

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Adoption of Chapter |) | |
| 4901:11-3, Ohio Administrative Code, |) | |
| Concerning Access to Poles, Ducts, Conduits, |) | Case No. 13-579-AU-ORD |
| And Rights-of-Way by Public Utilities |) | |

**REPLY COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE
ASSOCIATION AND THE HETNET FORUM**

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TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 1 |
| DISCUSSION | 2 |
| I. THE ADOPTION OF THE FCC CABLE RATE AS THE SINGLE RATE FOR POLE ATTACHMENTS WILL PRODUCE AN OVERALL INCREASE IN INFRASTRUCTURE INVESTMENT | 2 |
| II. CLEAR, CONCISE TIMELINES FOR ACCESS TO POLE ATTACHMENTS WILL PROMOTE FASTER BROADBAND DEPLOYMENT | 4 |
| III. SITUATIONS WARRANTING THE TOLLING OF TIMELINES MUST BE INDEPENDENTLY IDENTIFIABLE | 7 |
| IV. ACCESS TO POLE FACILITIES SHOULD BE UNAMBIGUOUS AND TECHNOLOGY-NEUTRAL | 9 |
| V. UTILITIES SHOULD NOT ACT AS CREATORS AND ARBITRATORS OF SAFETY STANDARDS FOR ATTACHERS TO POLE INFRASTRUCTURE | 11 |
| VI. TEMPORARY ATTACHMENTS AND OTHER CLARIFICATIONS TO THE PUCO DRAFT RULES | 12 |
| CONCLUSION | 14 |

INTRODUCTION

Pursuant to an Entry dated May 15, 2013, the Public Utilities Commission of Ohio (“PUCO”) announced that it was considering adopting a new chapter of rules in 4901:1-3, Ohio Administrative Code (“O.A.C.”), dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities.¹ In its Entry, the PUCO invited interested parties to comment on the proposed rules and to assist in the review required by Executive Order 2011-01K.² Comments and reply comments were originally due on June 14, 2013 and July 1, 2013, respectively; however, the Attorney Examiner entered an Order granting a motion for extension and set a new deadline for initial comments of July 12, 2013 and for reply comments of July 30, 2013.³ PCIA – The Wireless Infrastructure Association,⁴ which represents the wireless infrastructure industry, and the HetNet Forum,⁵ a membership section of PCIA (together “PCIA”), submitted initial comments in response to the Entry on July 12, 2013.⁶ In its comments, PCIA urged the PUCO to

¹ *In re* Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities, *Entry*, Case No. 13-579-AU-ORD (May 15, 2013) (“Draft Rules”), *available at* <http://dis.PUCO.state.oh.us/TiffToPDF/A1001001A13E15B40809A80412.pdf>.

² Executive Order 2011-01K, Establishing the Common Sense Initiative (Jan. 1, 2011), <http://www.governor.ohio.gov/Portals/0/pdf/executiveOrders/EO2011-01.pdf>.

³ Draft Rules; Attorney Examiner *Entry*, Case No. 13-579-AU-ORD (Jun. 4, 2013) <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13F04B34239H59351.pdf>.

⁴ PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications, and broadcasting services. PCIA and its members partner with communities across the nation to effect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community.

⁵ The HetNet Forum, formerly the DAS Forum, is a membership section of PCIA dedicated to the advancement of heterogeneous wireless networks. “Heterogeneous networks” combine “macro”, or large, infrastructure such as monopoles with small cells and distributed antenna systems. By integrating the two types of infrastructure together, carriers are able to target geographic areas to increase network capacity.

⁶ *See* Initial Comments of PCIA – The Wireless Infrastructure Association & The HetNet Forum, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B72723H56133.pdf> (“PCIA Comments”).

provide access to pole tops for wireless attachments, adopt efficient make-ready timelines and revise the calculation of the rates pole owners charge to telecommunications providers in the state of Ohio in accordance with the Federal Communications Commission's ("FCC") 2011 Pole Attachment Report and Order ("FCC Order").⁷ On July, 22, 2013 the Attorney Examiner entered an order granting the extension of the deadline for reply comments to August 29, 2013.⁸ Pursuant to the Commission's Orders of May 15, 2013, June 4, 2013 and July 22, 2013, PCIA now respectfully submits the following reply comments to the proposed rules.

