telecommunications Association ("OCTA") represents the interests of Ohio's cable industry. One of the vitally important aspects of our members' provision of service in Ohio is access to the poles, conduits and rights-of-way of Ohio public utilities. This access is essential to provide a variety of communications services, including video, voice, and Internet access services. OCTA, and its members, therefore, hold a significant stake in the outcome of this

proceeding to revise the Commission's regulations governing the rates, terms and conditions by which attachments to the facilities of Ohio public utilities are made.

Although the Commission's long-standing pole attachment regulations have been effective in facilitating the deployment of competitive broadband and other communications facilities in a timely and economic manner, OCTA agrees that changes in technology, the competitive landscape, and the manner in which broadband services are provided and consumed warrant the Commission's revisiting of its pole attachment regulations. In general, the regulatory revisions proposed by the Commission Staff should result in significant improvements to access guidelines, non-rate cost allocations (such as make-ready costs), and the resolution of pole-related disputes.

Certain aspects of the Staff's proposed revisions, however, would mark a significant step backwards from important regulatory and policy advances already made and would greatly complicate what is already a complex regulatory framework.

OCTA's proposed modification to the Staff's rules fall into two broad categories: (1) those relating to the non-rate terms and conditions of access; and (2) those pertaining to rates. A copy of the proposed rules is attached as Attachment A, with OCTA's suggested revisions marked with double strikethrough for deletions and underlining for added language.

With respect to the Staff's proposed revisions to its non-rate regulations, OCTA agrees that certain of the proposed revisions would make for quicker access to poles as well as for fairer cost allocations. Where issues cannot be negotiated by the parties acting on their own, the Staff's proposal of a dispute resolution process that includes mediation would be beneficial in addition to other remedies that OCTA here proposes. However, as the Commission considers revamping its rules in this proceeding, the Commission should not lose sight of its current and important role in reviewing, approving, and enforcing reasonable terms and conditions through the tariff process.

As to rates, the Commission should not replace its streamlined and effective single-rate pole regime with the Federal Communications Commission's ("FCC") two-rate system (one each for attachments used for "cable services" and those used for "telecommunications services") that the FCC was required by federal statute to implement. This two-rate environment has been problematic from the outset, resulting in the FCC effectively equalizing the two rates in response. This two rate system should not be adopted here.

II. Non-Rate Terms and Conditions

A. Permit Applications, Processes and Access Deadlines Should Be Explicit.

OCTA concurs with the inclusion of deadlines and timeframes by which owners must provide access to requesting attachers, and by which owners must provide notice to attachers regarding the removal or termination of utility facilities, for increases in the pole rate, and the modification of utility facilities. However, OCTA believes that effective deadlines should be more explicit in order to make even clearer that there is a definite date by which a required action may lawfully be taken. The rules also should provide both broader and more specific remedies for violations of its access rules and for unreasonable terms and conditions.

So that all parties understand that notices and responses required by the rules should be completed as soon as practicable and before the deadlines specified in the regulations, OCTA has proposed revisions to Sections 4901:1-3-03(A)-(B) to make clear that pole owners must act as promptly as reasonably feasible, and that deadlines set forth for responses, notices, and for actual access are exactly that: hard deadlines that must be followed. In addition, OCTA has proposed revisions to 4901:1-3-03(B) to remove the utility's discretion to increase the time frame by 15 days. It is an "option" that OCTA believes could turn into a standard procedure if left solely up to the discretion of pole owners. In any case, 1-3-03(B)(6) already provides the utility with the ability to

deviate from the required time frame in the event that there is a "good and sufficient" cause that renders the required time limits infeasible.

OCTA has also proposed to revise Section 4901:1-3-03(B) to increase the amount of time a pole owner must wait until permitted to withdraw an outstanding estimate of make-ready charges. The proposed 14-day period is not always sufficient for attachers to review make-ready estimates (particularly if the attacher is a smaller service provider with a small number of personnel handling pole attachment responsibilities or if the attacher is working on a large project requiring make-ready work on a large number of poles). The 45-day period OCTA has proposed will provide attachers with ample time to review make-ready estimates while not unreasonably burdening the utility performing the make-ready work.

B. OCTA Agrees That Make-Ready And Similar Costs Should Be Paid By The Party Benefitting From, or Causing, The Underlying Work.

Section 4901:1-3-04(G) of the Staff's proposed rules allocates the costs of modifying utility facilities between all parties that obtain access to such facilities as a result of the modification and all that directly benefit from such modification. OCTA agrees that parties benefitting from or requiring the modification work should be required to bear the costs of such work.

OCTA has proposed a minor revision to this Section, including deleting the sentence requiring "all such parties" to share in the cost of modifying facilities. OCTA believes that the remaining language in this provision makes clear which parties are required to contribute, and that the deletion of this sentence provides for greater clarity.

C. Terms and Conditions, Including Those Pertaining to Rate and Non-Rate Charges, Cost Allocation and Access Procedures and Timelines, Must Not Deviate From Approved Tariffs.

The Commission's tariff review process plays a vital role in ensuring that the rates, terms, and conditions for access are fair, reasonable, and comply with applicable laws and regulations.

Although communications service providers and utilities may voluntarily negotiate agreements setting forth such rates, terms, and conditions, the negotiation of such agreements should not provide the opportunity to perform an "end-run" around the Commission's tariff review. We have proposed a revision to Section 4901:1-3-04 of the proposed rules to make clear that such voluntarily negotiated agreements must be consistent with the pole owner's tariff, and that the Commission may determine whether a utility's terms, rates, and conditions are just and reasonable in its tariff review proceedings.

