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**

REPLY COMMENTS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

The Ohio Cable Telecommunications Association ("OCTA") respectfully submits these Reply Comments in the captioned docket. In so doing, OCTA reaffirms and incorporates by reference its Initial Comments submitted in this proceeding, including, specifically, the draft rule revisions attached to those Initial Comments.

I. INTRODUCTION

Notwithstanding the diversity of commenters and of the views expressed in the parties' initial comments, there was significant agreement on important matters. In particular, there was broad agreement among communications attachers (both as to "wireless" and traditional wire-based facilities deployments) that structure access processes should be streamlined[1] and that the costs of such access should be tied more tightly to the party causing the costs.[2] And while the divide among the commenters falls between communications parties on the one hand, and electric-utility pole owners on the other, there seems to be general agreement that there should be

[1] *See* Initial Comments of PCIA – the Wireless Infrastructure Association and the Hetnet Forum at 7-10 (filed July 12, 2013) ("PCIA Comments"); Initial Comments of Fiber Technologies Networks, LLC at 6-7 (filed July 12, 2013) ("Fibertech Comments"); Initial Comments of Data Recovery Services, LLC at 7-8 ("DRS Comments").

[2] *See* Joint Comments of Ohio Power Company, Ohio Edison Company, the Cleveland Electric Illuminating Company, the Toledo Edison Company, the Dayton Power and Light Company, and Duke Energy Ohio, Inc. at 19 ("Electric Utilities Comments"); DRS Comments at 10-11; Comments of Ohio Cable Telecommunications Association at 4 ("OCTA Comments").

only one rental-rate methodology.[3] There is no reason to change the existing Ohio formula[4] that has been found time and again to be fully compensatory to the pole owner[5] and is – by far – the most prevalent across all the states.

The electric utility commenters, however, have a unique and shocking view: they advocate the adoption of a rate methodology that would more than triple regulated pole attachment rates in Ohio and generate dramatic windfalls.[6]

Following the sequence of our initial comments, OCTA replies first to the non-rate, terms and conditions issues raised and then addresses rates.

II. NON-RATE TERMS AND CONDITIONS MUST FACILITATE THE CONTINUED EXPANSION OF BROADBAND

A. Access Procedures Should Expedite Deployment With Costs Assigned to the Cost-Causer

The wide-ranging social benefits of broadband only are enjoyed where facilities are deployed and operational.[7] OCTA members over the years have shared experiences similar if not identical to those articulated by other communications commenters like Fibertech, PCIA and TWTC – each of whom are seeking to fulfill the imperatives of broadband. Long access delays are infeasible as a business matter,[8] and detrimental to Ohio's broadband policy objectives.[9]

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[3] *See* Initial Comments of OneCommunity at 6-7 ("OC Comments"); Comments of Frontier North, Inc. at 7 ("Frontier Comments"); Electric Utilities Comments at 19.

[4] *See* OCTA Comments at 9-10.

[5] *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999); *Southern Co. Serv. Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 200), *rev'd*, 534 U.S. 327 (2002); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 345 F.3d 1033 (11th Cir. 2003); *Re: Columbus and Southern Electric Company,* 50 PUR 4th 37 (1982).

[6] *See* Electric Utilities Comments at 20-22.

[7] *See* OC Comments at 5; Fibertech Comments at 4; PCIA Comments at 11; Comments of Zayo Group, LLC ("Zayo Comments") at 1.

[8] *See* PCIA Comments at 7; Fibertech Comments at 6.

Prohibitive deployment costs and deployment delays – another form of cost – remain a significant impediment[10] and should be addressed in a manner consistent with OCTA's proposed revisions to the Commission's rules,[11] with expedited formal and informal (mediation) dispute-resolution procedures to apply where negotiation fails.[12] Access to the pole resource should be expeditious and cost based, with the cost-causer responsible for compensating the pole owner, as well as existing attachers that must move plant to accommodate the new attachments of others.[13]

Even though cable operators' networks are more widely deployed than some newer, "pure-fiber" competitors, permitting and make-ready delays continue to be an issue for line extensions and similar kinds of projects. Ohio cable operators today continue to experience permitting delays, as well as difficulties associated with plant surveys and coordination of make-ready construction on a timely basis. Cable operators also have observed increases in non-recurring charges associated with permitting and engineering functions that must continue to be monitored. Access timelines, access standards tied closely to the physical differences between the hardware deployed and variations in plant and plant configurations ("wireless" facilities placed on the pole top, for example, involve engineering and construction considerations different than, say, overlashing fiber to an existing strand), the use of qualified third-party contractors, third-party referees and staff-sponsored mediation are among the solutions to the real access difficulties documented in the record so far.[14] Ultimately, distinctions among

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[9] *See* OC Comments at 5; Fibertech Comments at 16-17.

