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

FINDING AND ORDER

The Commission finds:

(1) Pursuant to 47 U.S.C. 224(c)(2), this Commission certified to the Federal Communications Commission (FCC) that we regulate the rates, terms, and conditions for pole attachments, and in so regulating, have the authority to consider, and do consider, the interests of subscribers of cable television, as well as the interests of the consumers of the utility services. *See* Ohio Adm.Code 4901:1-7-23 and *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 F.C.C. Rcd 5541 (WCB 2010), App. C. Based upon this state certification, the FCC will not exercise federal jurisdiction of pole attachments as provided in 47 U.S.C. 224(a) and (b).

(2) On January 10, 2011, the Governor of the state of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative," which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among other things, the Commission must review its rules to determine the impact that a rule has on small business; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth.

(3) Additionally, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against a business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to

eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative (CSI) office the draft rules and the BIA.

(4) Pursuant to its Entry of April 3, 2013, the Commission stated that it is considering a new chapter of rules, in Ohio Adm.Code 4901:1-3, specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities. The Entry also scheduled a workshop on April 17, 2013, in order to provide interested stakeholders with the opportunity to offer feedback before it issued the proposed rules and opened them up to public comment. The workshop was held as scheduled and stakeholder comments were offered.

(5) Pursuant to its Entry of May 15, 2013, the Commission issued its Staff's proposed rules and invited public comment. The Entry also included the BIA in order to assess and justify any adverse impact that the proposed rules have on the business community. Initial comments were to be filed on or before June 14, 2013, and reply comments were to be filed by July 1, 2013. These time frames were subsequently extended to allow for the filing of initial comments by July 12, 2013, and reply comments by August 29, 2013.

(6) The record reflects that the following entities have filed either initial comments, reply comments, or both: PCIA-The Infrastructure Association and The HETNET Forum (jointly, PCIA); The Ohio Bell Telephone Company dba AT&T Ohio, AT&T Corp., Teleport Communications America LLC, and New Cingular Wireless PCS, LLC dba AT&T Mobility (jointly, AT&T); Frontier North Inc. (Frontier North); Fiber Technologies Networks, LLC (Fibertech); City of Dublin (Dublin); Ohio Cable Telecommunications Association (OCTA); Data Recovery Services, LLC (Data Recovery); OneCommunity; tw telecom of ohio llc (TWTC); Ohio Telecom Association (OTA); 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. (jointly, Electric Utilities); and Zayo Group, LLC (Zayo).

(7) On July 12, 2013, as amended, Gardner F. Gillespie and John Davidson Thomas each filed a motion seeking permission to appear pro hac vice for the purpose of representing the OCTA. On July 12, 2013, as amended, Zachary Champ filed a motion seeking to appear pro hac vice for the purpose of representing PCIA. The Commission finds that the motions pro hac vice are reasonable and should be granted for the limited purpose of this proceeding.

(8) The Commission has carefully reviewed the rules proposed by Staff and the comments filed by interested parties. The Commission will address the more relevant comments below. Some minor, noncontroversial changes have been incorporated into the rules without Commission comment. Any recommended change that is not discussed below or incorporated into the proposed rules should be considered denied.

General Issue - Statutory Authority

(9) The Electric Utilities assert that the Commission lacks statutory authority to promulgate the proposed rules. In support, the Electric Utilities note that the Commission's BIA referenced R.C. 4927.03 and R.C. 4927.15 as the basis for the Commission's authority to promulgate the proposed rules (Electric Utilities at 10). The Electric Utilities also reject any reliance on R.C. 4905.51 as a basis for the support of the rules to establish rates and conditions for joint use agreements. Rather, the Electric Utilities opine that R.C. 4905.51 only allows for the Commission to assert jurisdiction upon public utilities for the stated purpose provided that they fail to reach a joint use agreement and one of the entities seeks Commission resolution. The Electric Utilities similarly assert that the Commission's authority under R.C. 4905.71 to regulate the justness and reasonableness of the charges, terms, and conditions is only triggered by either the filing of a tariff or complaint. (Electric Utilities at 10, 11.)

The Electric Utilities also contend that, due to the unique status of electric companies and incumbent local exchange carriers (ILECs) as pole owners, the proposed rules should not apply to attachments made by electric companies and ILECs to each other's poles (Electric Utilities at 12). The Electric Utilities

contend that the practice of joint use agreements has sufficiently worked over the years pursuant to R.C. 4905.48 and R.C. 4905.51 (Electric Utilities at 12, 13).

AT&T points out that the FCC saw a clear need to revisit its prior interpretation of 47 U.S.C. 224(b) with respect to joint use agreements due to the diminished bargaining positions and pole ownership between electric utilities and ILECs that has occurred over time. Thus, the FCC determined that neither the language nor the structure of 47 U.S.C. 224 precludes a determination that ILECs are entitled to pole attachment rates, terms, and conditions that are just and reasonable. AT&T concludes by noting that neither the FCC nor the Staff proposal cancels joint use agreements. (AT&T Reply at 6-9.)

The Commission emphasizes that while R.C. 4905.51 and R.C. 4905.71 provide the Commission with authority to resolve disputes, nothing within these statutes or others prohibit the Commission from establishing rules to address the regulation of pole attachments, conduits, and rights-of-way. Additionally, through its adopted rules, the Commission is implementing the mechanisms provided for under these statutes. Finally, nothing in these rules prohibit public utilities from continuing to operate pursuant to joint use agreements.

Comments on Ohio Adm.Code 4901:1-3-01 - Definitions

(10) Proposed Ohio Adm.Code 4901:1-3-01(A). Staff defined an "attaching entity" as including cable operators, telecommunications carriers, ILECs and other local exchange carriers (LECs), public utilities, governmental entities, and other entities with either a physical attachment or a request for attachment to a pole or conduit. Staff's definition excludes, however, seasonal attachments by governmental entities.

Both AT&T and the OTA suggest modifying this paragraph by incorporating the limitations on attaching entities codified in R.C. 4905.51 and 4905.71. Specifically, these commenters assert that the definition of "attaching entity" should include the requirements outlined in R.C. 4905.71 that an attaching entity be authorized to attach by obtaining, under law, any necessary public or private authorization and permission to construct and maintain the attachment. Additionally, these commenters

submit that the definition include determinations from R.C. 4905.51 that "public convenience, welfare, and necessity require such use or joint use, and that such use or joint use will not result in irreparable injury to the owner or other users of such equipment or any substantial detriment to the service to be rendered by such owners or other users." (AT&T at 4-5; OTA at 3; PCIA Reply at 12.) The Electric Utilities claim that the proposed definition goes too far and that the Commission should revisit the definition in order to more narrowly circumscribe the types of attaching entities (i.e., cable operators or telecommunications carriers) that are encompassed by the proposed rules (Electric Utilities at 23-24). AT&T points out that Staff's proposed definition mirrors the FCC's definition found in 47 C.F.R. 1.402(m) (AT&T Reply at 5).

OTA and AT&T assume "seasonal attachments" as referenced in proposed Ohio Adm.Code 4901:1-3-01(A) do not include telephone and electric facilities but, rather, are limited to seasonal decorations and adornments, such as flower baskets, U.S. flags, wreaths, banners, and the like, that do not impede access to the pole or adversely affect any existing attachments. OTA and AT&T recommend specifically including a definition of "seasonal attachments" so that the purpose is clear. (OTA at 4; AT&T at 5.)

The Commission has added language to the definition that an attaching entity must have been authorized to attach as discussed in R.C. 4905.51 and 4905.71. The modification also addresses the Electric Utilities' argument that we should narrow the types of entities encompassed by these rules as an "attaching entity" subject to these rules will either be another public utility or an entity that is authorized and has obtained, under law, authorization and permission to construct and maintain the attachment like a cable provider. Finally, because "seasonal attachments" are widely understood and only used one time in the definition of "attaching entity" we see no reason to define this phrase.

(11) Proposed Ohio Adm.Code 4901:1-3-01(K). Staff's proposal defined "pole attachment" as an attachment by a cable system, telecommunications service provider, or an entity other than a public utility to poles or conduit controlled by a public utility.

OTA proposes clarifying the definition by including a provision that only facilities attached in the usable space on a pole are deemed to be a pole attachment. OTA also suggests including a reference to a "public utility" in the pole attachment definition since under R.C. 4905.51, a "public utility" can also be an attaching entity. (OTA at 4.) AT&T raises the same concern however, AT&T's fix is to remove the phrase "other than a public utility" from the definition (AT&T at 5- 6).

The Electric Utilities oppose the recommendations of the OTA and AT&T. The Electric Utilities opine that the proposed modification would give ILECs the power to pick and choose whether an attachment would be made pursuant to a joint use agreement or be made as if the ILEC were a competitive local exchange carrier (CLEC). Accordingly, the Electric Utilities believe that the rights, privileges, and obligations between public utilities should remain defined by joint use or joint pole agreements subject to review pursuant to R.C. 4905.48 and 4905.51. (Electric Utilities Reply at 9-10.)

OTA's proposal involving facilities in the usable space is contrary to our discussion regarding access to pole tops and, therefore, will not be adopted. Rather than adopt OTA's proposal to include public utilities in the list of attaching entities, we are removing the specific references to certain entities that can attach to a pole and replacing the list with the defined term "attaching entity." Regarding the Electric Utilities' concern involving ILECs and joint use agreements, we clarify that nothing in these rules is intended to change the status of the existing joint use agreements. Thus, any party currently subject to a joint use agreement will need to follow the termination and/or renegotiation provisions set forth in the joint use agreement prior to attaching to a utility's poles through some other mechanism. Accordingly, the definition of "pole attachment" should be modified.

Commentor proposed additional definitions

(12) Because communications service providers should have access to space at the pole top, the OCTA proposed a definition of "communications space" that clarifies that this space includes the pole top (OCTA at 5). "Communications space" is used

widely throughout the rules, therefore, we have made this a defined term in Ohio Adm.Code 4901:1-3-01(F).

(13) For the purpose of calculating the time requirements set forth in this Finding and Order, the Commission sua sponte defines a "day" as being a calendar day.