DISCUSSION

In this filing, PCIA focuses on issues related to rates, timelines and access. Greater consistency between PUCO and FCC rules will provide several benefits including clarity as related to the PUCO's delegated authority under 47 U.S.C. § 224(c),⁹ reduced confusion over which rates apply and a lessened administrative burden for attachers operating in Ohio.¹⁰

I. THE ADOPTION OF THE FCC CABLE RATE AS THE SINGLE RATE FOR POLE ATTACHMENTS WILL PRODUCE AN OVERALL INCREASE IN INFRASTRUCTURE INVESTMENT

The PUCO should adopt the 2011 Order's methodology for calculating rental rates charged to pole attachers because they allow for cost-recovery for pole owners and align the

⁷ *In re* Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240 (2011) ("FCC Pole Attachment R&O").

⁸ Attorney Examiner Entry, Case No. 13-579-AU-ORD (Jul. 22, 2013) <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G22B52502F32562.pdf>.

⁹ See Joint Comments of Ohio Power Co., Ohio Edison Co., the Cleveland Electric Illuminating Co., the Toledo Edison Co., the Dayton Power & Light Co. & Duke Energy Ohio, Inc. at 22, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B64022H88734.pdf> ("Utilities Comments").

¹⁰ See Comments of the Ohio Telecom Association at 2, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B14532H96337.pdf> ("OTA Comments").

attachment fees in a technology-neutral way. Cost is a substantial barrier to entry, and “[a]ny reduction in the cost of installation and maintenance of the network increases the economic incentive to invest in a community.”¹¹

The PUCO should not implement the Utilities’ suggested rate formula. The Utilities’ rate formula artificially inflates attachment rates by eliminating the FCC and proposed PUCO multiplier factor and reduces the amount of usable pole space.¹² Utilities state that the PUCO draft rules would create a situation whereby electric ratepayers “cross-subsidize services that they may not even enjoy.”¹³ This argument is without merit. The change in rates does not materially affect utilities’ bottom lines.¹⁴ In truth, “[t]he core business of utilities is to provide utility service to their customers. Leasing pole space to telecoms serves merely as a supplementary revenue source, and will remain so even after reduced rates are implemented.”¹⁵ Utilities’ comments masquerade as meticulous solutions to a problem that does not exist. The PUCO should reject Utilities’ arguments and adopt the draft rate formula.

PCIA believes that the PUCO should adopt a single rate for attachments if the rate utilized is the cable rate. A universal rate framework “that applies to all attaching entities will assist public utilities with processing pole attachment requests in a timelier manner, which will lead to cost savings for both the utility and the attaching entity.”¹⁶ Multiple rate structures would not only complicate the PUCO’s regulation of pole rates, “but it would also decrease the

¹¹ See Comments of Zayo Group, LLC at 2, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B20442I65972.pdf> (“Zayo Group Comments”).

¹² See Utilities Comments at 20.

¹³ See *Id.* at 19.

¹⁴ See Zayo Group Comments at 2-3.

¹⁵ See *Id.*

¹⁶ See Initial Comments of Onecomunity at 7, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B52430F69576.pdf>.

regulatory certainty that pole owners and communications service providers depend on, with no compensating benefit to stakeholders.”¹⁷ PCIA agrees that “by establishing a uniform pole attachment rate formula, the [PUCO] would help secure lower prices and higher quality services for Ohio telecommunications customers and encourage increased deployment of new telecommunications technologies.”¹⁸ The PUCO should adopt the FCC cable rate and apply the rate to all attachers.

II. CLEAR, CONCISE TIMELINES FOR ACCESS TO POLE ATTACHMENTS WILL PROMOTE FASTER BROADBAND DEPLOYMENT

Clear, concise timelines are critical to ensure greater competition, higher quality service and lower prices for the deployment of broadband services. If timelines for deployment are too long, a prospective customer of broadband services may be forced to buy connectivity from an existing provider, or cancel the order for new services.¹⁹ Broadband service is a critical element for business. The promise of new and faster connectivity is significant, but may be outweighed by the need for immediate broadband connectivity from an existing provider. These hard choices are not the types that Ohioans seeking advanced broadband services should be faced with simply because of a failure to adhere to standard timelines for project approval and buildout. The PUCO has an important part to play in insuring that Ohio businesses and consumers have access to competitive services, rates and speeds.

¹⁷ See Comments of the Ohio Cable Telecommunications Association at 11, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B61611E04135.pdf> (“OCTA Comments”).

¹⁸ See Comments of Frontier North Inc. at 8, Case No 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B63908I50527.pdf>.

¹⁹ See Initial Comments of Data Recovery Services, LLC at 4, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B53028F68540.pdf> (“DRS Comments”).