D. Access to Pole Tops, Outside Of The Traditional "Communications Space" Must Be Permitted.

Communications service providers should have access to space at the pole top above the Communications Space, as the Staff has provided for in its proposed rules. To further support this position, OCTA has proposed a definition of "Communications Space" in Section 4901:1-3-01(E) that clarifies that this space includes the pole top.

E. The Rules Should Not Contain an Omnibus Requirement for the Submission of Parties' Easement and Right-of-Way Authority.

The Commission's rules should not contain a general requirement that the materials demonstrating an attacher's right-of-way occupancy authority be submitted to the Commission. Such a measure is unnecessary, unreasonable and strays beyond the Commission's regulatory authority.

A cable television operator's franchise has many purposes and many functions. But the most basic of these is the expression of the operator's authority to place its facilities needed to provide its services and functions in the public rights-of-way and compatible utility easements. "Any franchise shall be construed to authorize the construction of a cable system over public rights-

of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . ." 47 U.S.C. § 541(a)(2).

Section 4901:1-3-03(E) of the draft rules, however, provides a broad and ill-defined mechanism for Commission review of a cable operator's authority to occupy these rights-of-way – authority that already has been secured through the franchising process. With franchising decisions now made by the Ohio Department of Commerce's statewide franchising process[1] (and previously by the local franchising authority) and interpretation and adjudication of property and contract rights reserved to the courts[2], the draft rules create a wholly unnecessary and unlawful third level of review.

Pole attachment agreements often contain provisions requiring the cable operator to provide to the utility evidence of its right to occupy easements and rights-of-way. Occasionally, a dispute develops, and if the parties are unable to resolve the dispute, the matter proceeds to court. The questions that arise in such disputes include: (i) the scope of an easement or right-of-way grant; (ii) the efficacy of a franchise or easement grant; (iii) the boundaries of an easement, private property or even a franchise area; and (iv) the type and "nature" of a facility placed in the easement or right-of-way. Resolution of these sorts of questions are of a fundamentally judicial nature and are not the province of regulatory agencies. Adopting Section 4901:1-3-03(E) would place the Commission

[1] Ohio Rev. Code § 1332.24.

[2] The courts, not the Commission have this adjudicative authority that the rule seeks. "The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the constitution, Article IV." Village of New Bremen v. Pub. Utils. Comm'n, 103 Ohio St. 21, 30, 132 N.E. 162 (1921). By contrast, "the public utilities commission is an administrative board and only has such authority as the statute creating it has given it." Village of New Bremen, 103 Ohio St. at 30. The Ohio Supreme Court "has repeatedly declared that the powers of the commission are conferred by statute and that it has no other authority than thus vested in it." Village of New Bremen, 103 Ohio St. at 30 (citations omitted). It has long been held that this Commission "is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights." Village of New Bremen, 103 Ohio St. at 30-31; Penn Cent. Transp. Co. v. Pub. Utils. Comm'n, 35 Ohio St.2d 97, 100-01, 298 N.E.2d 587 (1973) ("The determination of competing equities ... is more properly reserved to the courts for disposition and the Commission is in no sense a court.").

beyond the prescribed limits of authority. Southgate Dev. Corp. v. Columbia Gas Transmission, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976); Dayton Commc'ns Corp. v. Pub. Utils. Comm'n, 64 Ohio St.2d 302, 414 N.E.2d 1051 (1980); State ex rel. Dayton Power & Light v. Riley, 53 Ohio St.2d 168, 373 N.E.2d 385 (1978); Victor Bldg. Co. v. Toledo Edison Co., 6th Dist. No. L-83-008, 1983 Ohio App. LEXIS 12053 (Apr. 15, 1983).

F. Remedies for Pole Owner Failure To Meet Access Requirements.

Section 4901:1-3-05 of the Staff's proposed rules sets forth a general complaint procedure entitling an attacher to file a complaint with the Commission for claims of denial of access in violation of the Commission's requirements, or to address unreasonable terms and conditions of attachment (or request the Commission to mediate disagreements over such terms). Those remedies and procedures need to be more specific. While the access rules and timelines present a useful step forward in facilitating broadband access deployment, the Commission should consider revising its proposed rules to provide for remedies in the event that a pole owner does not comply with access timelines and other access requirements.

In particular, Section 4901:1-3-03(B)(7) states that if a pole owner fails to respond to a permit application within 45 days, the requesting attacher can hire a contractor to complete a survey. Further, (B)(7) states that if the owner fails to complete make-ready work within 60 days after receipt of payment of the make ready estimate (or 105 days for large orders)[3], then the requesting attacher can hire a contractor to complete the make ready work. Notwithstanding these welcome additional protections, there remains a gap between the time a survey is completed and the time the public utility issues a make-ready estimate and target date for completion within 14 days of approval (or 14 days of the contractor's survey).

[3] For make-ready work above the Communications Space, the owner has ninety (90) days after receipt of payment to perform the work and 135 days for large orders.

To close this gap, OCTA proposes that if the owner fails to issue a make-ready estimate within that 14-day time frame, the requesting attacher can hire a contractor to perform the work at its own expense and in accordance with the requirements and timelines set forth for completion of make ready.