Comments on Ohio Adm.Code 4901:1-3-02 - General applicability

(14) Proposed Ohio Adm.Code 4901:1-3-02(A). Staff proposed language establishing that citations within this chapter to the United States Code (U.S.C.) or to the FCC's Code of Federal Regulations (C.F.R.) is intended to incorporate those sections of federal law and federal rules as of a date certain. Staff's purpose for adopting this subsection is meant to conform to the incorporation by reference provisions of R.C. 121.71 through 121.76.

OTA and AT&T claim that the Commission recently addressed the incorporation by reference issue in *In re Review of Chapter 4901:1-7, of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules*, Case No. 12-922-TP-ORD, Finding and Order (Oct. 31, 2012), at 4, Att. A at 4, and concluded that a date certain was not necessary where, as here, there is a reference in the rule to federal laws and regulations but not an incorporation of the text of the federal law or regulation into the Commission's rule. AT&T and OTA urge a similar determination in this proceeding. (AT&T at 7-8; OTA at 5.)

The Electric Utilities argue that adoption of the position advocated by OTA and AT&T would violate Ohio's nondelegation doctrine which prohibits the General Assembly and, by extension, the Commission, from incorporating by reference future amendments to federal statutes. *See State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992); *City of Cleveland v. Piskura*, 145 Ohio St. 144, 60 N.E.2d 919 (1945). The Electric Utilities also note that removal of the date certain language would violate R.C. 119.02, which sets forth specific requirements for rulemaking, including public notice of the rule, publication of its full text, and a hearing. Accordingly, the Electric Utilities urge the Commission to reject the edit proposed by OTA and AT&T. (Electric Utilities Reply at 6-8.)

The Commission notes that Ohio has a long-standing tradition of adopting its own laws and regulations involving pole attachments, conduit occupancy, and rights-of-way. Adoption of the position recommended by OTA and AT&T would represent a reversal of that long-standing practice as we would be agreeing to abide by, at the state level, any change adopted by the FCC without providing public notice of the proposed changes and without going through Ohio-specific rulemaking requirements. Accordingly, the recommendation made by OTA and AT&T should be denied. Finally, the Commission sua sponte determines that the effective date of the cited sections of the U.S.C. and C.F.R. should be July 1, 2014, in order to be more contemporaneous with the adoption of the pole attachment rules.

(15) Proposed Ohio Adm.Code 4901:1-3-02(D). This proposed subsection establishes requirements that must be included by a public utility when seeking a waiver of a rule in this chapter. OCTA recommends changing who may seek a waiver of a rule in this chapter by striking "public utility" and replacing that phrase with "party" (OCTA Att. A at 3). The Commission does routinely use the term "party" in its rules when discussing waivers. Therefore, we find that OCTA's recommendation is well-made and the rule should be modified accordingly.

Comments on Ohio Adm.Code 4901:1-3-03 - Duty to provide access and required notifications

(16) Proposed Ohio Adm.Code 4901:1-3-03(A)(1). Staff proposed language requiring a public utility to provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. However, the paragraph also provides that where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes, 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.

(17) AT&T and OTA note that capacity and engineering exceptions contained in this paragraph are as equally applicable to LECs as they are to electric companies and that the FCC allows LECs to deny access to pole, ducts, and conduits for these same reasons [(*See* 47 C.F.R. 1.1403(a))]. Accordingly, both parties

recommend amending the proposed rule to correct this disparity between LECs and the electric companies. (AT&T at 8; OTA at 6.) The Commission agrees and the paragraph will be amended consistent with OTA's proposed language.

(18) Fibertech seeks clarification that all attaching entities, including ILECs, will be provided with equal, nondiscriminatory access to poles under this proposed paragraph. Additionally, Fibertech believes the phrase "generally applicable engineering purposes" is overly broad, not based on Ohio law, and subject to interpretation and/or use that allows for denial of access to poles and conduit for any reason. As such, Fibertech recommends that this phrase be stricken. (Fibertech at 17-18.)

The Electric Utilities contest removing their ability to deny access for generally applicable engineering purposes. These commenters note that under 47 U.S.C. 224, the Pole Attachment Act (PAA), and the proposed rules, there are only four reasons for which a pole owner may deny a potential attaching entity access to its poles: insufficient capacity; safety; reliability; or generally applicable engineering purposes. Fibertech's proposal, according to the Electric Utilities, would give electric utilities less authority to protect and maintain their systems than they have under the PAA by removing the ability to deny access for generally applicable engineering purposes. According to the Electric Utilities, removal of this reason for denial of access may not necessarily be covered by the three remaining reasons for denial. The Electric Utilities further point out that all access denials are subject to Commission oversight, therefore, Fibertech's concern is unjustified. (Electric Utilities Reply at 23-24.)

The Commission notes that the definition of "attaching entity" set forth in proposed Ohio Adm.Code 4901:1-3-01(A), includes ILECs. Therefore, pursuant to the proposed rule, ILECs should be afforded equal, nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned by public utilities. Additionally, the Commission declines to strike the phrase "generally applicable engineering purposes" as requested by Fibertech. The Electric Utilities correctly point out that Fibertech's proposed revision does not comport with the federal PAA. Further, Fibertech offers no evidence demonstrating that the phrase in question has been applied in

an overly broad manner or subject to misinterpretation and/or misuse in those states applying the PAA. Therefore, the Commission declines to adopt the revision recommended by Fibertech.

(19) Finally, the Commission, acting sua sponte, wishes to make explicit in this paragraph that the nondiscriminatory access required under the proposed rule be made pursuant to rates, terms, and conditions that are just and reasonable. It is in the public interest to ensure that not only do all attachers have nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but that all attachers are afforded such access on terms and conditions that are just and reasonable. Accordingly, this paragraph should be amended to include the phrase "under rates, terms, and conditions that are just and reasonable" at the end of the first sentence.

(20) Proposed Ohio Adm.Code 4901:1-3-03(A)(2). Staff proposed language requiring that requests for access to a public utility's poles, ducts, conduits, or rights-of-way be in writing. Furthermore, if access is not granted within 45 days of the request, the public utility must confirm the denial in writing by the 45th day. Such denial must be specific and include all relevant evidence and information supporting denial, and must explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

To better facilitate broadband deployment and the safe and efficient distribution of electric utility services, the Electric Utilities believe that public utilities should be allowed to require the use of electronic notification systems, such as the Spatially-Enabled Permitting and Notification System and the National Joint Utilities Notification System. According to the Electric Utilities, such systems ensure that both pole owners and attaching entities remain informed regarding the progress of their pole attachment projects by providing quick and efficient notification to attaching entities in the event that any attachment requires modification or relocation. (Electric Utilities at 38-39.)

In its reply comments, PCIA opposes the mandatory use of an electronic notification system and states that the development

of any electronic notification system should be accomplished through the partnership of all users of the system. PCIA believes that a system whose design includes end-user input has the potential to reduce errors and increase efficiencies. (PCIA Reply at 13.)

The Commission agrees with the recommendation of the Electric Utilities and determines that the proposed language should be adopted. An electronic notification system will increase the speed and efficiency of communication between pole owners and attaching entities, as well as provide a standard for such communication. With regard to the concern raised by PCIA, the Commission recognizes the potential benefits of end-user input into the development of any system. Nonetheless, the Commission is also aware that attachers are likely to have competing desires and interests in the development of any electronic notification system, all of which cannot be accommodated in the final system. Attempting to make such accommodation will likely complicate and delay the implementation of an electronic notification system. As such, pole owners are encouraged, to the extent practical, to consider input from attachers prior to deploying an electronic notification system, but are not required to do so. To clear up any ambiguity that may exist regarding requests for access that are not denied, the Commission has added a sentence clarifying that such requests are granted if not denied in writing within 45 days.

(21) Proposed Ohio Adm.Code 4901:1-3-03(A)(3)(a). This paragraph requires a public utility to provide an attaching entity notice 60 days prior to removing or terminating any service to those facilities. This notice requirement as proposed only applies to entities obtaining access through a pole attachment agreement, and not to attaching entities who obtain access through the public utility's tariff. Therefore, the benefit of the proposed rules' 60-day notice requirement should not be narrowly limited in this manner but, rather, should be extended to all types of attaching entities regardless of the manner in which the attachment is procured. This revision will protect attaching entities from discrimination relative to service affecting and public safety concerns that may otherwise arise.

(22) Proposed Ohio Adm.Code 4901:1-3-03(A)(3)(c). Staff proposed language requiring a public utility to provide an attaching entity no less than 60 days written notice prior to any modification of facilities other than routine maintenance or modification in response to emergencies.

The Electric Utilities believe that this paragraph is overly broad and unduly burdensome as written. These commenters argue that they should not be required to notify an attaching entity of any changes to a pole unless the changes affect the attaching entity's equipment. (Electric Utilities at 40.) AT&T disagrees and questions whether the Electric Utilities should be able to unilaterally decide if changes to a pole will affect the equipment of an attaching party. Instead, AT&T believes that notifying such parties of any pole changes and making them part of this process is the better approach. (AT&T Reply at 22-23.)

The Commission finds that this paragraph imposes a minimal obligation upon a public utility to notify all attaching entities of any modification to any facilities. While many such changes may in fact be irrelevant, it is foreseeable that this will not always be the case. Further, in light of the Commission's adoption of the Electric Utilities' recommendation to permit the use of an electronic notification system, supra, the Electric Utilities' argument that the notification requirement is burdensome is essentially moot and should be denied.

(23) The Electric Utilities further contend that any such notification required by this provision should not supersede any notification requirements that may be in a utility tariff regarding disconnections for nonpayment. The Electric Utilities point out that, while most attachments are just physical attachments, many attachments do nonetheless consume power and are billed monthly. Notice and other requirements associated with disconnection and nonpayment should, in their view, not be superseded by the proposed rules, but instead, should adhere to existing tariff requirements. (Electric Utilities at 40-41.)

The Commission notes that, in recommending this change, the Electric Utilities reverse the order in which authority is controlling. Regulations are not subject to tariffs; rather, tariffs

are subject to regulations. As such, Commission regulations, e.g., proposed Ohio Adm.Code 4901:1-3-03(A)(3), provide the framework within which tariffs may be established. Consequently, a tariff provision should not supersede a Commission regulation. Accordingly, the Commission finds that the Electric Companies request should be denied.