As drafted, the PUCO timelines are too long. Fibertech states that “for wireless attachments, the [PUCO]’s [draft] process, at a minimum, would afford the pole owners 209 days to survey, estimate, and perform the make-ready work, and could afford the pole owners up to 224 days for larger applications.”²⁰ PCIA agrees that while the draft timelines, “represent a starting point, the [PUCO] must go further to remedy the problems associated with excessive delays.”²¹ As highlighted above, customers are not willing or able to wait these periods for service connections. Prospective broadband customers will either choose an existing provider or decline to order new service. Additionally, these time limits are “being interpreted as authorizing pole owners in all cases to wait the full prescribed time period before completing make-ready work and issuing licenses.”²² PCIA supports the regulatory option where an attacher may request a shortened timeline to avoid the absurdity of a handful of poles requiring the exhaustion of the full timeline.²³

PCIA agrees that the independent notification period following the completion of survey work is redundant and therefore supports the elimination of the fourteen day notification period.²⁴ The deletion of the notification period would remove a significant period of time from the attaching process and allow for the attacher and the pole owner to avoid unnecessary time and expense in creating and sending the notification.²⁵

²⁰ See Initial Comments of Fiber Technologies Networks, LLC at 8-9, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B70149E44716.pdf> (“Fibertech Comments”) where Fibertech states the PUCO timelines as drafted are “simply too long”.

²¹ DRS Comments at 7.

²² Fibertech Comments at 9.

²³ See *Id.* at 9-10.

²⁴ *Id.* at 10.

²⁵ *Id.*

Given that the PUCO's timelines may create hardship for wireless attachers, the Utilities' appeals for *lengthened* timelines are inappropriate. Timelines lengthened beyond the PUCO draft rule will result in abandoned projects, increased costs and slowed deployment of broadband services in the state of Ohio. In its comments, Utilities called for doubling of the survey timeline from 45 to 90 days, and from 60 to 120 days for larger orders.²⁶ The requested extension for the estimate period was increased from 14 to 30 days.²⁷ The survey period was increased from 14 to 30 days of receipt of a contractor's survey.²⁸ Utilities also requested the deadline for completion of make-ready be increased from 60 to 150 days and from 105 to 190 days for larger orders.²⁹ This would amount to an increase of approximately five months,³⁰ not including for Utilities' various timeline tolling additions which could increase the time periods even more.³¹

Such requests would have both direct effects on attachers' ability to provide service. The timelines requested are not in line with the FCC's timelines, nor are they in line with several states which have timelines closer to the PUCO's draft rules.³² Further, Utilities' argument that they cannot anticipate the staffing needs for pole attachment requests, that they cannot have "unlimited resources sitting idle while waiting for the next pole attachment application to arrive" certainly paints a vivid picture, but fails to connect the dots as to why they must double, or more

²⁶ Utilities Comments at 27.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 28.

³⁰ 151 days or 161 days for larger orders.

³¹ See Utilities Comments at 28-33 detailing a variety of exceptions to the timelines.

³² See generally FCC Order; See *In re DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures—Phase I*, PURA Docket No. 07-02-13, Decision at 18-19 (Apr. 30, 2008) ("Connecticut").

than double, the timelines in the draft rules; timelines that utilities doing business in other jurisdictions throughout the country operate under today.³³

III. SITUATIONS WARRANTING THE TOLLING OF TIMELINES MUST BE INDEPENDENTLY IDENTIFIABLE

PCIA welcomes the important conversation Utilities raise regarding special conditions in the face of storms and emergencies.³⁴ As fellow providers of vital services, PCIA member companies empathize with the difficult work of power restoration. However, PCIA urges the PUCO to define the types of storms or emergencies that would warrant tolling the make-ready timelines. The suggestion by Utilities that, “if a company’s normal internal staffing is not available due to a weather event or other force majeure event, the make-ready clock should automatically be tolled,” is overly broad.³⁵ Instead, the PUCO should establish clear independent parameters for the types of extraordinary events that would trigger a delay, provide mechanisms for status communications and provide neutral ways for all parties to determine when the event has concluded and when the make-ready timeline can continue.³⁶ The FCC requires such clarification in defining “good and sufficient cause” for delay.³⁷ Under the FCC rules, deviations are not accepted for “routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities

³³ Utilities Comments at 26.

³⁴ *Id.* at 30.

³⁵ *Id.* at 31.

³⁶ DRS also supports additional detail when a deviation from timelines is requested. “If a deviation provision is to be included in the proposed rules, it must articulate and identify specific instances in which a public utility may deviate from the prescribed time requirements, and provide a defined period of time in which a public utility may so deviate.” DRS at 7.

³⁷ *See* FCC Order ¶ 68.

commission rulemaking, that affect pole attachments.”³⁸ The PUCO should adopt similar guidance.