Furthermore, it is important to preserve the requesting attacher's vital access to utility facilities that could be threatened by the pole owner's removal of facilities, increase in rates, or modification of facilities as contemplated in proposed Section 4901:1-3-03(A)(3). Thus, OCTA has revised the procedures set forth in proposed Section 4901:1-3-03(A)(4) for an attaching entity to request temporary stay of such action to include a presumption that such petition would be deemed granted, instead of denied, in the event that the Commission did not rule on such a petition within the required 30 day period. The proposed rule itself recognizes that such circumstances could cause the affected attacher to suffer "irreparable harm and likely cessation of service," and OCTA's proposed revision here more appropriately protects against this risk.

III. Rates -- The Commission Should Not Change The Existing Pole Rate Formula.

Regardless whether the utility poles are used to carry attachments to provide cable or telecommunications services, utility poles generally possess the same physical characteristics and associated costs. Because these costs are all already captured by the Commission's existing single-formula system to generate rates that effectively compensate pole owners for providing access, the proposed implementation of a second formula for attachments used to provide telecommunications services would introduce numerous unreasonable costs and disadvantages, which we discuss below.

A. A Pole is a Pole.

The object of regulation here is a physical attachment (typically a bolt and a clamp or similar mechanical device) to a pole. The attachment itself occupies a minimal amount of space, with an

additional minimal amount of space (typically one foot) necessary for clearance from adjacent facilities. Furthermore, the pole to which the attachment is affixed has finite physical properties, finite fixed costs, and finite recurring expenses associated with its service life. There are height differences, differences in pole diameters, and "age" differences for poles in services. But other than this, there is very little variation: in other words, a pole is a pole. All of the elements of the pole, and the attachment already are effectively captured in the Commission's current pole attachment rate formula. Consequently, that should not change through the introduction of another formula that attempts to account for the organization and transmission of electrons that have no effect whatsoever on the economics of providing the foot or so of space required for the typical pole attachment.

B. Ohio's Current Pole Rate Formula.

The Commission's long-standing approach of applying one single pole attachment rate formula,[4] has been instrumental in achieving principled and economic rate setting that fully compensates the pole owner for its costs in providing attachment space to communications companies. The existing formula also provides effective guidance to pole owners and attachers negotiating attachment agreements in arms-length negotiations by utilizing well known and understood elements that are transparently applied. It should not be changed, and there should be no additional formula.

[4] Maximum rate = space factor x net cost of a bare pole x carrying charge rate, where the space factor = space occupied by attachment / total usable space. In addition, the formula sets forth an 0.85 appurtenance factor to account for extraneous items or non-pole investments. *See In re. Cincinnati Bell for Authority to Adjust its Rates and Charges and to Change its Tariffs*, Case No. 81-1338-TP-AIR, Opinion & Order, Jan. 7, 1983, p. 42, in which the Commission adopted the FCC's Cable Formula. *See* Ohio Admin. Code 4901:1-7-23(B). For purposes of clarity, we have revised the proposed rules to expressly include this appurtenance factor.

The existing formula's elements are well-known and are based on publicly-filed information which is tracked by pole owners in the normal course of operating their businesses.[5] For example, the investment, depreciation, expense and tax data used to calculate a pole owner's pole costs and carrying charges can be found in the owner's ARMIS filings with the FCC (in the case of a pole owner that is an FCC regulated carrier), or with the owner's annual filings with the Federal Energy Regulatory Commission (in the case of pole owners that are electric companies), as well as with the state public utility regulators such as the Commission (for instance, the Commission requires telephone companies to provide "in their annual report information required by the commission to calculate pole attachment and conduit occupancy rates and any other information the commission determines necessary to fulfill its responsibility under section 4905.71").[6] In addition, the formula relies on a handful of well-established presumptions regarding the physical dimensions of a utility pole and a communication attachment's occupancy[7] that are widely understood and accepted by the communications industry and regulators.

The use of a formula relying upon publicly available information filed with regulatory agencies and upon minimal, well-established presumptions regarding the physical dimensions of a pole result in a rate mechanism that can be transparently applied to create a rate that pole owners, pole attachers, and regulators alike can independently verify. These known elements breed rate, regulatory and commercial certainty.[8]

---

[5] 47 C.F.R.§1.1404(h)-(j).

[6] Ohio Admin. Code § 4901:1-6-37.

[7] These presumptions include a pole height of 37.5 feet, a usable space of 13.5 feet, and a vertical space per attachment of 1 foot. *In re Amendment of Commission's Rules and Policies Governing Pole Attachments.* Consolidated Partial Order on Reconsideration, CS Docket No. 97-98 (May 22, 2001) ("2001 Order on Reconsideration), ¶ 48; *In re Cincinnati Bell* at 43.

[8] In order to protect these presumptions, OCTA has proposed revisions to Section 4901:1-3-04(F) of the Staff's proposed rules to require the use of statistically valid survey or actual data to rebut these presumptions, consistent with FCC precedent. *See* 2001 Order on Reconsideration at ¶ 70.

C. Two Pole Rates Is A Formula For Contentiousness & Uncertainty.

On the other hand, moving to a two-formula system by adding the second "telecommunications formula" for attachments used to provide "telecommunications" (or comparable) services would have the opposite effect. Not only would such a multi-tiered rate structure complicate the Commission's regulation of pole rates, but it would also decrease the regulatory certainty that pole owners and communications service providers depend on, with no compensating benefit to stakeholders.