[10] *See* Fibertech Comments at 16-17; PCIA Comments at 10.

[11] *See* OCTA Proposed Revisions to Sections 4901:1-3-03 (Attachment A to OCTA's Initial Comments).

[12] *See* Proposed Revisions to Section 4901:1-3-06.

[13] *See* DRS Comments at 11; Electric Utilities Comments at 19.

[14] *See* PCIA Comments at 15; DRS Comments at 7; OTCA Comments at 7-8.

attachers only can be justified if the physical properties of the *attachments* are materially and substantially different.

Even after plant has been deployed (and it is critically important to understand that the new attacher must pay the upfront costs associated with its attachment, *in addition to* the recurring rent for the space that it occupies on the pole),[15] the Commission must continue its critical formal and informal dispute-resolution functions to address pole-owner initiatives to impose unreasonable costs on attachers that cannot be resolved by the parties themselves. These costs can take numerous forms, including inappropriate assignment of costs related to pole replacements, make-ready, plant inventories and so-called safety audits – as well as the "remediation" activities and costs that flow from these activities.

Stated differently, efficient plant deployment is only the beginning. Once networks are deployed, attachers and regulators alike must ensure that pole-related costs are pinned tightly to sound economic principles. Nowhere is this more important than rental rates which recur year after year.

III. THE COMMISSION SHOULD CLARIFY THAT ITS EXISTING RATE FORMULA APPLIES TO ALL NON POLE-OWNING COMPETITORS

A. There Should Be One Rate Applicable To Cable and Other Competitive Providers

Most or all of the commenters seem to share the perspective that there should be only one rate formula in place.[16] As indicated in our initial comments, a two-rate environment, one for

[15] One imperfection in prevailing pole rate and regulatory regimes that confers substantial but frequently overlooked benefits to pole owners is the fact that if a pole needs to be replaced to accommodate a new attacher, the new attacher has to pay the entirety of the capital costs of the pole (plus the costs associated with transferring the facilities of other attachers from the new pole). Despite the fact that the new pole was bought and paid for by the new attacher, that pole becomes the property of the utility, on which the new attacher pays rent – year after year.

[16] *See, e.g.,* OC Comments at 6-7; Frontier Comments at 7-8; Electric Utilities Comments at 19; OCTA Comments at 9.

"cable" and one for "telecommunications" is a prescription for market distortions, commercial and legal uncertainty, disputes and litigation. The FCC, in articulating that broadband is virtually synonymous with profound and far-reaching economic and societal benefits, made the explicit connection between pole rates and broadband, concluding, in 2010, that "[t]o support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible. The rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is "just and reasonable" and fully compensatory for utilities."[17] And, unlike the FCC, which labors under a statutory obligation to implement and administer two separate rates for "cable" and "attachments used by telecommunications carriers,"[18] this Commission carries no such burden. Notwithstanding this statutory burden, in 2010 the FCC explicitly noted in the National Broadband Plan the policy and practical challenges associated with its two-rate universe:

> Applying different rates based on whether the attacher is classified as a "cable" or a "telecommunications" company distorts attachers' deployment decisions. This is especially true with regard to integrated, voice, video and data networks. This uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers). By expanding networks and capabilities, these providers risk having a higher pole rental fee apply to their entire network.
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> FCC rules that move toward low rates that are as uniform as possible across service providers would help remove many of these distortions. This approach would also greatly reduce complexity and risk for those deploying broadband.[19]

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[17] *Connecting America, The National Broadband Plan*, Chapter 6.1 "Improving Utilization of Infrastructure" at 128. (FCC 2010), http://download.broadband.gov/plan/national-broadband-plan-chapter-6-infrastructure.pdf (site last visited Aug. 28, 2013).

[18] 47 U.S.C. 224(d) ("cable rate"); *see also* 47 USC 224(e) ("telecom rate").

[19] *National Broadband Plan* at 129-129 (internal citations omitted).