Utilities have also requested that deadlines be tolled for projects requiring local government permitting or the obtaining of easements over private property.³⁹ PCIA member companies are well aware of the inherent difficulties when coordinating with public and private parties in order to obtain lawful access for project installations. However, the timelines themselves serve to account for these types of foreseeable delays. Further, and as detailed above, the need for permitting in and of itself should encourage parties to make requests for easements earlier in the process rather than waiting until the final days of the timeline. For these reasons, the PUCO should not allow tolling under these circumstances.

Utilities have requested a tolling of the make-ready deadlines if “existing attachments are found to be in violation of safety codes, at least until such time as it is agreed which attaching entity is responsible for paying to correct the safety violation.”⁴⁰ Utilities state that they “did not create those violations and should not be responsible for correcting them within the new deadlines.”⁴¹ However, Utilities are not wholly innocent, because they have the opportunity to conduct a post-attachment inspection.⁴² The shifting of the burden to the next party to seek attachment to the pole and the mandate that the parties investigate and “agree” as to which entity should pay for the fix is inappropriate. PCIA would support mechanisms whereby the entity causing the safety violation is identified. PCIA welcomes further discussion about the test

³⁸ *Id.*

³⁹ Utilities Comments at 31.

⁴⁰ *Id.* at 32.

⁴¹ *Id.*

⁴² DRS Comments at 10.

Utilities provided, however new wireless attachers should be allowed to attach so long as the attachment does not exacerbate the existing violation and the make-ready deadlines should not be tolled.

PCIA supports certain enforcement mechanisms “to ensure compliance with the applicable time requirements.”⁴³ The proposed “penalty per day for each day the utility fails to adhere to the established timeline” would serve as liquidated damages and an overall deterrence for timeline abdication.⁴⁴

IV. ACCESS TO POLE FACILITIES SHOULD BE UNAMBIGUOUS AND TECHNOLOGY-NEUTRAL

Utilities’ suggested revisions pertaining to access unfairly disadvantage wireless attachers in Ohio. In its comments, Utilities propose language which would allow pole owners to “restrict future use of bracketing, boxing and extension arms on their poles”.⁴⁵ This policy would unfairly target wireless attachers. While Utilities state that such a policy would free existing attachers from “considerable time and resources in removing their existing attachments,” such a policy would be prejudicial to new parties wishing to attach to the pole with these types of structural apparatus.⁴⁶ In many cases extension arms are required for a wireless attacher to access the fiber runs necessary for network operation. Further, the suggested language that attaching entities use techniques “consistent with the utility’s then-current engineering practices and standards” is overbroad and open to misuse because utilities use varied internal engineering practices that can

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ Utilities Comments at 37.

⁴⁶ *Id.* See FCC Order where “blanket prohibitions on pole top access are not permitted.” FCC Order ¶19.

be leveraged to selectively target new attachments.⁴⁷ The PUCO should therefore not adopt these requested modifications.

Utilities' contention that PUCO rules should allow pole owners to prohibit pole-top attachments should be dismissed.⁴⁸ As PCIA noted in its initial comments, "installation on the top of a pole provides a substantially greater radiofrequency footprint than installations in the lower communications space, and is often necessary to satisfy seamless network design requirements."⁴⁹ Further, with this larger radiofrequency footprint, fewer attachments are required to provide the same amount of coverage. In practice, each Ohio utility could create its own specific construction standards that could unfairly exclude pole-top attachments. The basis for the attachments to the pole should be based on independent engineering standards.⁵⁰ Under the FCC Order, if a utility determines that it wants to deny a pole-top attachment, it must detail reasons that relate to that specific pole.⁵¹ We urge the PUCO to adopt the FCC pole-top framework. PCIA supports proposed changes to rules 4901:1-3-03(B)(3)(b) and 4901:1-3-03-(B)(4), O.A.C., which bring the PUCO's regulations into alignment with the FCC's regulations.⁵²

⁴⁷ Utilities Comments at 37.

⁴⁸ *Id.* at 38.

⁴⁹ PCIA Comments at 8.

⁵⁰ In denying an attachment a utility "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." FCC Order ¶75.

⁵¹ "[W]e find that a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the *particular attachment(s)* and the *particular pole(s)* at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. *Id.* ¶76 (*emphasis added*).

⁵² OTA Comments at 7.