In particular, the addition of the Staff's proposed telecommunications formula would complicate the Commission's regulatory mission. This Staff's proposed formula for "telecommunications" attachments incorporates additional cost-allocation factors[9] (dependent variables) associated with the number of attaching entities, subject to yet additional variation that will affect the calculation of the rate depending upon whether the poles are located in urban or non-urban areas. In addition, because these factors will vary depending upon the location of the particular poles in question, these additional layers of variables create a greater risk of otherwise unnecessary litigation and regulatory and dispute resolution proceedings (including tariff and complaint proceedings), to adjudicate factual disputes concerning such factors.

Further complicating the regulatory picture is the fact that the proposed telecommunications formula is itself multi-faceted; there are actually three separate telecommunications formulas. Not only are there two separate telecommunications formulas for urban and non-urban poles as discussed

[9] The Staff's proposed telecommunications formula in the Appendix to Rule 4901:1-3-04 is Rate = space factor x cost, where the cost in urbanized areas = .66 x (net cost of a bare pole x carrying charge rate), and the cost in rural areas = .44 x (net cost of a bare pole x carrying charge rate). The telecommunications formula presumes that poles located in urbanized service areas have five attaching entities, while those located in non-urbanized areas have three attaching entities, in addition to the presumptions incorporated into the Cable Formula.

above, but a third formula[10] that is to be utilized if it results in a higher rate than the telecommunications formulas set forth in Paragraph (B) of the Appendix to Section 4901:1-3-04 and discussed above. This third formula is similar to the other telecommunications formulas, but substitutes a simpler carrying charge rate and does away with the urban/non-urban presumptions with respect to the number of attaching entities used in calculating the rate.

D. Disputes Will Abound As to Which Formula Should Apply to Which Poles.

Also, the factual issues of whether an attachment is used to provide cable or telecommunications services, and precisely which applications or "services" in particular constitute "cable" or "telecommunications" services will add to the increased litigation and regulatory proceedings needed to make such factual determinations.[11] This increased litigation was a major factor behind the FCC's efforts in recent years to revise its telecommunications formula to yield rates at the same level as those produced by its cable formula.[12] The artificial distinction between attachments creates different rates, and that creates different incentives. Communications service providers would have an incentive to ensure that the maximum number of their services (on the maximum number of possible poles) qualify for the lower rate. Pole owners would have the opposite incentive, leading to increased disputes that would have to be settled in the Commission's tariffing or complaint proceedings.

Furthermore, the service notification that cable operators would be required to provide pole owners in order to apply a two-formula system is problematic. The proposed requirement itself in

[10] The proposed "alternate" telecommunications formula in the Appendix to Rule 4901:1-3-04 is Rate = space factor x net cost of a bare pole x (maintenance and administrative carrying charge rate), where the space factor = ((space occupied) + (2/3 x (usable space / no. of attaching entities)) / pole height.

[11] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51 (Apr. 7, 2011 ("2011 Pole Attachment Order") at ¶ 8 ("The Order reinterprets the telecommunications rate formula for pole attachments consistent with the existing statutory framework, thereby reducing the disparity between the current telecommunications and cable rates.").

[12] *See 2011 Pole Attachment Order at ¶ 134*

4901:1-3-03(A)(5) is unclear as to the precise nature of the notice the cable operator would be required to provide to the pole owner. For instance, would a cable operator need simply to provide a one-time notice to the pole owner upon the commencement of telecommunications services? This type of notice could provide an incomplete picture of the cable operator's service profile, and thus could be used by pole owners to charge the telecommunications rate across the board. Or, on the other hand, if this requirement imposes an ongoing obligation on the cable operator to provide a more granular level of notification (such as on a pole-by-pole or attachment-by-attachment basis), that would prove unduly burdensome. Cable operators would be required to devote significant administrative and operational resources in order to comply. [13] In either instance, the notice requirement would give rise to numerous factual disputes the Commission would have to address.

For these reasons, we have proposed removal of the two-rate process and removal of the obligation of cable operators to notify pole owners upon offering telecommunications services in Section 4901:1-3-03(A)(5).

E. A Two-Rate World Creates Artificial Competitive Imbalances.

Moreover, the Staff's proposed "telecommunications" formula is sure to create a competitive imbalance between providers of "telecommunications" services and providers of "cable services," without any compensating economic, business, technical or policy justification. Whether an attachment is used by a communications service provider to deliver cable service, telecommunications service, or some other communications service has no impact whatsoever on the costs incurred by the pole owner to provide the pole space accommodating such attachment.[14] The

[13] These additional burdens would contravene the goals set forth in the State of Ohio's Common Sense Initiative, which aims to identify and eliminate regulatory impacts that make it difficult for businesses to operate in Ohio.

[14] *See Texas Utils. Elec. Co. v. FCC,* 997 F.2d 925, 935 (D.C. Cir. 1993) (in which the court held that a utility proposing to charge separate rates for cables carrying different types of communications service "offer[ed] no basis for its disparate treatment of the two types of cable" and doubting that a distinction "between video and nonvideo cable attachments can

(footnote continued)

cable formula already fully compensates pole owners for their cost of providing pole space to attachers.[15] Any artificially increased attachment rates would raise the cost of providing services as well as the cost to end user customers, both of which would have the effect of affirmatively impeding the state's goal of increasing the deployment of broadband services.[16] Multi-tiered rate structures distort the investment decisions of service providers by creating regulatory risk and uncertainty, and there is no reason to court those sorts of complications and inefficiencies here.[17]

F. There Is No Rational Or Statutory Justification To Impose Two Rates.

The only justification provided for the proposed implementation of a two-tiered structure is the fact that the dual formulas "mirror the rate formulas adopted by the FCC in 47.CFR 1.1409...."[18] But the FCC's multi-tiered rate structure resulted from a congressional mandate to implement two formulas[19] and not from any finding that attachments used to provide telecommunications services increased costs to pole owners or otherwise justified a higher rate. The FCC, based on its