Ultimately, and after considerable effort, the FCC diminished the extreme rate differentials that existed between the "cable" and "telecom" rates and the pole-rate related distortions they create.[20] Unlike the 30 states that are regulated at the FCC, Ohio does not have this two-rate problem and it, respectfully, should not create one here. The Commission, accordingly, should affirm that its existing rate formula applies to the attachments of all non-pole-owning competitors.

B. The Applicable Rate Formula Should Remain In Effect

The initial comments make it abundantly clear that moving to a two-rate world is a solution in search of a problem[21] – or perhaps more accurately, a problem that could imperil a solution that has worked and worked extremely well in Ohio for more than 30 years.

Specifically, Ohio's fully allocated rate formula,[22] which is the same as the FCC's "cable" formula, should be reaffirmed here. It is in effect today in 30 FCC jurisdictions[23] (and has been since the early 1980s) and is in effect in numerous other "certified" state jurisdictions, and has been found time and again to be fully compensatory to pole owners,[24] including by this Commission that not only explicitly found the formula to be compensatory in formal

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[20] *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.") *affirmed American Elec. Power Corp, et al. v. FCC,* Case No. 11-1146 (D.C. Cir. 2013).

[21] *See, e.g.,* Electric Utilities Comments at 3.

[22] *See In Re Cincinnati Bell for Authority to Adjust its Rates and Charges and to Change its Tariffs*, Case No. 81-1338-TP-AIR at 42 (PUCO Jan. 7, 1983); *Re: Columbus and Southern Electric Company,* 50 PUR 4th 37 (1982).Ohio Admin. Code 4901:1-7-23(B).

[23] *States that Have Certified That They Regulate Pole Attachments*, DA 10-983 http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-893A1.pdf (FCC 2010). *See also* note 32, *infra.*

[24] *See,* note 31, *infra.*

proceedings,[25] but by ratifying rates based on the Ohio formula in numerous pole-rate settlements over the years with Ohio pole owners.[26] Moreover, because the formula is populated with the publicly-available data of the regulated pole owners, and the elements of it are so well-known, verifying new pole attachment rates has become a predictable and usually routine administrative process between pole owners and attachers. The net result has been that the formula has solved exponentially more controversies than ever have arisen to the level of full-on dispute over its 31-year history. The Commission should clarify that this methodology – and its underlying policies that are at least as vital today as they were when they were first adopted decades ago – applies to all attachments of a cable system (and all attachments of other non-incumbent competitors too).

1. The Basic Elements Of The Ohio Formula

The Ohio formula is cost-based, relying on the utility's actual, documented pole-related costs, and allocates to the attaching party its appropriate share. The Ohio formula (again, identical to the FCC's formula) already is at the high end of the range that Congress set for the FCC. Congress allowed the FCC to find that pole attachment rates are "just and reasonable" if they are within the range of (i) the utility's "incremental" or "but for" costs incurred in providing a pole attachment service and (ii) an appropriate share of its "fully allocated" costs – those costs that would exist even in the absence of any pole attachments. *See* 47 U.S.C. § 224(d); S. Rep.

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[25] *See* note 22.

[26] *See, e.g. In re Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates,* Case No. 08-709-EL-AIR (Opinion and Order, July 8, 2009) and *In re Application of AEP Ohio for an Increase in Electric Distribution Rates,* Case Nos. 11-351-EL-AIR and 11-352-EL-AIR (Opinion and Order, December 14, 2011). This demonstrates that the electric utilities believed they were fully compensated using the Ohio formula. Further, in determining the reasonableness of a stipulation, the Commission must consider whether the package benefits ratepayers and the public interest and if the package violates any important regulatory principle or practice. *See, e.g. Cincinnati Gas & Electric Co.,* Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.,* Case No. 91-698-EL-FOR et al. (December 30, 1993).

No. 95-580, at 19-20 (1977). Congress permits the FCC to charge up to the higher "fully allocated" rates which it decided to do; and this Commission followed suit. Under that formula, cable operators contribute to the overall costs of the pole owner above and beyond any incremental costs incurred by the pole owner, adding benefit to the utility and its customers.

As explained, in more detail below, the Ohio formula's allocation method assigns to the attaching party that portion of the costs of the **entire pole** represented by the proportion of the average pole's usable space used by the attacher.[27] Assuming that an average pole has 13.5 feet of usable space, and assuming that an attachment uses one foot of that space, the FCC method assigns 1/13.5 or 7.41 percent, of the annual costs of the entire pole to the attacher.