(24) Proposed Ohio Adm.Code 4901:1-3-03(A)(4). Staff proposed language permitting an attaching entity to petition for a temporary stay of the action contained in a notice received pursuant to Ohio Adm.Code 4901:1-3-03(A)(3) within 15 days of receipt of such notice. Such submission must include, 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 days of the date of the petition for temporary stay was filed. If the Commission does not rule on a petition within 30 days after the filing of the answer, the petition shall be deemed denied.

OCTA recommends changes that include a presumption that an attaching entity's petition for a temporary stay would be deemed granted, instead of denied, if not acted upon by the Commission within the required 30-day period. According to OCTA, such a revision is necessary to preserve the attaching entity's access to vital utility facilities and to prevent "irreparable harm and likely cessation of service." (OCTA at 8.) The Electric Utilities oppose OCTA's proposal. OCTA's proposed revision would effectively grant a petition for temporary stay even in instances where an attaching entity has failed to make a showing of irreparable harm according to the Electric Utilities. (Electric Utilities Reply at 24.)

The Commission finds that a temporary stay should only be granted when there are exigent circumstances. Consequently, this paragraph requires "a showing of irreparable harm and likely cessation of service" by the petitioner seeking the stay. In other words, the petitioner bears the burden of proof. Adoption of the changes proposed by OCTA would establish a presumption that this burden has been met upon filing since, under the proposed change, the request for a temporary stay would be automatically granted unless the Commission affirmatively denies the petition. While OCTA believes that

this presumption is necessary to prevent the "irreparable harm and likely cessation of service," the Commission finds this argument to be without merit. If the petitioner demonstrates that it will truly suffer irreparable harm and face the likely cessation of service, the petitioner's burden has been met and the presumption is not necessary. The presumption would only be beneficial to a petitioner seeking a temporary stay when the petitioner fails to meet its burden of proof. As such, the Commission finds that the change recommended by OCTA should be denied.

(25) Proposed Ohio Adm.Code 4901:1-3-03(A)(5). Staff proposed language requiring cable operators to notify pole owners upon offering telecommunications services or any comparable services regardless of the technology used.

OCTA avers that the notification requirement contained in this paragraph is unclear as to the precise nature of the notice that a cable operator must provide to a pole owner, including the triggers for when the notice is required. Accordingly, OCTA recommends removing this paragraph. (OCTA at 12-13.)

The Commission's adoption of a single, unified pole attachment rate, discussed infra, renders the rationale for requiring such notice no longer applicable. Accordingly, this paragraph should be stricken from the proposed rules.

(26) Proposed Ohio Adm.Code 4901:1-3-03(B)(1). Staff proposed language requiring a public utility to respond to an attaching entity within 45 days of receipt of a complete application to attach facilities to its poles or within 60 days, in the case of larger orders. This response may be a notification that the public utility has completed a survey of poles for which access has been requested.

OCTA proposes adding language to this paragraph requiring the public utility to respond to an attaching entity's application for attachment as promptly as reasonably feasible, but in no case longer than 45 days after receipt of a complete application or within 60 days, in the case of larger requests for attachments. OCTA also recommends deletion of the sentence referring to the survey as a possible response. (OCTA Att. A at 4.) Finally, OCTA contends that any established deadline should be a firm

deadline and must be followed (OCTA at 3). TWTC supports OCTA's modification (TWTC Reply at 3). Fibertech advocates that the Commission adopt shorter access timelines in order to ensure the continued success of competitive facilities-based telecommunications providers in the Ohio market and to prevent right-of-way owners from unlawfully utilizing delay tactics to stall and potentially stop the public's access to high-capacity broadband services. Fibertech encourages the Commission to generally adopt the framework utilized by the Connecticut Public Utilities Regulatory Authority, which requires application review, survey, and issuance of make-ready estimates within 45 days of receipt of a pole attachment application and the completion of make-ready work within 45 days of receipt of payment of the estimate. Fibertech also recommends that all communication attachment applications should be separated into the categories of small, standard, and large with time frames of 30, 45, and 60 days respectively to perform the survey and issue the make-ready estimate. (Fibertech at 7, 9-11; Fibertech Reply at 7.)

PCIA and Data Recovery concur with Fibertech's concerns regarding the survey time frames. PCIA recommends that the Commission should allow an attacher to request a shorter time frame in those scenarios in which only a handful of poles are involved (PCIA Reply at 5) while Data Recovery advocates for a 30-day survey period in which the pole owner must notify the attaching entity of approval the application. Additionally, Data Recovery proposes that all pole owners be required to log application requests by date and time received. Data Recovery also proposes the establishment of a 50-pole maximum that an attaching entity may request as part of a particular order. Data Recovery believes that such a cap will allow pole owners to process requests and complete make-ready performance in a timely manner. Further, Data Recovery proposes that the Commission establish an engineering cost per pole in order to provide transparency and allow the pole owner to start the process. (Data Recovery 8-9.)

OTA recommends that the Commission modify the paragraph to mirror the FCC's provisions, set forth in *In re the Implementation of Section 224 of the Act and A National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration (Apr. 7,

2011), FCC 11-50, ¶19 (*Pole Attachment Order*), that require the pole owner to notify the attaching entity in a timely manner if the pole owner deems the application to be incomplete (OTA 6-7).

The Electric Utilities reject the requests for shorter processing time frames and, in fact, propose that the deadlines to perform the surveys be extended to 90 days for normal orders and 120 days for large orders upon the receipt of a complete application. The Electric Utilities submit that "[t]he demand for an instant network is unrealistic and should not be paid for by electric customers in the form of funding an over-staffed payroll to achieve unrealistic deadlines * * *." (Electric Utilities Reply at 19.) Additionally, specific to proposed Ohio Adm.Code 4901:1-3-03(B)(5)(a)-(e), the Electric Utilities seek to lower the limit of the number of attachment requests subject to the standard deadlines. The Electric Utilities believe that their proposed modifications will create a much more manageable workflow in order to provide core electric services to customers throughout Ohio, while preserving the right of attachers to expect reasonably consistent responses to their make-ready requests. (Electric Utilities at 27.)

Fibertech and PCIA reject the Electric Utilities' proposal to increase the time frames to complete the make-ready work. PCIA notes that the time frames proposed by the Electric Utilities do not conform to the FCC's timelines or the timelines of several states, which are closer to those set forth in the proposed rules. Further, PCIA rejects the Electric Utilities' arguments that they cannot have unlimited resources sitting idle while waiting for the next pole attachment application to arrive. In support of its position, PCIA asserts that the Electric Utilities are currently operating in other states under similar timelines to those set forth in the proposed rules. (Fibertech Reply at 11; PCIA Reply at 6-7.) AT&T contends that any departure from the FCC rules regarding survey work have not been justified (AT&T Reply at 16).

The Commission has amended proposed Ohio Adm.Code 4901:1-3-03(B)(1) to better define the purpose of a survey. Regarding the proposed time frames for completion of survey work, the Commission finds that the proposed time frames are consistent with the FCC's existing parameters [i.e., 47 C.F.R.

1.1420(c)] and should be adopted. In reaching this determination, the Commission recognizes that the 45-day time frame for the completion of the survey is the same 45-day time frame referenced in adopted Ohio Adm.Code 4901:1-3-03(A)(4). If a pole owner is denying an application for lack of capacity, safety, reliability, or engineering standards, a survey must be completed. As a result, pole owners must utilize their time appropriately in order to respond to the application and complete the requisite survey within the same 45-day time frame.

Further, the Commission finds that the delineation between "standard" and "large" applications is sufficient and that there is no need to add additional levels of treatment for applications containing requests for a volume of poles beyond these classifications. Additionally, while Data Recovery requested that the maximum number of poles per application be limited to 50, the Commission agrees with Fibertech that reducing the maximum number of poles would be detrimental to many projects.

(27) Proposed Ohio Adm.Code 4901:1-3-03(B)(2). Staff proposed language requiring that where a request for access is not denied, a public utility shall present to the attaching entity an estimate of charges to perform all necessary make-ready work within 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 14 days of receipt by the public utility of such survey. In addition, a public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented and an attaching entity may accept a valid estimate and make payment within 14 days from receipt of the estimate but before the estimate is withdrawn.

OCTA recommends that an estimate of charges associated with make-ready work be provided as promptly as reasonably feasible, but in no case longer than within 14 days of providing the survey (OCTA Initial Comments Attach. A at 4). OCTA also proposes that if the pole owner fails to issue a make-ready estimate within 14 days of the survey being completed, 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 the make-ready work (OCTA at 8). Additionally, OCTA recommends the paragraph be revised in order to increase the amount of time a pole owner must wait until permitted to withdraw an outstanding estimate of make-ready charges. Specifically, OCTA believes that a 45-day period will provide attachers with sufficient time to review make-ready estimates while not unreasonably burdening the utility performing the make-ready work. (OCTA at 4.)

The Electric Utilities submit that proposed Ohio Adm.Code 4901:1-3-03(B)(2)(a) and (b) be modified to provide an attaching entity with 21 days, rather than the proposed 14 days, to make payment before the estimate can be withdrawn. They believe that this period of time better reflects the amount of time necessary for the remitting and processing of a payment. In addition, the Electric Utilities believe that language should be inserted to require that, if the estimate has been withdrawn, the attaching entity must resubmit its application, and the process starts anew. (Electric Utilities at 41.) Additionally, the Electric Utilities reject OCTA's proposal to expand the time for attachers to review make-ready estimates from 14 days to 45 days arguing that OCTA's proposed revision would result in the attachers having as much time to review an estimate as the pole owner would have to perform the survey. Further, the Electric Utilities point out that make-ready estimates are prepared based on a snapshot of the pole at a specific point in time. Therefore, the more time that passes following the preparation of an estimate, the more likely that the conditions on the pole have changed and the accuracy of the estimate is affected. (Electric Utilities Reply at 24-25.)

Fibertech proposes to modify proposed Ohio Adm.Code 4901:1-3-03(B)(2)(a) to clarify that the pole owner may not withdraw an outstanding estimate until the time for acceptance of such estimate has expired, and in no event after the estimate has been accepted by the attaching entity. Fibertech notes that, under the proposed rule, there is an overlap of time during which the estimate could be potentially accepted and withdrawn. With respect to proposed Ohio Adm.Code 4901:1-3-03(B)(2)(b), Fibertech believes that it is critical for the Commission to clarify that the requisite time frame will be treated as having been tolled if, within the time period, the

prospective attaching entity sends the pole or conduit owner a written dispute of the estimate or request for additional information regarding the scope of proposed make-ready work or allocation of costs for that work. (Fibertech at 11-13.)