---

withstand current technological innovations" that allow " a single fiber strand to carry both video and data communications"); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.,* 6 F.C.C.R. 7099, 7105 ¶ 29 (1991) (in which the FCC held that a utility could not impose a higher pole attachment rate for data services because the utility "fail[ed] to provide any. . . justification" as it was unable even to "suggest that it incurs any additional costs in preparing or maintaining its poles as a result of the [cable operator's] installation of fiber optic cables or. . . data transmission activities

[15] *See FCC v. Florida Power Corp.,* 480 U.S. 245, 254 (1987) ("it could [not even be] seriously argued[] that a rate providing for the recovery of fully allocated cost, including the actual cost of capital , is confiscatory"); *Alabama Power Co. v. F.C.C.* 311 F.3d 1357, 1370-1371 (11th Cir. 2002) (holding "implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation"); *RCN Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co.,* 17 F.C.C.R. 25,238, 25,241 (2002) (in which the FCC explained that its "pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation"); *Omnibus Broadband Plan Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan* 110 (2010) ("Broadband Plan").

[16] *See* Ohio Rev. Code § 1332.22(C), which cites the Ohio General Assembly's finding that "[e]nhancing the existing broadband infrastructure and increasing consumer access to robust and reliable broadband products and services are important, statewide concerns; Ohio Rev. Code § 4927.02 (which sets forth the policy of the state to "[E]ncourage innovation in the telecommunications industry and the deployment of advanced telecommunications services; and [N]ot unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services"). *See also Broadband Plan* at 110.

[17] *2011 Pole Attachment Order* at ¶126; *Broadband Plan* at 110.

[18] *In re the Adoption of Chapter 4901:1-3, Ohio Admin. Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of Way by Public Utilities,* Entry, Case No. 13-579-AU-ORD (May 15, 2013), Attachment B Business Impact Analysis, para. 9.

[19] 47 U.S.C. § 224.

conclusion that telecommunications attachments did not justify a higher rate, overhauled its rules to equalize the rates generated by the congressionally ordained cable and telecommunications formulas.[20] Thus, rather than mechanically grafting the FCC's two formulas onto its Ohio-specific regulations, this Commission should pursue its own policy goals of reducing cost inputs for broadband and preserving the fully functional one-rate system in place today. Note that the FCC's recent revamping of its "telecommunications" attachment rates to mirror in most cases the "cable" attachment rates was that agency's effort to avoid as much as consistent with its statutory mandate the complications outlined here. The Commission here can, and should, avoid those complications simply by adhering to its one-rate system.

There is no statutory requirement in Ohio for a two-rate system, and, further, Section 4905.71 does not support such a distinction. The tariffing requirements set forth in Section 4905.71 of the Ohio Revised Code provide that "every telephone or electric light company that is a public utility... shall permit... upon the payment of reasonable charges" for the attachment of facilities to poles and conduit space.[21] As we have noted above, the type of service carried over the facilities attached to a pole has no effect on the costs incurred by the pole owner to provide the attachment space. Consequently, the proposed use of two different rate structures that would result in different rates for different types of services would not be reasonable, and would thus violate the state's pole attachment statute.

---

[20] *See 2011 Pole Attachment Order at 146-149* (in which the FCC concluded that "lowering the telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials" and that the reduction in the rates generated by the revised telecom formula would "approximate the cable rate, advancing [the Commission's] policies"). The U.S. Court of Appeals for the D.C. Circuit upheld the FCC's revisions to equalize the rates generated by the cable and telecommunications formulas, holding that "the Commission's justifications are reasonable" and that the FCC's order therefore "warrants judicial deference." *American Electric Power Service Corp. v. Federal Communications Commission*, 708 F.3d 183, 190 (D.C. Cir. 2013).

[21] Ohio Rev. Code § 4905.71(A).

In an industry environment where different services can be provided over the same wires in absence of statutory requirement as is the case with the FCC, it makes no sense to administer different rates when only physical properties of a pole attachment are what affects pole owner costs. Our revisions to the proposed rules, attached as Exhibit A, reflect the prevailing view that a single-formula rate regime based on the cable rate in Appendix A 4901:1-3-04(A) is preferable for determining attachment rates. In particular, we have proposed revisions to the rules to remove the two-formula system (leaving only the cable formula in Appendix A 4901:1-3-04(A)) as well as removing references in the rules to different types of communications services provided over attachments to utility poles.

IV. CONCLUSION

For the foregoing reasons, the Commission should incorporate the revisions proposed by OCTA to clarify the obligations of pole owners to provide access to their conduits and poles in a timely and transparent manner, to properly allocate the costs of make-ready work, to preserve the regulatory purview of the Commission over pole attachments, and to remove the obligations set forth in the proposed rules that exceed the Commission's authority. The Commission should also consider providing additional remedies for violation of its access rules and timelines. Finally, the Commission should abandon the proposal to introduce a multi-formula attachment rate regime that unnecessarily differentiates between different types of services in a manner that would complicate the Commission's regulatory mission, introduce uncertainty into the business decisions of service

providers, raise rates for consumers, are not justified by cost differences and impede the deployment of broadband services.