2. The Same Formula Used In Ohio Is Well-Understood, Has Been Refined In Scores Of Regulatory Decisions, And Has Been Reviewed And Approved In More Than A Dozen Judicial Decisions.

The first FCC Report and Order under Section 224 was issued in 1978. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978). Since then, the FCC has issued many Reports and Orders in rulemaking proceedings interpreting and refining its rate analysis under Section 224.[28] It has issued scores of

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[27] Opponents of the formula often erroneously characterize the formula as not charging for the cost of the pole's unusable space. But that is not correct. The formula charges cable operators the same percentage of the costs of the unusable space as it charges for the rest of the pole costs. In other words, the formula's carrying charge element factors in the *entire pole* not just that part that is usable (or actually used) by the communications attacher. *See Alabama Cable Telecomm's Ass'n. v. Alabama Power Co.*, 16 FCC Rcd 12209, 12236 ¶ 60 (2001) ("Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.").

[28] *See, e.g.*, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 FCC 2d 187 (1980); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 (1987); *aff'd, Memorandum Opinion and Order on Reconsideration*, 4 FCC Rcd 468 (1989); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 (2011), *aff'd sub nom. Am. Electric Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) ("2011 Pole Attachment Order").

decisions in connection with complaints brought under the Section.[29] Beginning in 1981, the Federal Courts of Appeals (and the Supreme Court) have issued more than a dozen opinions on review of FCC orders and decisions under Section 224.[30] There is no question that the application of the FCC's rate analysis under Section 224 is well-established, well-known, and judicially sanctioned. In their decisions, the courts – including the Supreme Court – have held that pole rates calculated under the FCC's methodology are fully compensatory and do not provide any subsidy to the cable operators attaching to the poles.[31]

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[29] *See, e.g., Panhandle TV v. Potomac Edison Co.*, PA 83-0019, PA 83-0021, PA 83-0025, 1984 FCC LEXIS 2131 (Aug. 10, 1984); *American Television & Commc'ns Corp. v. Wisconsin Power & Light Co.*, PA 82-0066, PA 82-0077, 1985 FCC LEXIS 4136 (Dec. 31, 1984); *Group W. Cable v. Wisconsin Elec. Power Co.*, PA 92-0062, 82-0071, 82-0070, 1985 FCC LEXIS 3476 (Apr. 9, 1985); *Continental Cablevision of New Hampshire, Inc. v. Concord Elec. Co.*, PA 82-0074, 1985 FCC LEXIS 3023, (June 28, 1985).

[30] *See, e.g., Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (upholding a set of Commission Orders promulgating rules and policies for rate regulation under the Pole Attachment Act, in particular the determinations regarding usable space, rate methodology, and the prospective application to all attachments); *Alabama Power v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (vacating a Commission modification of a pole attachment agreement because the Commission failed to fairly and accurately calculate the maximum allowable rate); *Texas Power & Light Co. v. FCC*, 784 F.2d 1265 (5th Cir. 1986) (holding that the Commission acted arbitrarily and capriciously by denying the utility company the right to include deferred taxes in its tax base and that the utility is entitled to include a component of its investment in private rights of way in its calculation of pole attachment rates); *Florida Power Corp.*, 480 U.S. 245 (rejecting a claim that the Pole Attachment Act violated the Takings Clause); *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (affirming Commission's ability to prohibit utility from charging an unregulated rate because the attachment was carrying non-video communications); *Gulf Power*, 534 U.S. 327 (holding that attachments carrying commingled services, as well attachments providing wireless telecommunications, fall within the Pole Attachment Act); *Southern Co.*, 293 F.3d 1338 (upholding the Commission's Orders implementing the 1996 Amendments to the Pole Attachment Act with regard to rules regarding reserve space, scope of third party access, and pole modification notices); *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (rejecting an as-applied Fifth Amendment challenge to the Commission's rate methodology for pole attachments); *Southern Co.*, 313 F.3d 574 (affirming three Commission Orders implementing amendments to the Pole Attachment Act; the disputed Orders assured that telecommunications providers can obtain attachment space at just and reasonable rates); *Public Service Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (affirming Commission's modification of underlying agreement as a reasonable exercise of authority under the Pole Attachment Act); *Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033 (rejecting a Fifth Amendment challenge to a Commission-imposed pole attachment rate); *Gulf Power Co. v. FCC*, 669 F.3d 320 (D.C. Cir. 2012) (plaintiff barred from pursuing a Takings Claim by *Alabama Power;* Commission correctly applied *Alabama Power* to the instant case); *American Elec. Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (affirming the Commission's 2011 Pole Attachment Order).