The Commission determines that an attaching entity should have 21 days, rather than the proposed 14 days, to accept the estimate and make payment before the estimate can be withdrawn and the rule has been revised accordingly. The Commission believes that a 21-day time frame properly balances the interests of both the pole owners and the attachers. A pole owner may not withdraw an outstanding estimate until the day after the time for acceptance has expired (i.e., twenty-two days after receipt of the estimate). The Commission agrees that, in some cases, there may be no charges for make-ready work. Therefore, the Commission incorporates "if any" to the adopted language. Additionally, the Commission agrees that the requisite time frame should be tolled if, within the period, the prospective attaching entity sends the pole owner a written dispute of the estimate or request for additional information regarding the scope of proposed make-ready work or allocation of costs for that work.

(28) Proposed Ohio Adm.Code 4901:1-3-03(B)(3). Staff proposed language requiring that, 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 that may be affected by the make-ready.

The Electric Utilities state the use of the word "immediately" could lead to disputes and, therefore, suggests changing it to "promptly." The Electric Utilities also suggest allowing for electronic communications in order to reflect current technology and resulting in a more efficient and timely communication. Further, the Electric Utilities seek to have the option to delegate to the requesting attaching entity the responsibility for providing notification to affected existing attachers. (Electric Utilities at 41-42.) OCTA also proposes minor revisions to this rule (OCTA Att. A at 5).

The Commission agrees that the word "immediately" shall be replaced with "promptly." Additionally, the Commission believes that electronic notification should be the preferred

form of contact where possible. The Commission does not agree that the duty to notify existing attachers can be delegated. Therefore, the rule should be revised in accordance with this finding.

(29) Proposed Ohio Adm.Code 4901:1-3-03(B)(3)(a)(i). OCTA proposes the paragraph be modified to require that for attachments in the communications space, the notice must identify the individual pole(s) and specify the make-ready to be performed on such pole(s) (OCTA Att. A at 5). The Commission finds that, in order to be consistent with our determinations set forth supra pertaining to communications space being a defined term, and in order to provide a clearer notification process, OCTA's proposed modifications should be adopted.

(30) Proposed Ohio Adm.Code 4901:1-3-03(B)(3)(a)(ii). Staff proposed language requiring that the date set for completion of make-ready be no later than 60 days after notification is sent or 105 days in the case of larger orders.

The Electric Utilities propose that the deadline for the completion of make-ready work be extended to 150 days. The Electric Utilities submit that it requires time for the existing providers to construct their networks, especially when taking into account scheduling issues involving safety and reliability priorities. The Electric Utilities consider the demand for an instant network to be unrealistic and do not believe that it should be paid for by electric customers in the form of funding for over-staffed payroll. (Electric Utilities at 28; Electric Utilities Reply at 19.)

TWTC rejects the Electric Utilities' modifications to the proposed timelines. Specifically, TWTC asserts that the Commission must establish aggressive make-ready time frames in order to further the policy of encouraging pro-competitive and nondiscriminatory access to poles, ducts, and conduits. (TWTC Reply at 2-3.) Fibertech and PCIA similarly reject the Electric Utilities' modifications to the proposed make-ready timelines. Specifically, these commenters argue that the proposed changes are significant and that these, along with the other changes proposed by the Electric Utilities, will create a near total barrier to entry for new attachers since any delay to

the new attachers will adversely impact their customers and affect competitive choice. (Fibertech at 9, 16; Fibertech Reply at 11; PCIA Reply at 5-6.) OCTA proposes that the words "as promptly as reasonable feasible" be added to the paragraph (OCTA Att. A at 5).

The Commission finds that the time frames set forth in the proposed rule properly balance the interests of the attachers and the pole owners. Specifically, the Commission finds that 60 days for standard applications and 105 days for larger applications provide a sufficient amount of time for the completion of the make-ready work, while not unreasonably delaying the needs of the attachers. However, in order to focus on the need for the timely completion of the make-ready work, the Commission finds that the language should be revised to require that the make-ready completion date be as prompt as possible, as recommended by OCTA.

(31) Proposed Ohio Adm.Code 4901:1-3-03(B)(3)(a)(iii). Staff proposed language providing that the notice must state that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

The Electric Utilities propose that language be added to clarify that existing attachments cannot be modified if such modification will increase loading on the pole (Electric Utilities at 43). PCIA considers the Electric Utilities' proposal impractical since any repair, regular maintenance, or upgrade of even the most inconsequential size, weight, or material could trigger an increase in pole loading. Instead of the language proposed by the Electric Utilities, PCIA recommends that the Commission maintain the existing framework that pole attachers currently abide by which requires that any attachment must comply with the independently-established National Electric Safety Code (NESC). (PCIA Reply at 11.)

The Commission finds that the record is incomplete regarding the loading concerns identified by the Electric Utilities. Specifically, there is no detail in the record as to the manner in which loading determinations would be made, including how any necessary inspections would be performed. Therefore, the revision proposed by the Electric Utilities is denied.

(32) Proposed Ohio Adm.Code 4901:1-3-03(B)(3)(a)(iv) and (v). Staff proposed language providing that the notice must state that the public utility may assert its right to 15 additional days to complete make-ready and, if make-ready is not completed by the completion date set by the public utility (or 15 days later if the public utility has asserted its 15-day right of control) the attaching entity requesting access may complete the specified make-ready.

Fibertech and OCTA recommend the Commission eliminate any provision under Ohio Adm.Code 4901:1-3-03(B) that allows the pole owner to unilaterally extend timelines for access to poles beyond those time frames explicitly established by the rules. Fibertech asserts that allowing the pole owner to add additional time for any reason in its sole discretion is unreasonable and could be applied in a discriminatory manner. At a minimum, Fibertech believes that the Commission should require the pole owner to show good cause as to why a 15-day extension is warranted in a particular circumstance. OCTA points out that proposed Ohio Adm.Code 4901:1-3-03(B)(6) already provides the utility with the ability to deviate from the required time frame in the event that there is good and sufficient cause that renders the required time limits to be infeasible. (Fibertech at 13; OCTA at 3-4.)

The Commission agrees with Fibertech and OCTA that the pole owners should not unilaterally be able to exercise a 15-day extension in order to complete the make-ready work. Rather, the Commission believes that, consistent with proposed Ohio Adm.Code 4901:1-3-03(B)(6), discussed infra, a pole owner can avail itself of an extension of time upon a demonstration of good and sufficient cause as to the reason why it is unable to complete the make-ready work within the prescribed time frame. Therefore, proposed Ohio Adm.Code 4901:1-3-03(B)(3)(a)(iv) has been deleted.

(33) Proposed Ohio Adm.Code 4901:-1-3-03(B)(3)(b) and (B)(4). Staff proposed language setting forth the information that must be included in notices for wireless attachments above the communications space, including that the notice must: specify where and what make-ready will be performed; set a date for completion of make-ready that is no later than 90 days after notification is sent or 135 days in the case of larger orders; state

that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion; state that the public utility may assert its right to 15 additional days to complete make-ready; and state the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure. Further, Staff's proposed Ohio Adm.Code 4901:1-3-03(B)(4) required public utilities to ensure that make-ready work is completed by the date set by proposed Ohio Adm.Code 4901:1-3-03(B)(3)(b) or 15 days later if the public utility has asserted its additional right of control.

The Electric Utilities recommend that pole owners be permitted to prohibit pole-top attachments provided the prohibition occurs on a nondiscriminatory basis. Additionally, the Electric Utilities recommend that the rule clarify that where a public utility allows a pole-top attachment, any such attachment must be in compliance with the utility's engineering and construction standards and that each utility retains the exclusive right to perform work, or directly employ contractors to work, in the power space. (Electric Utilities at 37-38; Electric Utilities Reply at 22.)

According to PCIA, the FCC, in its *Pole Attachment Order*, clarified that "[S]ection 224 allows wireless attachers to access space above what has traditionally been referred to as 'communications space' on a pole" and that utilities may only deny access where there is an issue of safety, capacity, or reliability and that wireless attachers' rights to attach to pole tops is the same as their right to attach equipment anywhere else on the pole (PCIA at 7 citing *Pole Attachment Order*, ¶77). PCIA suggests adopting a procedure similar to the FCC requirement that when a utility denies a request for access, it must state with specificity its reasons for doing so, and provide specific and relevant evidence describing its reasons for denial, such as safety, engineering, and capacity-related issues (PCIA at 2, 4, 7-9).

TWTC urges the Commission to reject the proposed modifications offered by the Electric Utilities (TWTC Reply at 3). AT&T rejects the proposal of the Electric Utilities to allow pole owners to prohibit pole top attachments if the prohibition is nondiscriminatory. Rather, AT&T, joined by OTA and PCIA,

recommends that the rules specify that wireless attachments are permitted above the communications space, specifically on pole tops. (AT&T at 9; AT&T Reply 20; AT&T Reply at 22 citing 76 FR 26624, ¶26; OTA at 7; PCIA Reply at 10.) Fibertech states that a denial of access to the pole top should be based on a reference to fair, established, and nondiscriminatory standards, such as those established in the NESC, and not based on a blanket prohibition which could leave an entire area of the state underserved with regards to wireless technology. Also, Fibertech submits that a denial of access should be determined on a case-by-case basis with an explanation of why such an attachment is inappropriate. (Fibertech at 18-19; Fibertech Reply at 18-19.) OCTA recommends that proposed Ohio Adm.Code 4901:1-3-03(B)(3)(b)(iv) be amended to remove the ability of pole owners to exercise a 15-day extension in order to complete the make-ready work (OCTA Att. A at 5-6).