Respectfully submitted,

Benita Kahn
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
614-464-6487
bakahn@vorys.com
smhoward@vorys.com

Gardner F. Gillespie by Stephen M. Howard
John Davidson Thomas
Sheppard Mullin Richter & Hampton
1300 I Street NW, 11th Floor East
Washington DC 20005-3314
202-469-4916
ggillespie@sheppardmullin.com
dthomas@sheppardmullin.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 12th day of July, 2013 by electronic mail upon the persons listed below.

Stephen M. Howard

Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com
Randall.Griffin@aes.com
burkej@firstenergycorp.com
stnourse@aep.com
selisar@mwncmh.com

via regular U.S. mail
Dylan T. DeVito
Senior Director
Network Development/Associate General Counsel
Zayo Group, LLC
1805 29th Street, Suite 2050
Boulder, CO 80301

4901:1-3-01 Definitions.

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. 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.~~

(C) "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.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Communications Space" means that portion of the pole typically used for the placement of communications conductors beginning (from the highest vertical point to the lowest vertical point on the pole) below the bottom point of the communications worker safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached.

(F) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(G) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.

(H) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.

(I) "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.

(J) "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.

(K) "Pole attachment" means any attachment of facilities by a cable system, a provider of telecommunications service, or an entity other than a public utility to a pole, duct, conduit, or right-of-way owned or controlled by a public utility. With respect to poles owned or controlled by a public utility, the facilities of a cable system, a provider of

telecommunications service, or an entity other than a public utility shall constitute a "Pole Attachment" only if that facility is in actual direct physical contact with the pole

(L) "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.

(M) "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.

(N) "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.

(O) "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.

(P) "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.

~~(Q)"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.~~

(Q~~P~~) "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, and associated equipment for telecommunications or cable services, and which includes capacity occupied by the public utility.

4901:1-3-02 General applicability.

(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 June 1, 2013.

(B) The obligations found in this chapter, shall apply to (i) 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 (ii) a telephone company and electrical light company that is a public utility pursuant to section 4905.71 of the Revised Code.

(C) The commission may for good cause shown and consistent with state and federal law, waive any requirement, standard, or rule set forth in this chapter, other than a requirement mandated by statute unless such waiver is permitted by the terms of the statute.

(D) Any ~~public utility~~ 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.

(E) All waiver requests must be approved by the commission. Such a request may, at the commission's discretion, toll any time frames.

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 as promptly as is reasonably feasible, but in no case, and except for the enumerated reasons set forth below, less than forty-five (45) days after an attaching party's submission of a written application. Notwithstanding this obligation, a public utility providing electric service 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. If access is not granted within forty-five (45) days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day. 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.~~ on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.

(3) A public utility shall provide an attaching entity as promptly as is reasonably feasible, but in no case no less than sixty (60) days written notice prior to:

(a) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term, or condition of the attaching entity's pole attachment agreement;

(b) Any increase in pole attachment rates; or

(c) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(4) An attaching entity may file with the commission a petition for temporary stay of the action contained in a notice received pursuant to paragraph (3) of this section within fifteen (15) 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 (7) days of the date the petition for temporary stay was filed. No further filings under this section 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 (30) days after the filing of the answer, the petition shall be deemed ~~denied~~ granted.

~~(5) Cable operators must notify pole owners upon offering telecommunications services or any comparable services regardless of the technology used.~~

(B) Timeline for access to public utility poles

(1) Survey

A public utility shall respond as described in paragraph (A)(2) of this section to an attaching entity's ~~within~~ application for attachment as promptly as reasonably feasible, but in no case longer than forty-five (45) days ~~of~~ after receipt of a complete application ~~to attach facilities to its poles~~ (or within sixty days, in the case of larger ~~orders~~ requests for attachments as described in paragraph (B)(5) of this section). ~~This response may be a notification that the public utility has completed a survey of poles for which access has been requested.~~ A complete application is an application that provides the public utility with the information that is reasonably necessary under ~~its~~ reasonable application and access procedures to begin to survey the ~~poles~~ facilities for which access is being sought.

(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~~ the make-ready work necessary solely to accommodate the attachment request as promptly as reasonably feasible, but in no case longer than within fourteen (14) days of providing the response required by paragraph (B)(1) of this section, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this section, within fourteen (14) 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 ~~fourteen~~ forty-five (45) days after the estimate is presented.

(b) An attaching entity may accept a valid estimate and make payment within ~~fourteen~~ forty-five (45) days from receipt of the estimate but before the estimate is withdrawn.

(3) Make-ready

Upon receipt of payment specified in paragraph (B)(2)(b) of this section, the public utility shall notify immediately and in writing all known entities with existing attachments on the facilities that may be affected by the proposed make-ready.

(a) For attachments in the ~~communications space~~ Communications Space, the notice shall:

~~(i) Specify where and what make-ready will be performed.~~

(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 as promptly as reasonable feasible, but that is no later than sixty (60) days after notification is sent (or one-hundred and five (105) days in the case of larger orders, as described in paragraph (B)(5) of this section).

(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.

~~(iv)State that the public utility may assert its right to fifteen additional days to complete make-ready.~~

(iv) State that if make-ready is not completed by the completion date set by the public utility ~~(or, if the public utility has asserted its fifteen-day right of control, fifteen days later)~~, the attaching entity requesting access may complete the specified make-ready, provided that the work is performed by persons qualified to perform such work.

(v~~i~~) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(b) For Pole attachments ~~wireless attachments~~ above the Communications Space, the notice shall:

(i) Identify the individual pole(s) and specify make-ready to be performed on such pole(s) ~~Specify where and what make-ready will be performed.~~

(ii) Set a date for completion of make-ready as promptly as reasonable feasible, but that is no later than ninety days (90) after notification is sent (or one-hundred

and thirty-five days in the case of larger orders, as described in paragraph (B)(5) of this section).