[31] *See, e.g., Florida Power Corp.*, 480 U.S. 245 (rejecting a claim that the Pole Attachment Act violates the Takings Clause); *Alabama Power*, 311 F.3d 1357 (rejecting an as-applied Fifth Amendment challenge to the Commission's rate methodology for pole attachments); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) (finding that the FCC methodology under the Pole Attachment Act provides just compensation); *2011 Pole Attachment Order*, 26 FCC Rcd 5240, 5322 ("We find no evidence in the record that

The vast majority of states that regulate pole attachments have adopted the FCC's analysis for determining whether pole rates are reasonable.[32] Ohio is one prominent example of a state's wholesale adoption of the FCC rate methodology. Ohio's "certified" neighbors that have chosen to regulate pole attachment – Kentucky, Illinois and Michigan among them – have opted for the FCC formula.[33] Ohio's other neighbors, like Pennsylvania, Indiana and West

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supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates.").

[32] Twenty-one States (including the District of Columbia) displaced FCC jurisdiction with their own pole attachment regulation. *See* 47 U.S.C. § 224(c); *States That Have Certified That They Regulate Pole Attachments,* Public Notice, WC Docket No. 10-101, 25 F.C.C.R. 5541, 5541-42 (2010). Although the States are entitled to adopt other rate calculation formulas, almost every state exercising pole attachment jurisdiction has adopted or relies heavily on the same formula, or a similar formula, to that used by the FCC to set reasonable pole attachment rates for cable operators: **Alaska,** *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 - 3 AAC 52.940,* Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002); **California,** *Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service,* R.95-04-043, 1.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998); **Connecticut,** *Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access,* Docket No. 05-06- 01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep't of Pub. Util. Control 2005); **District of Columbia,** *Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbia,* Order No. 12796 (2003); **Idaho,** Id. Code § 61-538; **Illinois,** Ill. Admin. Code § 315.20; **Kentucky,** *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Ky. Pub. Serv. Comm., No. 251, at *8 (Sept. 17, 1982); **Massachusetts,** *A Complaint and Request for Hearing of Cablevision of Boston Co.,* D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998); **Michigan,** *In the Matter of the Application of Consumer Power Company,* Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis *26* (1997), *reh'g denied,* 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm 'n,* No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm 'n,* No. 113689 (Mich. Sup. Ct. Aug. 31, 1999); **New Jersey**, *Regulations of Cable Television Readoption with Amendments: N.J.A. C. 14:18,* Docket No. CX02040265 (2003); **New York,** *In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095,* 997 N.Y. PUC Lexis 364 (1997); *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tar Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers,* Case 01-E-0026 (2001); **Ohio**, *Re: Columbus and Southern Electric Company,* 50 PUR 4th 37 (1982); **Oregon,** *Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety,* AR 506; 510 at p. 10 (2007); **Utah,** UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006); *In the Matter of an Investigation into Pole Attachments,* 2006 Utah PUC Lexis 213 (2006); **Vermont,** Vt PSB Rule 3.703; *Vermont Policy Paper and Comment Summary on PSB Rule 3.700* (2001) at 6; and **Washington**, Rev. Code Wash. § 54.04.045.

Two states — **Arkansas** and **New Hampshire** — have not yet adopted a pole attachment rate formula. *See* Ark. Code Ann. §§ 23-4-1001 *et seq.*; *Re Act: 740 of 2007*, Ark. Pub. Serv. Comm., Docket No. 08-073-R, Order No. 5 (July 30, 2008); NH Code of Admin. Rules § 1304.06.

[33] *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Ky. Pub. Serv. Comm., No. 251, at *8 (Sept. 17, 1982); Ill. Admin. Code § 315.20; *In the Matter of the Application of Consumer Power Company,* Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis *26* (1997), *reh'g denied,*

Virginia are all FCC states.[34] This regulatory and geographic consistency should be sustained here in Ohio. There is no need and no reason for the Commission to reinvent the wheel, or accept the utilities' fix for something that is still rolling true after 30 years.