The Commission determines that the proposed rule should be revised in order to clarify that wireless attachments, including those on pole tops, are permitted. The Commission also determines that pole owners may deny access where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes. Consistent with the discussion supra, the Commission finds that the pole owners should not be unilaterally provided with the ability to exercise a 15-day extension in order to complete the make-ready work. Rather, a pole owner can avail itself of an extension of time pursuant to Ohio Adm.Code 4901:1-3-03(B)(7) upon a demonstration of good and sufficient cause as to the reason why it is unable to complete the make-ready work within the prescribed time frame. Therefore, proposed Ohio Adm.Code 4901:1-3-03(B)(3)(b)(iv) is eliminated and the proposed rules are modified accordingly.

(34) Commenters' Additional Paragraphs to Proposed Ohio Adm.Code 4901:1-3-03. OCTA requests the Commission add a paragraph that requires that, 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 in accordance with the requirements and timelines set forth in this section (OCTA Att. A at 6).

The Commission agrees that attaching entities should be allowed to hire a contractor if the public utility fails to issue a make-ready estimate within the 14-day period required by paragraph (B)(2) of this section. Specifically, the attaching entity requesting access may complete the specified make-ready work provided they utilize an approved contractor identified on a list provided by the pole owner in accordance with Ohio Adm.Code 4901:1-3-03(C). This requirement shall be adopted as part of Ohio Adm.Code 4901:1-3-03(B)(4).

(35) Proposed Ohio Adm.Code 4901:1-3-03(B)(5)(a)-(e). Staff proposed the following time frames and requirements for public utilities: the timelines in paragraphs (B)(1) through (B)(3) of this section apply to all requests for pole attachments up to the lesser of 300 poles or one-half percent of the public utility's poles in the state; 15 days may be added to the survey period described in paragraph (B)(1) of this section to larger orders up to the lesser of 3,000 poles or five percent of the public utility's poles in the state; 45 days may be added to the make-ready periods described in paragraph (B)(3) of this section to larger orders up to the lesser of 3,000 poles or five percent of the public utility's poles in the state; the timing of all requests for pole attachments larger than the lesser of 3,000 poles or five percent of the public utility's poles in the state shall negotiated in good faith; and multiple requests from a single attaching entity shall be treated as one request when the requests are filed within 30 days of one another.

The Electric Utilities assert that the proposed thresholds are far from manageable. They highlight that during the 15-month period of calendar year 2012 and the first quarter of 2013, Ohio Edison Company (OE) received requests for more than 13,000 pole attachments, corresponding to an estimated 17,000 engineering hours. The Electric Utilities contend that if OE received a 3,000-pole request in a given month it would nearly triple the average monthly volume in the past year for the company yet the proposed rules would allow only an additional 60 days to complete all make-ready work for the entire project. Further, the Electric Utilities highlight that there is no cap on the number of sequential requests that a single attacher may submit every 30 days or any limit on the number of requests that may be submitted collectively by all attachers. Based on these potentialities, the Electric Utilities state that

deadlines associated with the volume of make-ready requests could prevent an electric utility from performing its own work, thereby potentially subjecting the utility to not meeting its own reliability standards, and potentially resulting in complaints of inadequate service by electric utility customers. Based on these concerns, the Electric Utilities request that the lower and upper limits for the volume of poles associated with the stated timelines be reduced and also that the number of poles for which attachment requests are made by all attaching entities per month be considered, not just by a single attaching entity. (Electric Utilities at 25-27.)

Fibertech objects to the Electric Utilities' proposal to lower the minimum quantity levels for standard and larger applications. Fibertech describes how, despite meeting with specific electric companies to explain its proposed service expansion, the companies had no incentive to adequately prepare for the increase in the number of poles requested. (Fibertech Reply at 9-10.) Further, Fibertech asserts that the Electric Utilities proposal will create unduly long delays and threaten significant harm to competitive telecommunications providers and their customers. Fibertech also believes that the proposed timelines will limit growth and economic development initiatives in the state of Ohio, based on its contention that few purchasers of telecommunications services will wait a significant period of time, to receive the desired service. Rather than the time frames set forth in the proposed rules, Fibertech advocates adoption of the time frames set forth in its proposed Ohio Adm.Code 4901:1-3-03(B)(1)-(B)(3), discussed supra. (Fibertech at 8, 11.)

The Commission determines that the language should be adopted as proposed by Staff. Based on a review of the record, the Commission believes that the proposed rule is reasonable and creates a balance between the interests of the pole owners and the attachers. Specifically, the Commission finds that the established time frames and pole volumes neither place an undue burden on the pole owners nor create undue barriers to attachers. Further, the Commission notes that, in accordance with proposed Ohio Adm.Code 4901:1-3-03(B)(6), discussed infra, pole owners are permitted to deviate from the specified limits upon the proper demonstration.

(36) Proposed Ohio Adm.Code 4901:1-3-03(B)(6). Staff proposed language permitting the public utility to deviate from the time limits specified in this section either: before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment; or 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. If the public utility deviates during the make-ready it must 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 may deviate from the time limits for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

The Electric Utilities state that the proposed rules are unfair, in that they fail to provide safe harbors for pole owners that cannot meet the deadlines due to factors beyond their control, including weather conditions, private property issues, and the unresponsiveness of existing attachers. They also contend that the proposed rules prioritize the deployment of cable television and information systems over safety and reliability of the electric utilities' pole infrastructure and the power grid. (Electric Utilities at 8.) The Electric Utilities also find it particularly difficult to coordinate with attachers that have no pole attachment workforce, such as fire departments, highway departments (e.g., traffic control devices), school districts, police departments, municipalities, and others. Additionally, the Electric Utilities assert that the Commission should toll the proposed make-ready deadlines for projects requiring local government permitting or the obtaining of easements over private property. The Electric Utilities assert that good and sufficient cause exists if a company's normal internal staffing is not available due to a weather event or other force majeure events. (Electric Utilities at 28-31.)

AT&T states that the Electric Utilities' arguments fail the public policy test and, therefore, there is no justification for any deviation from the FCC's rules (AT&T Reply at 16). Data Recovery and Fibertech note that the proposed rule permits a public utility to deviate from the make-ready time

requirements set forth in the rules for good and sufficient cause that renders it infeasible for the public utility to complete the make-ready work within the prescribed time frame (Data Recovery at 6; Fibertech Reply at 12-14). Data Recovery recommends that, if a deviation provision is to be included in the proposed rules, it must identify specific instances and time periods for which a public utility may deviate from the requisite time requirements (Data Recovery at 6). While Data Recovery recognizes that the deviation provision of the proposed rule mirrors the standard adopted by the FCC, the agency clarified that "good and sufficient cause" may exist in certain instances to allow utilities "to cope with an emergency that requires federal disaster relief," but not 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 commission rulemaking, that affect pole attachments." (Data Recovery at 7 citing the FCC's *Pole Attachment Order*, ¶68.)

PCIA and Fibertech reject the Electric Utilities' request for a tolling of make-ready time frames relative to projects requiring local government permitting or the obtaining of easements over private property arguing that the timelines themselves serve to account for these types of foreseeable delays (PCIA Reply at 7-9; Fibertech Reply at 12-14). PCIA believes that, inasmuch as these type of issues are foreseeable, requests for easements should be made earlier in the process. In regard to the request for the tolling of make-ready deadlines if the existing attachments are found to be in violation of the safety codes, PCIA points out that the Electric Utilities should have discovered the violations during post-attachment inspections. Therefore, PCIA submits that, in these situations, the make-ready deadlines should not be tolled and new wireless attachers should, instead, be allowed to attach so long as the attachment does not exacerbate the existing violations. (PCIA Reply at 7-9.)

The Commission believes that, with the addition of the definition of "good and sufficient cause" [incorporated as Ohio Adm.Code 4901:1-3-03(B)(7)(b)(i)], the rule provides the ability for deviation from the requisite limits. Additionally, the

Commission finds that the rule should be revised to reflect that a public utility may not deviate from the time limits specified in this section before offering an estimate of charges, unless the parties have an agreement specifying time limits for estimates and acceptance of such estimates that exceed those set forth in this section. In incorporating this modification, the Commission notes that the intent of this proposed rule is to establish minimum terms and conditions under which attachers and pole owners can operate. We believe that the rule, as originally proposed, failed to address this concern. As a result, we find that the rule should be split into two rules, as set forth in the Attachment A. Due to the unique nature of joint use agreements, parties to such agreements may negotiate time frames that differ from those set forth in Ohio Adm.Code 4901:1-3-03(B).

In response to PCIA's request that the Commission define the types of storms or emergencies and establish clear, independent parameters for the types of extraordinary events that would trigger a delay, the Commission finds that the scope of possibilities is too great to define. Therefore, PCIA's request is denied.

(37) Proposed Ohio Adm.Code 4901:1-3-03(B)(7). Staff proposed language providing that, 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 paragraph (B)(3)(a)(ii) of this section, the attaching entity requesting attachment in the communications space may hire a contractor to immediately complete the make-ready if the public utility has failed to assert its right to perform remaining make-ready.

Fibertech proposes that competitive providers be permitted to employ temporary attachments prior to completion of make-ready work. The competitive provider would bear the cost of such installation, including inspection by the pole owner. Fibertech notes that such temporary arrangements have been utilized in the states of Connecticut, New Jersey, and New York. (Fibertech at 13-16; Fibertech Reply at 19-21.) PCIA supports permitting attachers to employ temporary

attachments to serve a customer prior to the expiration of any prescribed licensing time frames (PCIA Reply at 12).

AT&T notes that often the attaching entity fails to remove the attachment or convert the temporary attachment to a permanent attachment resulting in damage to the pole, decreasing its life expectancy, and becoming a safety hazard. Moreover, temporary attachments can create conflicts with subsequent attaching parties who go through the permanent attachment process. Therefore, while AT&T recommends allowing pole owners to address the terms and conditions for making temporary attachments in their reasonable and nondiscriminatory practices, the Commission should not authorize temporary attachments in its rules. (AT&T Reply at 18-19.) The Electric Utilities concur with AT&T's comments on this proposed rule (Electric Utilities Reply at 19-21).

The Commission will not issue a rule providing for the use of temporary attachments at this time. The Commission notes that the type of rule suggested by Fibertech is not currently addressed in the FCC's rules and there are a number of administrative and technical issues related to temporary attachments that must be dealt with before such a rule could be adopted, none of which have been vetted in this docket. Notwithstanding this determination, the Commission recognizes that pole owners and attaching entities may voluntarily agree to the use of temporary attachments and negotiate reasonable terms and conditions on a case-by-case basis. In doing so, however, we note that proposed Ohio Adm.Code 4901:1-3-03(G) requires public utilities to permit attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity on the pole. Therefore, Fibertech's request should be denied.