(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.

~~(iv) State that the public utility may assert its right to fifteen additional days to complete make-ready.~~

~~(v)~~(iv) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(c) If a public utility fails to issue a make-ready estimate within the 14-day period required by paragraph (B)(2) of this section, the attaching entity requesting attachment may hire a contractor to perform the required make-ready work at its own expense and in accordance with the requirements and timelines set forth in this section.

(4) For Pole ~~wireless~~ attachments above the Communications Space, a public utility shall ensure that make-ready is completed as promptly as reasonably feasible but in no case later than ~~by~~ the date established under ~~set by the public utility in~~ paragraph (3)(b)(ii) of this section ~~(or, if the public utility has asserted its fifteen-day right of control, fifteen days later).~~

(5) For the purposes of compliance with the time periods in this section:

(a) A public utility shall apply the timeline described in paragraphs (B)(1) through (B)(3) of this section to all requests for pole attachments up to the lesser of three-hundred poles or one-half percent 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 section to larger orders up to the lesser of three-thousand poles or five percent 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 section to larger orders up to the lesser of three-thousand poles or five percent 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 percent of the public utility's poles in the state.

(e) A public utility ~~may~~ shall treat multiple requests from a single attaching entity as one request when the requests are filed within thirty days of one another.

(6) A public utility may deviate from the time limits specified in this section:

(a) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(b) During performance of make-ready for good and sufficient cause that renders it infeasible for the public utility to complete the make-ready work within the prescribed time frame. A public utility that so deviates shall immediately 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 shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(7) If a public utility fails to respond as specified in paragraph (B)(1) of this section, an attaching entity requesting attachment ~~in the communications space~~ may, as specified in section (C) of this rule, hire a contractor to complete a survey. If make-ready is not completed by the date specified in paragraphs (B)(3)(a)(ii) or (B)(3)(b)(ii) of this section, the attaching entity requesting attachment ~~in the communications space~~ may hire a contractor to complete the make-ready~~:~~

~~(a) I~~ immediately, if the public utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attaching entity that it will do so.~~; or~~

~~After fifteen days if the public utility has asserted its right to perform make-ready by the date specified in paragraph (B)(3)(a)(ii) of this section and has failed to complete make-ready.~~

(C) Contractors for survey and make-ready

(1) A public utility shall make available and maintain a current and commercially reasonable ~~keep up-to-date a reasonably sufficient~~ list of contractors ~~it~~ authorized ~~s~~ 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 section (B) of this rule~~.

(2) If an attaching entity hires a contractor for purposes specified in section (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 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 may make ~~final~~ determinations on behalf of the electric utility, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes, subject to the criteria set forth in

Section 4901-1-3-03(A), and subject to the requesting attacher's right to contest such determination using the Commission's complaint or mediation procedures.

(D) Notwithstanding all time frames identified above, parties are free to negotiate different time frames on a case-by-case basis.

~~(E) 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 section is intended to abridge the legal rights and obligations of municipalities and landowners.~~

~~(F) 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.~~

~~(G)~~(E) 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.

~~(H)~~(F) The time frames and basic procedures for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles.

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

(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 proceeding 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 that are not inconsistent with the rates, terms and conditions set forth in the public utility's tariff.

(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 section 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 the rate, term, or condition is just and reasonable in complaint, tariff or other appropriate proceedings. 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 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 sum of the operating expenses and actual capital costs of the public utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) When parties fail to resolve a dispute regarding charges for pole attachments and the commission's complaint procedure under sections 4905.26 or 4927.21 of the Revised Code are invoked, the commission will apply the formulas set forth in the appendix to this rule for determining a maximum just and reasonable rate.

~~(E) Allocation of Unusable Space Costs~~

~~(1) With respect to the formula referenced in the appendix of this rule, a public utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.~~

~~(2) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.~~

~~(3) Public utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formulas referenced in the appendix of this rule. For non-urbanized service areas (under fifty-thousand population), a presumptive average number of attaching entities of three. For urbanized service areas (fifty-thousand or higher population), presumptive average of attaching entities of five. If any part of the public utility's service area within the state has a designation of urbanized (fifty-thousand or higher population) by the Bureau~~

~~of Census, United States Department of Commerce, then all of that service area shall be urbanized for purposes of determining the presumptive average number of attaching entities.~~

~~(4) A public utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:~~

~~all entities seeking access the methodology and information upon which the utilities presumptive average number of attaching entities is based.~~

~~(b) Each public utility is required to exercise good faith in establishing and u date its resum tive avera e number of attachin entities.~~

~~(c) The presumptive average number of attaching entities may be challenged by an attaching entity by submitting information demonstrating why the public utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.~~

~~(d) Upon successful challenge of the existing presumptive average number of attaching entities, the resulting data determined shall be used by the public utility as the presumptive number of attaching entities within the rate formula.~~

~~(F) With respect to the formulas~~

(~~F~~E) With respect to the pole attachment formula~~s~~ referenced in the appendix 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 with a statistically valid survey or actual data.

(~~G~~F) 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 rule 4901:1-3-03(B)(3) of the Administrative Code, only if 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.

(G~~H~~) 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 section, pursuant to 47 U.S.C. 224(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

4901:1-3-05 Complaints.