C. The Electric Utilities' Proposal Would More Than Triple Pole Rents and is Not In the Public Interest

The electric commenters, while agreeing that there should be one regulated rate (but disagreeing with the ILECs that a regulated rate should be applied to them) urge the adoption of a repeatedly discredited formula that never has been adopted by an expert regulatory agency like this Commission and that would result in the near-quadrupling of the regulated pole-attachment rate in Ohio. At a time when this Commission and others are looking for ways to make broadband more widely available and to facilitate the deployment of broadband infrastructure, the electric companies are headed in the wrong direction.

1. The Utilities' Proposal Assigns Disproportionate Pole Costs to Cable and Other Competitors

The utilities propose a formula that assigns a disproportionately large amount of the pole to communications attachers. Specifically – and assuming a pole that has three communications attachers – the utility methodology would assign more than 80% of the annual pole costs to communications attachers, when those attachments actually use but a small fraction of the pole.[35]

1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm 'n,* No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm 'n,* No. 113689 (Mich. Sup. Ct. Aug. 31, 1999).

[34] *States that Have Certified That They Regulate Pole Attachments*, DA 10-983 http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-893A1.pdf (FCC 2010).

[35] *See* note 6.

The utilities' proposal follows the same *basic* structure of most regulated pole-rate formulas in effect in the United States for which there are three elements – the first two of which are uncontroversial.

First, the **net book investment:** [(total pole investment) – (accumulated depreciation) – (accumulated deferred income taxes) – (appurtenance deduction of 15%)].

Second, the **annual carrying charges**: taxes, administration and general, depreciation, rate of return and maintenance.

Third, **the space allocation factor**. This last element defines the percentage of the physical space of the pole that is assigned to the attaching party. This is where the utilities' proposal diverges sharply from the Ohio formula and what long has been considered acceptable and appropriate.

The Ohio allocation factor (the portion of the annual pole costs assigned to cable) is 7.41%. This allocation factor is reached by presuming that:

- ✓ The "typical" pole used for competitive communications attachments is 37.5 feet tall.
- ✓ 13.5 feet of this "typical" pole is usable.
- ✓ Cable companies use 1 foot of that usable space.

Applying these principles produces the allocation factor : 1/13.5 = 7.41%.

By contrast, the utilities propose a space-allocation methodology that vaults from 7.41% to nearly than 27%.[36] They do so by, first, converting the 40" (3'3") communications worker safety zone from "usable space" to "unusable space."[37] Then, after accounting for the one foot of usable space that cable operators (and others) use, the utilities allocate one-third of the now

[36] *See id.* at 20.

[37] *See id.* at 21.

greatly-expanded *unusable* space to those attachers.[38] The assignment of the communications worker safety zone is radical, unjustified and, most tellingly, never been accepted by an expert regulatory agency, primarily because the space, in practice is both used and usable by the pole owners for attachments, including, among other things, street light installations.[39]

The specifics of the utilities' proposal are as follows:

- × The "typical" pole used for competitive communications attachments is 37.5 feet tall.
- × The utilities' discredited allocation defines 27.25 feet of this "typical" pole is **unusable**.
- × Competitive communications companies use 1 foot of that usable space.
- × There are 3 attaching parties.

Applying ***these*** principles, the utilities' proposal assigns communications attachers 10.08 feet, or approximately **27%** of the total pole space.[40] Thus, application of the utilities' proposal would increase rates calculated under the Ohio formula by a factor of **3.63**.[41] The practical consequences of this windfall are alarming.

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[38] *See id.* at 20.

[39] *See, e.g.*, Memorandum Opinion and Order, *Amendment of Rules for the Regulation of Cable Television Pole Attachments*, FCC 80-90, ¶ 4, rel. March 10, 1980 (rejecting argument that the safety space should be allocated to the cable operator); Memorandum Order and Opinion, *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, FCC 84-325, ¶10, rel. July 25, 1984 (same, on the ground that utilities make profitable use of the safety space); Report and Order, *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, rel. ¶ 20, Apr. 3, 2000 (same).

[40] The arithmetic

- o 1 foot of usable space + (27.25 / 3) / 37.5
- o 1 + 9.08 / 37.5
- o 10.08 / 37.5
- o **= 26.88%**

[41] The arithmetic: 26.88 / 7.41 = **3.63.**

Applying the Ohio elements of a 37.5' pole with 13.5 feet of usable space, and assuming three feet of communications space, about 22%[42] of the pole's usable space is used by communications (but with only one foot used by cable). This in turn would leave 10.5 feet, or about 78% used by the electric company. But the utilities' proposal turns this field reality on its head – and then some.