(38) The Electric Utilities also urge the Commission to be clear that attaching entities do not have the right to perform work in the power space. Therefore, they propose that the rule be modified to refer to the communications space. (Electric Utilities at 43.) The Electric Utilities also recommend the insertion of language providing that public utility pole owners would not be subject to liability for damages that may arise in connection with an

attaching entity's performance of make-ready work (Electric Utilities at 40).

The Commission agrees that the entity requesting attachment may hire a contractor to complete the make-ready in the "communications space" consistent with rules adopted in this proceeding. The rule has been revised accordingly. In regard to the proposed limitation of liability, the Commission finds that the proposed language addresses damages, an inappropriate subject for consideration in the context of a rule proceeding. Rather, the issue of limiting liability may be addressed in the context of a negotiated agreement if applicable. Moreover, any issues raised regarding limited liability could be resolved by the courts in a contract dispute or other litigation.

(39) Commenters' Proposed Additional Ohio Adm.Code 4901:1-3-03(B)(8). The Electric Utilities propose language to address safety violations on a pole requested for attachment. The Electric Utilities request that the following three presumptions be established: (a) any unauthorized attachment should be assumed to have caused the safety violation and the unauthorized attaching entity should be required to pay for a pole replacement; (b) the owner of an attachment that is not in compliance with the rules should bear the responsibility to pay to correct the violation; and (c) make-ready deadlines should be tolled under these circumstances until the safety violation has been corrected by the attacher that caused the violation. (Electric Utilities at 33.)

Fibertech disagrees with the Electric Utilities proposal to toll the proposed time frames when pre-existing safety violations must be corrected. Rather, Fibertech recommends that the violation be corrected as soon as possible along with performing any required make-ready work on the pole and billing the offending party. According to Fibertech, this would protect the safety of all parties involved and not penalize new attachers for the non-compliant and unsafe practices of other attachers. (Fibertech Reply at 14-15.) Similarly, Fibertech rejects the Electric Utilities' contention that any required replacement of a pole should occur outside of the proposed time frames. While recognizing that pole replacements may become necessary for reasons such as insufficient space or pre-

existing safety violations, Fibertech submits that if a pole that requires replacement is exempted from the requisite time frames, it becomes impossible to both predict when service may be provided and complete service until the poles are replaced. (Fibertech Reply at 18.)

The Commission believes that safety violations should be promptly inspected and that the cause of the violation be determined at such inspection. If an attachment is found to be out of compliance during a safety inspection, the attacher causing the safety violation or non-compliance should be financially responsible for correction of the violation, but the correction itself should be performed by the pole owner since the violation is located on its pole. The rule has been revised accordingly. However, with regard to tolling of time frames, we do not believe that the Electric Utilities have made a compelling argument for the automatic tolling of attachment requests based on the detection of a safety violation. Therefore, the Electric Utilities' recommendation pertaining to tolling of time frames is denied.

(40) Proposed Ohio Adm.Code 4901:1-3-03(C)(1). Staff proposed language addressing the hiring of contractors for survey and make-ready, including that a public utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its poles. OCTA recommends the paragraph be modified to merely provide that the public utility make available and maintain a current and commercially reasonable list of contractors, without limitations to just the communications space (OCTA Att. A at 7). The Commission finds that OCTA's proposal is without merit and should be denied.

(41) Proposed Ohio Adm.Code 4901:1-3-03(C)(4). Staff proposed language addressing the hiring of contractors for survey and make-ready, including that the consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity as well as for reasons of safety, reliability, and generally applicable engineering purposes.

The Electric Utilities concur that the consulting representative must have the absolute authority to make final decisions to deny attachment requests on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes, as well as construction standards. Therefore, they recommend that construction standards also be included in this paragraph and that the word "may" be changed to "shall." (Electric Utilities at 8-9, 44.)

Fibertech recommends deleting the phrase "and generally applicable engineering purposes" as this phrase is overly broad, not based on Ohio law, and could result in any reason being offered for denial of access to poles (Fibertech at 18-19). OTA recommends that the rule be expanded to include all pole owners and not just electric utilities (OTA at 8). OCTA proposes that the rule be modified so that the consulting representative's right to make determinations is subject to the criteria in Ohio Adm.Code 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 (OCTA Att. A at 7-8).

The Commission agrees with OTA that "telephone company" should be added to the scope of this paragraph and the rule has been revised accordingly. The Electric Utilities proposed language change should not be implemented, at this time, however, due to lack of record evidence to support the proposal. OCTA's proposal is unnecessary in light of the fact that adopted Ohio Adm.Code 4901:1-3-05 and adopted Ohio Adm.Code 4901:1-3-06 provide mechanisms for the processing of complaints and for the mediation of disputes, respectively.

(42) Proposed Ohio Adm.Code 4901:1-3-03(E). Staff proposed language with respect to rights-of-way, which notes that: public utilities are subject to all constitutional, statutory, and administrative rights and responsibilities for use of public rights-of-way; private rights-of-way for all public utilities are subject to negotiated agreements with the private property owner, exclusive of eminent domain considerations; public utilities are prohibited from entering into exclusive use agreements of private building riser space, conduit, and/or closet space; and public utilities shall coordinate their right-of-

way construction activity with the affected municipalities and landowners. In addition the paragraph notes that, nothing in this section is intended to abridge the legal rights and obligations of municipalities and landowners.

OCTA contends that this rule improperly provides the Commission with the ability to review a cable operator's authority to occupy rights-of-way. OCTA believes that the establishment of this power is unnecessary due to the fact that a cable provider's authority to occupy rights-of-way has already been secured through the statewide franchising process controlled by the Ohio Department of Commerce and that the interpretation and adjudication of property and contract rights has been reserved to the courts. Therefore, OCTA proposes the deletion of this proposed rule. (OCTA Initial Comments, 6, Att. A at 8.)

Dublin states that it has previously utilized its constitutional, statutory, and administrative rights to promote the creation and operation of broadband services. Upon reviewing this proposed rule, Dublin notes that the rule will not adversely affect the legal rights and obligations of municipalities and landowners and will not adversely impact the efforts of municipalities to promote broadband. (Dublin at 4.) AT&T does not believe the proposed rule is intended to impact local control over rights-of-way in any respect (AT&T Reply at 23).

The Commission agrees with Dublin and AT&T that the rule will not adversely impact the legal rights and obligations of municipalities relative to rights-of-way. Therefore, the Commission finds the proposed rule to be reasonable and finds that OCTA's recommendation should be denied.

(43) Proposed Ohio Adm.Code 4901:1-3-03(F). Staff proposed language reserving the right of the Commission 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 R.C. 4905.16 and 4905.31.

Without directly commenting on this paragraph, OCTA recommends removing this rule in its entirety (OCTA Att. A at 8). While OCTA offered no direct rationale for removing this

paragraph in its comments pertaining to proposed Ohio Adm.Code 4901:1-3-03(E), the OCTA discusses a "* * * broad and ill-defined mechanism for Commission review of a cable operator's authority to occupy rights-of-way * * *" (OCTA at 6). However, the Commission notes that proposed Ohio Adm.Code 4901:1-3-03(E) does not contain any such mechanism, but rather, merely sets forth rights, responsibilities, and limitations with regard to public utilities' use of rights-of-way. Instead, proposed Ohio Adm.Code 4901:1-3-03(F) provides a mechanism for review.

Provisions relating to a cable operator's authority to occupy rights-of-way do not represent the totality of a pole attachment agreement but, rather, are included among numerous provisions pertaining to all aspects of the pole attachment arrangement between the cable operator, or any attacher, and the pole owner. As the scope of such agreements is not limited to a cable operator's authority to occupy rights-of-way, the Commission finds its right to review any or all arrangements between public utilities and between public utilities and private land owners as provided in this paragraph to be in the public interest. Clearly, the impact of agreements between public utilities and between public utilities and private landowners related to access to pole attachments, ducts, and conduit is not limited to the parties entering into these agreements. Such agreements may have implications that reach beyond the parties and affect other interested stakeholders. It is foreseeable that such contracts could have implications for and affect other attachers seeking access to the same facilities. As such, it is in the public interest for the Commission to reserve the right to review and approve any or all such agreements. Therefore, the Commission finds that OCTA's recommendation is without merit and should be denied.

(44) Proposed Ohio Adm.Code 4901:1-3-03(G). Staff proposed language requiring the public utility 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.

OTA and the Electric Utilities proposed new language to ensure attaching techniques are safe and meet current engineering standards (OTA at 8; Electric Utilities at 37). The

Commission agrees with the policy concerns asserted by both the Electric Utilities and OTA. Therefore, this paragraph has been revised accordingly.

(45) Proposed Ohio Adm.Code 4901:1-3-03(H). Staff proposed language requiring that the time frames for access to a public utility's conduits shall be identical to the time frames established in this rule for access to a public utility's poles.

While recognizing that the FCC has not yet done so, Fibertech strongly supports the proposal to establish time frames for access to conduit. Fibertech notes that the current licensing system in Ohio is unduly slow and unpredictable and permits the utility to control whether and when Fibertech may serve its customers. (Fibertech at 6, Att. A at 24.) TWTC asserts that access to conduits is just as critical to the timely deployment of competitive facilities as access to poles. Specific to the proposed rule, TWTC submits that if there are practical difficulties with respect to applying pole attachment make-ready rules to conduit occupancy, a waiver should be sought by the conduit owner explaining the specific circumstances as to why different time frames for conduit access should be utilized. (TWTC Reply at 4.) OCTA suggests that both the time frames and basic procedures should be identical to the time frames established in this rule for access to a public utility's poles (OCTA at 8).

AT&T and OTA oppose inclusion of this rule, noting that the *Pole Attachment Order* at ¶45 considered a similar request to establish timelines for access to conduit but declined to do so. Specifically, these commenters point out that the FCC found that access to ducts and conduit raise different issues than access to poles. (OTA at 8-9; AT&T at 9.) AT&T further notes that there is no support in the instant record to support the notion that issues related to duct and conduit access are similar to those of pole access (AT&T at 10). In summary, AT&T states that the significant differences in access to poles versus conduits were not thoroughly vetted in the aforementioned FCC proceeding, and were done even less so in the current case now before the Commission. Thus, AT&T believes that there is no empirical basis for the Commission to establish rules regarding time frames for access to conduit. (AT&T Reply at 11-13.)