Any attaching entity or a public utility may file a complaint against a public utility pursuant to sections 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 4201-9 of the Administrative Code shall apply. decision resolving issue(s) presented in a complaint filed pursuant to this section within a reasonable time not to exceed three-hundred and sixty days after the filing of the complaint.

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

(A) All local exchange carriers (LECs) have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way to cable operators and to competing providers of telecommunications services on rates, terms, and conditions that are consistent with 47 U.S.C. 224 pursuant to 47 U.S.C. 251(B)(4), as effective in paragraph (A) of rule 4901:1-3-02 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 pursuant to 47 U.S.C. 252, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code according to procedures established in rules 4901:1-7-8 through 4901:1-7-10 of the Administrative Code.

(B) All public utilities have the duty to provide nondiscriminatory access to poles ducts, conduits, and rights-of-way on just and reasonable terms. If an attaching entity is unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, or rights-of-way, in a situation other than those identified in paragraph (A), either party may petition the commission to mediate such an agreement pursuant to the process outlined in paragraphs (C)(1) through (C)(8) of this section.

(C) Mediation process

(1) Mediation is a voluntary alternative dispute resolution process in which a neutral third party assists the parties in reaching their own settlement. At any point during

the negotiation, any party or both parties to the negotiation may ask the commission to mediate any differences arising during the course of the negotiation.

(2) To request mediation, a party to the negotiation shall notify in writing the chief of the telecommunications section of the commission's legal department and the chief of the telecommunications division of the utilities department of the commission. A copy of the mediation request should be simultaneously served on the other party in the dispute. The request shall include the following information:

(a) The name, address, telephone number, e-mail, and fax number of the party to the negotiation making the request.

(b) The name, address, telephone number, e-mail and fax number of the other party to the negotiation.

(c) The name, address, telephone number, e-mail, and fax number of the parties' representatives participating in the negotiations and to whom inquiries should be made.

(d) The negotiation history, including meeting times and locations.

(e) A statement concerning, the differences existing between the parties, including relevant documentation and arguments concerning matters to be mediated.

(f) The other party to the negotiation shall provide a written response within seven calendar days of the request for mediation to the chief of the telecommunications section of the commission's legal department and to the chief of the telecommunications section of the utilities department, The response to a request for mediation shall be simultaneously served upon the party requesting the mediation.

(3) The commission will appoint a mediator to conduct the mediation. The mediator will promptly contact the parties to the negotiation and establish a time to commence mediation. The mediator will work with the parties to establish an appropriate schedule and procedure for the mediation.

(4) The mediator's function is to be impartial and to encourage voluntary settlement by the parties. The mediator may not compel a settlement. The mediator may schedule meetings of the parties, direct the parties to prepare for those meetings, hold private caucuses with each party, request that the parties share information, attempt to achieve a mediated resolution, and, if successful, assist the parties in preparing a written agreement.

(5) Participants in the mediation must have the authority to enter into a settlement of the matters at issue.

(6) Confidentiality

(a) Discussions during the mediation process shall be private and confidential between the parties. By electing mediation under this rule, the parties agree that no communication made in the course of and relating to the subject matter of the mediation shall be disclosed, except as permitted in this chapter.

(b) No party shall use any information obtained through the mediation process for any purpose other than the mediation process itself. This restriction includes, but is not limited to, using any information obtained through the mediation process to gain a competitive advantage.

(c) As provided in the Ohio Rules of Evidence 408, offers to compromise disputed claims and responses to them are inadmissible to prove the validity of that claim in a subsequent proceeding. Evidence of conduct or statements made in compromise negotiations are also not admissible in a future proceeding. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(7) Parties to the mediation shall reduce to writing the mediated resolution of all or any portion of the mediated issues and submit the resolution to the mediator.

(8) A member of the commission staff or an attorney examiner who serves as a mediator shall, by virtue of having served in such capacity, be precluded from serving in a decision-making role or as a witness on matters subject to mediation in a formal commission case involving the same parties and the same issues.

APPENDIX

4901:1-3-04 (Rates, Terms, and Conditions for Poles, Ducts and Conduits) Pole Attachment and Conduit Occupancy Rate Formulas

(A) The following formula shall apply to attachments to poles ~~by cable operators that solely provide cable services and do not offer any services comparable to telecommunications services~~ regardless of the technology used:

Maximum Rate

= space factor x net cost of a bare pole x carrying charge rate x 0.85

Where:

Space factor = space occupied by attachment ÷ total usable space

~~(B) With respect to attachments to poles by any telecommunications carrier or cable operator providing either telecommunications services or any comparable services regardless of the technology used, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (B)(1) or (B)(2) of this section.~~

~~(1) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(2) of this section:~~

~~Rate = space factor x cost Where~~

~~Cost in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)~~

~~Cost in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate).~~

~~Where~~

~~Space factor = *((space occupied) ÷ (2/3 x (usable space ÷ No. of attaching entities))*~~

~~(2) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(1) of this section:~~

~~Rate = space factor x net cost of a bare pole x (maintenance and administrative carrying charge rate)~~

~~Where~~

~~Space factor =~~

$$\frac{\text{((space occupied) + (2/3 x (usable space ÷ No. of attaching entities))}}{\text{pole height}}$$

(B~~C~~) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}}\right] \times \left[\text{No. of Ducts} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right] \times \text{Carrying Charge Rate}$$

Simplified as:

$$\text{Maximum Rate per Linear ft./m} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½.

Summary: Comments Comments of the Ohio Cable Telecommunications Association electronically filed by Benita Kahn on behalf of Ohio Cable Telecommunications Association