Applying the 27% allocation factor to *each* of the three communications parties on the pole would allow the pole owner to collect 81%[43] of the annual cost of the pole from parties that use only 22% of the asset. Conversely, under its proposal, the electrics would pay only 19% of the costs, when it occupies more than 78% of the usable space![44]

2. Effects of the Utilities' Proposed Windfall

First, assuming that the average pole attachment rate that Ohio Cable operators pay to Ohio's investor-owned electric utilities is $5.00, if the utilities' proposal were adopted, this rate overnight would jump to $18.15.[45]

Second, the electric utilities state that, collectively, they own approximately 3 million poles.[46] If one assumes that approximately one-half of those poles have communications attachments and that there are two communications attachers on each of those poles (standard industry rules-of-thumb), then there would be approximately 3 million communications attachments on the investor-owned utilities' poles. The utilities' space allocation proposal, then,

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[42] 3 / 13.5.

[43] 27 x 3 = 81.

[44] This analysis applies only to space occupancy and does not attempt to factor in such items as increased load burdens and the fact that much of the pole's unusable space is needed by the utility to ensure that its facilities maintain the far higher ground clearance requirements for its energized electric facilities – requirements that exist whether or not communications attachments were on the poles.

[45] $5.00 x 3.63 = **$18.15**.

[46] *See* Electric Utilities Comments at 2- 3. The utilities state that they own 2,996,100 poles.

would produce a per-attachment windfall in the amount of $13.15.[47] Applying this per-attachment windfall to 3 million attachments would generate an aggregate *annual* windfall of approximately **$40 million** per year – year after year.[48]

Third, the utilities' proposed allocation also ignores the relative usage and demands that the respective users place on the pole. Inherently dangerous electric utility plant is and must be located at the top of the pole. This is significant because all of the pole that is set in the ground *and* the vertical pole space needed for clearing both communications and electric facilities from the ground would be needed by the electrics alone, whether or not there were communications attachments on that pole. Electric facilities also weigh far more than fiber-optic and coaxial cable, and consist of heavy, thick copper conductors, bulky equipment such as transformers, capacitor banks, cross-arms, mechanical switches and other devices that take up far greater space and impose far greater strains on the pole than communications facilities. This greater strain is a function of both the far heavier weight of the electric facilities and the fact that they are placed at the top of the pole, at points farther from the ground.

In addition to the facial inequity of their proposal, and the windfall that it would generate for electrics at the expense of broadband, the electric commenters here are fighting the same space and cost-allocation battles that they fought, and lost, more than 30 years ago. They are, moreover, doing so at a time when the economic and policy imperatives for broadband are at least as compelling as when pole regulation first emerged in the late 1970s. In any case, the boldness of the utilities' proposal serves as a powerful reminder as to why the essential pole resource must continue to be regulated – and why their rate proposal must be rejected.

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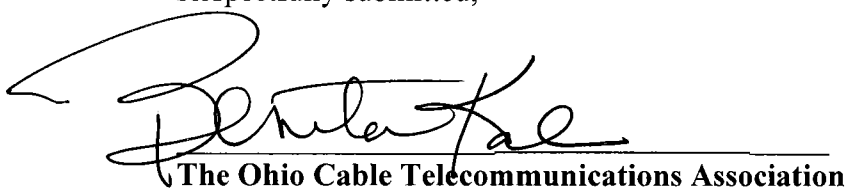
[47] $18.15 - $5.00 = **$13.15**

[48] $13.15 x 3,000,000 = **$39,450,000**.

IV. CONCLUSION

For these reasons, OCTA urges the adoption of rules and procedures consistent with these Reply Comments, OCTA's Initial Comments and the OCTA draft rules attached to those Initial Comments. Specifically, OCTA urges the Commission to adopt principles and procedures that facilitate efficient access to the pole resource and to clarify that the existing Ohio rate formula which has been in effect for more than 30 years apply to all attachments of a cable system and of competitive communications companies.

Respectfully submitted,



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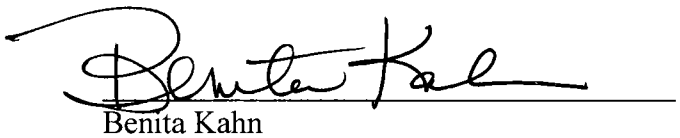
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Comments of the Ohio Cable Telecommunications Association was served this 29th day of August, 2013 by electronic mail upon the persons listed below.



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