The Commission determines that the proposed rule should not be implemented at this time due to lack of record evidence. While it is clear that timely access to ducts and conduits is necessary to foster a competitive broadband marketplace, it is equally clear that conduit access poses different issues than pole access. As such, pole access time frames may not be appropriately used as a standard for conduit access time frames. The Commission notes that the FCC has declined to establish time frames for conduit access. While we have considered such time frames, we find that issues unique to conduit access, such as permitting delays and collapsed ducts, may make pole access time frames inappropriate for use when applied to conduits.

Comments on Ohio Adm.Code 4901:1-3-04 - Rates, terms, and conditions for poles, ducts and conduits

(46) Staff proposed language regarding the rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and right-of-way of a telephone company or electric light company by a non-public utility. Pursuant to the proposed language, such access is to be established through tariffs that are filed with the Commission. Additionally, an attaching entity that is not a public utility may negotiate and enter into voluntary agreements for such provisions with a telephone or electric light company. Requests for such provisions by another public utility shall be established through negotiated agreements. In addition, Staff proposed specific pole attachment and conduit occupancy rate formulas, as well as the formula to determine the allocation of the costs for unusable space, both of which are set forth in appendices attached to the proposed rules.

Many commenters propose that the Commission adopt a single pole attachment rate formula rather than Staff's proposed rate formulas, which mirror the current FCC rate formulas for CATV attachments, urban telecommunications attachments, and non-urban telecommunications attachments (OCTA at 9, 11-16; Frontier North at 1-2; OneCommunity at 6-9; PCIA Reply at 3-4; Electric Utilities at 18-19). OCTA, Frontier North, and TWTC recommend that the cable rate formula should apply to all pole attachments because Staff's proposed formulas for telecommunications attachments, unlike the cable rate formula,

will require additional cost-allocation factors associated with the number of attaching entities. These commenters also contend that a multi-tiered rate structure will cause disputes to abound as to which formula should apply to which poles and will create artificial competitive imbalances between telecommunications and cable service providers. (OCTA at 9, 11-16; Frontier North at 11, Frontier North Reply at 3; TWTC Reply at 2-5.)

Frontier North and OCTA assert that because Ohio's pole attachment statutes do not contain the same constraints as the federal PAA, the Commission has the authority to develop a single, unified rate formula that applies to all attachments placed on utility poles, regardless of the attacher's regulatory classification (Frontier North at 11, Frontier Reply at 3; OCTA at 11-16). Frontier North further asserts that the Commission has the authority to adopt a uniform pole attachment rate formula that would apply to non-utility providers through an approved tariff under R.C. 4905.71, and as a default rate calculator for attaching utilities when the parties cannot agree on negotiated rates under R.C. 4905.51 (Frontier North at 2). Consistent with the cable rate formula, Frontier North proposes that the uniform rate should be allocated on the percentage of usable space occupied by an attachment. Frontier North further proposes that the presumed height of a standard pole be increased to 40 feet from the current 37.5 feet to better reflect actual conditions of pole usage (Frontier North at 9).

While the Electric Utilities agree that a single rate should apply to non-ILEC attachments, the Electric Utilities disagree with commenters supporting the cable rate formula as the basis of the uniform rate. Accordingly, the Electric Utilities support the application of a modified, simplified version of the telecommunications rate formula (as discussed below) for all non-public utility pole attachments. (Electric Utilities Reply at 15-16.) Specifically, the Electric Utilities propose that the single rate formula be based on the FCC's telecommunications rate formula with certain modifications: elimination of the artificial multipliers recently added to the federal telecommunications rate formula; allocation of the communications worker safety zone from usable to unusable space; allocation of all the unusable space to attaching entities rather than two-thirds of the unusable space; and the use of the presumption of three

attaching entities per pole, which is equal to the number of presumed attaching entities in the FCC's non-urban telecommunications rate formula, but less that the five attachments presumed in the FCC's urban telecommunications rate formula. (Electric Utilities at 19, 21.)

The Electric Utilities question using the default cost allocation mechanism to determine a maximum just and reasonable rate under a disputed joint use agreement. Specifically, the Electric Utilities point out that under a joint use agreement there is an assumption of joint ownership, whereas under the typical pole owner/attacher relationship, the attaching entity is paying a rental payment to attach and is also responsible for paying all nonrecurring engineering and make-ready expenses associated with the attachment. The Electric Utilities indicate that the cost allocation formulas in such agreements are structured very differently from pole attachment agreements. Accordingly, the Electric Utilities submit all of the rights and obligations in a joint use agreement must be viewed as a whole to determine the equities of the relationship. (Electric Utilities at 15-17.)

Frontier North contends that the Electric Utilities' proposed pole attachment rate formula should be rejected, arguing that such adjustments to the telecommunications rate formula would do nothing more than inflate the maximum rates permitted (Frontier North Reply at 7). Similarly, TWTC contends that the Electric Utilities' proposed, modified version of the FCC telecommunications rate should be rejected as being out of sync with the policy direction of Staff, the Commission, and the FCC. TWTC argues it is an undisputable economic reality that, so long as an attachment covers its incremental cost, there is not cross-subsidy. TWTC contends that electric consumers are clearly better off with communications facilities attached to electric poles than without such attachment. (TWTC Reply at 5.) OCTA asserts that the electric commenters' proposed rate formula has been repeatedly discredited and has never been adopted by an expert regulatory agency like the Commission. OCTA contends that the Electric Utilities' proposed rate formula would result in the near-quadrupling of the regulated CATV attachment rate in Ohio. OCTA also contends that 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 Utilities are headed in the wrong direction. (OCTA Reply at 11.)

OTA and AT&T argue that the Commission should simply require that pole attachment and conduit rate calculations mirror the directives, definitions, assumptions, methodologies, and the various formulae set forth by the FCC in its pole and conduit attachment rate orders (OTA at 10; AT&T at 1-3). OTA contends that, as proposed, the current appendix does not appear to allow or provide for any modifications that the FCC may propose in future orders (OTA at 10). AT&T asserts that none of the parties offering alternatives to the approach taken by the FCC on the rate formula and its application have justified any deviation from the rules adopted by the FCC (AT&T Reply Comments at 25). Zayo urges the regulation of pole attachment rates on the same compensatory basis as the FCC promulgated under the *Pole Attachment Order*. Zayo believes that bringing pole attachment rates to reasonable levels will incent telecommunications companies to enter into and/or expand within Ohio markets. (Zayo at 2-3.)

The Commission concludes that a single rate formula for all pole attachments is appropriate and should be adopted. In coming to this conclusion, the Commission agrees that the cost incurred by the pole owner to provide attachment space is not affected by the service being provided by the attaching entity. While AT&T, OTA, and Zayo advocate for the adoption of the FCC's current CATV, urban telecommunications, and non-urban telecommunications rate formulas adopted pursuant to the FCC's *Pole Attachment Order*, the Commission notes that the current telecommunications rate formulas for urbanized and non-urbanized areas result in rates that are at or near the FCC's cable rate. Specifically, given the FCC's current presumptions for the amount of space occupied by an attachment, average number of attachers, pole height, usable space, and unusable space, the FCC's telecommunications rate formulas yield rates that are nearly identical to the rate produced using the CATV rate formula under the same presumptions. Thus, while advocating adoption of the FCC's bifurcated rate formulas, AT&T, OTA, and Zayo are basically agreeing to a single pole attachment rate.

The Commission also concludes that the single rate formula to be adopted should be consistent with the CATV rate formula and allocated based on the percentage of usable space occupied by an attachment. The CATV rate formula has been deemed to be compensatory by the courts. *See, e.g., Alabama Power Co.* v. *FCC*, 311 F.3d 1357 (11th Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 44 L.Ed.2d 282 (1987). The Commission notes that the CATV rate formula, as determined by the courts in those cases, is compensatory but is subject to rebuttal as discussed below. The Commission also determines that the CATV rate formula is well known and requires fewer inputs than the telecommunications rate formulas. The Commission will address in a future entry the filing of tariffs consistent with the adopted rule.

The Commission further concludes that the current FCC presumptive inputs for the pole attachment formula be adopted for the purpose of calculating the single rate formula. The current assumptions are as follows: pole height equal to thirty-seven and one half feet, unusable space equal to twenty four feet, usable space equal to thirteen and a half feet, and space occupied by an attachment equal to one foot. The Commission rejects the Electric Utilities' assertion that 3.33 feet of the communications worker safety zone be reallocated from usable space to unusable space. The Commission also rejects Frontier North's assertion that the assumption for pole height should be increased to forty feet from thirty-seven and one half feet. The Commission finds that the Electric Utilities and Frontier North have not provided sufficient evidence to alter the well established allocation of usable and unusable space on a pole or the assumed height of a pole. The Commission does note, however, that these presumptions are rebuttable and that parties may challenge these presumptions in the future on a case-by-case basis through the filing of a complaint case.

Based on the record in this case and the analysis set forth supra, the Commission finds that, with respect to calculation of pole attachment occupancy rates, the definitions, assumptions, and methodologies set forth in 47 C.F.R. 1.1409(e)(1) should be adopted, including those related to the net cost of a bare pole and carrying charge rates. Additionally, the Commission finds that, with respect to the calculation of conduit occupancy rates, the definitions, assumptions, and methodologies set forth in 47

C.F.R. 1.1409(e)(3) should be adopted, including those related to net conduit investment and carrying charge rates. The attached revised rules have been revised accordingly.

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

Comments on Ohio Adm.Code 4901:1-3-05 - Complaints

(47) Staff proposed language providing that any attaching entity or a public utility may file a complaint against a public utility pursuant to R.C. 4905.26 or 4927.21 to address claims that it has been denied access to a public utility pole, duct, conduit, or right-of-way in violation of R.C. 4905.51 or 47 U.S.C. 224 and/or that a rate, term, or condition for a pole attachment is not just and reasonable. The Staff proposal further provides that the Commission shall issue a decision resolving issues presented in a complaint within a reasonable time not to exceed 360 days after the filing of the complaint.