Additionally, PCIA supports clarifications as they relate to the definition of “Communications Space” in Section 4901:1-3-01(E) and its inclusion of pole-top.⁵³

V. UTILITIES SHOULD NOT ACT AS CREATORS AND ARBITRATORS OF SAFETY STANDARDS FOR ATTACHERS TO POLE INFRASTRUCTURE

Utilities’ comments regarding pole loading are impractical in their application and should not be accepted. Utilities request changes to the language of 4901:1-3-03(B)(3)(a)(iii) that would limit the modification of existing attachments that would increase loading on the pole.⁵⁴ If applied as the Utilities suggest, any repair, regular maintenance, or upgrade of even the most inconsequential difference in size, weight or material could trigger an increase in pole loading. PCIA urges the PUCO to maintain the existing framework pole attachers already abide by, that any attachment must comply with the independently-established National Electrical Safety Code (“NESC”).⁵⁵

PCIA disagrees with Utilities’ proposed rule that attachers not be provided with a self-help remedy to hire contractors in the power space.⁵⁶ If the contracted party meets the requisite safety training or is hired by the utilities for similar work, that contractor should be allowed to work on behalf of the attachers in the power space. PCIA believes the draft language’s intent is clear and fosters useful remedies for accelerating the deployment of

⁵³ *Id.* at 5, attachment A at 1.

⁵⁴ Utilities Comments at 42-43.

⁵⁵ The collaborative national standard of the Institute of Electrical and Electronics Engineers, Inc. (“IEEE”) and the American National Standards Institute (“ANSI”), providing for the safeguarding of persons from hazards arising from the installation, operation or maintenance of: (1) conductors and equipment in electric supply stations and (2) overhead and underground electrical supply and communication lines and equipment.

⁵⁶ *See* Utilities Comments at 43 (requesting that the PUCO deny attachers the right to perform work in the power space).

broadband infrastructure including in providing access to the power space. The PUCO should not amend the draft rule.

Utilities' requested authority to levy penalties on unauthorized attachments of up to \$100 in tariffs and pole attachment agreements should be denied.⁵⁷ PCIA members abide by NESC codes and to the extent safety violations are found the PUCO should be the body assessing and collecting such fees. A regulatory environment in which the pole owners assess and collect fees from their tenants would constitute a conflict of interest. Resolution of any safety disputes, including any fines, should reside with the PUCO.

VI. TEMPORARY ATTACHMENTS AND OTHER CLARIFICATIONS TO THE PUCO DRAFT RULES

PCIA supports attachers' ability to "employ temporary attachments to serve a customer prior to the expiration of any prescribed licensing timeframes."⁵⁸ Temporary attachments can accommodate urgent needs for service and can act as a positive mechanism to speed the deployment of broadband services. Language that encourages the deployment of temporary attachments will aid in providing Ohioans with increased access to broadband services.

PCIA agrees with other commenters that revisions are required to clarify the definition of "attaching entity" in Rule 4901:1-1-3-01(A), O.A.C and supports the OTA amendments.⁵⁹ As currently drafted the definition excludes reference to R.C. § 4905.71 which requires that an attaching entity be "authorized" prior to attachment.⁶⁰ Further, clarification is required to account for instances when a utility itself may be an attaching entity. PCIA supports a modification that

⁵⁷ *Id.* at 34.

⁵⁸ Fibertech Comments at 14.

⁵⁹ OTA Comments at 3-4.

⁶⁰ *See* Initial Comments of the AT&T Entities at 4-5, Case No. 13-579-AU-ORD (filed Jul. 12, 2013), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13G12B50329J48529.pdf> ("AT&T Comments").

would remove the phrase “other than a public utility” from Rule 1(K).⁶¹ Utilities should operate under the same rules as fellow attachers.

PCIA does not support the mandated use of Utilities’ Electronic Notification Systems (“ENS”) at this time.⁶² Any ENS should be developed in partnership with all users of the system. A system designed and implemented without consultation with the end-user can result in more work, not less.⁶³ For example, internal staffing designations would have to be applied so that attachers can track the electronic notifications and take the appropriate actions. However, a well-designed system constructed with end-user input has the potential to reduce errors and increase efficiencies. PCIA would welcome further conversations regarding the proposal.

⁶¹ *Id.* at 6.

⁶² Utilities Comments at 38.

⁶³ *See generally* FREDERICK P. BROOKS JR., THE MYTHICAL MAN-MONTH: ESSAYS ON SOFTWARE ENGINEERING (Addison-Wesley Professional; Anniversary edition 1995) (1986).

CONCLUSION

For the foregoing reasons, PCIA urges the PUCO to adopt a framework that provides clear access to utility infrastructure—including pole-tops—accelerates the make-ready timelines and adopts a rate formula in line with the 2011 Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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



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Summary: Reply Comments of PCIA - The Wireless Infrastructure Association and The HetNet Forum electronically filed by Mr. D. Zachary Champ on behalf of PCIA and The HetNet Forum