Rather than the proposed resolution of a complaint within 360 days of the filing of the complaint, Fibertech recommends resolution within 90 days of the filing because it better signifies a timely resolution (Fibertech at 20). The Electric Utilities assert that very few pole attachment disputes have resulted in formal complaint filings. They note that the electric utilities have worked with telephone and cable providers regarding the applicable pole attachment tariff provisions. (Electric Utilities at 5.) AT&T asserts that, to the extent that there is a need for a state-specific complaint rule, such concerns are already addressed pursuant to existing Ohio Adm.Code 4901-9-01, or proposed Ohio Adm.Code 4901:1-3-06 (AT&T Reply at 26).

With respect to the issue of remedies, OCTA and Data Recovery recommend that the proposed rules must incorporate more specific remedies and procedures in the event that a pole

owner does not comply with access timelines and other access requirements (OCTA at 7; Data Recovery at 8). Additionally, the Electric Utilities recommend that public utilities be allowed to include provisions in tariffs and pole attachment agreements imposing penalties of up to $100 per violation for unauthorized attachments and safety violations. In response to these proposals, AT&T responds that it does not believe that there has been any demonstration to deviate from the FCC's pole attachment rules. Rather than establishing state-specific remedies or penalties in the proposed rules, AT&T believes that these issues are best addressed in a complaint process on a case-by-case basis, either before the Commission or the FCC. (AT&T Reply at 19-20, 26.) Finally, consistent with its proposed revision to the definition of "attaching entity" in proposed Ohio Adm.Code 4901:1-3-01(A) to include "public utilities" as part of the definition of "pole attachment," OTA seeks to amend this rule in order to delete the reference to "public utility" and simply include "any attaching entity" (OTA at 10).

The Commission determines that this rule is appropriate for the purpose of specifically addressing complaint cases related to issues involving pole attachments in Ohio. While recognizing the general complaint provisions of Ohio Adm.Code 4901-9-01, the Commission finds that this rule is not specifically applicable to disputes related to pole attachments. Instead, the Commission believes that it would be more appropriate that rules specifically related to pole attachment issues be adopted. In regard to the submitted comments requesting a 90-day turn around on pole attachment complaint cases, the Commission finds that such a time frame is unreasonable from an administrative standpoint when time must be allotted for discovery, testimony preparation, hearing, motions, and deliberation. Due process demands that sufficient time be provided in order to address each phase of the complaint process. In light of the fact that each complaint case is unique and case-specific, the Commission notes that we will complete complaint cases under this rule as quickly as possible but no later than 360 days after filing.

In regard to the request of the OCTA and Data Recovery that the proposed rule incorporate more specific remedies and procedures in the event that a pole owner does not comply

with access timelines and other access requirements, the Commission finds that the scope of its enforcement authority is already established as set forth in R.C. 4905.54. Specifically, pursuant to R.C. 4905.54, the Commission may assess a forfeiture of not more than $10,000 for each violation or failure against a public utility that violates a provision of R.C. Chapters 4901, 4903, 4905, 4907, and 4909 or that after notice fails to comply with an order, direction, or requirement of the Commission. Each day's continuation of the violation or failure is a separate offense.

Regarding the requested incorporation of provisions related to damages for failure of a pole owner to comply with the established time frames, the Commission determines that it does not currently possess such authority. While recognizing that the Commission has previously allowed for compensatory damages under specific limited scenarios (*See* e.g., the previously existing and now cancelled Minimum Telephone Service Standards, formerly Ohio Adm.Code Chapter 4901:1-5) these remedies were limited in scope to reimburse existing customers for service outages beyond a particular duration for which the customer had already prepaid. This scenario is distinguishable from the now requested compensatory remedies for scenarios related to pole attachments due to the fact that the requesting attachee is not currently an existing customer relative to the attachment in dispute. Additionally, the Commission points out that unlike R.C. 4928.15(B)(1), which specifically authorizes the Commission to order restitution to customers for damages related to electric power fluctuations, similar statutory authority does not exist relative to pole attachment disputes.

Finally, consistent with the approved revision to the definition of "attaching entity" in proposed Ohio Adm.Code 4901:1-3-01(A) to include "public utilities" as part of the definition, the Commission agrees with OTA's modification to proposed Ohio Adm.Code 4901:1-3-05 in order to delete the reference to "public utility" and simply include "any attaching entity." Accordingly, the rule should be revised to reflect such clarification.

Comments on Ohio Adm.Code 4901:1-3-06 - Mediation and arbitration of agreements

(48) Staff proposed language providing for a mediation and arbitration process for agreements regarding the provision of access by LECs, as well as all other public utilities, to poles, ducts, conduits, and rights-of-way.

PCIA, the Electric Utilities, and AT&T all support the mediation process (PCIA at 15; Electric Utilities at 4, 9; AT&T Reply at 26). In particular, the Electric Utilities note that the proposed rule provides a forum for informal resolution through mediation or arbitration of pole attachment disputes (Electric Utilities Reply at 9). PCIA encourages the Commission to ensure that the entering of the mediation process is done in good faith and is not used to subvert the timelines outlined in the rules (PCIA at 15). OCTA requests the rule be modified to reflect that all public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way on just and reasonable terms (OCTA Att. A at 11).

While the Commission recognizes the substantive intent of OCTA's recommendation, we note that it is already addressed within the language adopted in Ohio Adm.Code 4901:1-3-03(A)(1). However, as we have deleted paragraph (B) of the proposed rule, the first sentence of this rule has been revised to reflect that all public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way consistent with Ohio Adm.Code 4901:1-3-03(A)(1). The Commission further determines that since proposed Ohio Adm.Code 4901:1-3-06(A) sufficiently addresses mediation available to parties, the additional sections of the proposed rule are unnecessary. Therefore, only paragraph (A) shall be adopted as Ohio Adm.Code 4901:1-3-06.

(49) Upon consideration of the record as a whole, including the Staff proposal and all comments and reply comments submitted in response to it, the Commission enacts the rules attached as the appendix to this Finding and Order for the reasons discussed above. Other than existing Ohio Adm.Code 4901:1-7-23, the adopted rules are not intended to replace any of the Commission's existing rules in other chapters of the Ohio Administrative Code, but, rather, should be read in conjunction

with such existing requirements. Ohio Adm.Code 4901:1-7-23 will be rescinded upon the effective date of Ohio Adm.Code Chapter 4901:1-3.

It is, therefore,

ORDERED, That the motions pro hac vice be granted consistent with this Finding and Order. It is, further,

ORDERED, That Ohio Adm.Code Chapter 4901:1-3, as set forth in the appendix to this Finding and Order, is hereby adopted. It is, further,

ORDERED, That copies of Ohio Adm.Code Chapter 4901:1-3, as set forth in the appendix to this Finding and Order, be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That to the extent not addressed in this Finding and Order or the attached appendices, all other arguments raised are denied. It is, further,

ORDERED, That Ohio Adm.Code 4901:1-7-23 be rescinded upon the effective date of Ohio Adm.Code Chapter 4901:1-3. It is, further,

ORDERED, That notice of the adoption of this Finding and Order and the appendix be sent to the Electric, Energy, and Telephone list-serves. It is, further,

ORDERED, That a hard copy of this Finding and Order and the appendix setting forth the rules be served upon all commenters of record in this matter.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

JSA/vrm

Entered in the Journal JUL 30 2014

Barcy F. McNeal
Secretary

DRAFT - NOT FOR FILING

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 and that is authorized to attach pursuant to sections 4905.51 or 4905.71 of the Revised Code. 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.

(D) "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.

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

(F) "Communications space" means that portions of the pole typically used for the placement of communications conductors beginning below the bottom point of the communications workers safety zone and ending at the lowest point on the pole to which horizontal conductors may be safely attached.

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

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

(I) "Days" means calendar days for the purposes of these rules.

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

(K) "Electric company" for purposes of this chapter, shall have the same meaning as

DRAFT - NOT FOR FILING

defined in division (A)(3) of section 4905.03 of the Revised Code.

(L) "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.

(M) "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.

(N) "Pole attachment" means any attachment by an attaching entity to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

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

(P) "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.

(Q) "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.

(R) "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.

(S) "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.

(T) "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.

(U) "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.

DRAFT - NOT FOR FILING

4901:1-3-02 Purpose and scope.

(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 April 1, 2014.

(B) This chapter establishes rules for the provision of attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility under rates, terms, and conditions that are just and reasonable. Ohio has elected to regulate this area pursuant to 47 U.S.C. 224(c)(2).

(C) 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 electric light company that is a public utility pursuant to section 4905.71 of the Revised Code.

(D) The commission may, upon an application or motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

(E) Any 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.

(F) All of the automatic time frames set forth in this chapter may be suspended pursuant to directives of the commission or an attorney examiner.

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 under rates, terms and conditions that are just and reasonable. Notwithstanding this obligation, a public utility 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

DRAFT - NOT FOR FILING

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. A complete application is an application that provides the public utility with the information reasonably necessary under its procedures to begin to survey the poles.

(3) If the public utility establishes or adopts an electronic notification system, the attaching entity must participate in the electronic notification to qualify under this chapter.

(4) A public utility shall notify the attaching entity in a timely manner if the application to attach facilities to its poles is deemed to be incomplete. If access is not granted within forty-five days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day (or by the sixtieth day in the case of larger orders as described in paragraph (B)(6) of this section). 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. A request for access to a public utility's poles, ducts, conduits, or rights-of-way that is not denied in writing within forty-five days of the request shall be deemed to be granted.

(5) A public utility shall provide all attaching entities no less than sixty days written notice prior to:

(a) Removal of facilities or termination of any service to those facilities;

(b) Any increase in pole attachment rates; or

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

(6) An attaching entity may file with the commission a petition for temporary stay of the action contained in a notice received pursuant to paragraph (5) of this section within fifteen 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

DRAFT - NOT FOR FILING

an answer within seven 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 days after the filing of the answer, the petition shall be deemed denied unless suspended.

(B) Timeline for access to public utility poles

(1) Survey

Not longer than forty-five (45) days after receipt of a complete application to attach facilities to its poles (or within sixty days, in the case of larger orders as described in paragraph (B)(6) of this section), a public utility must perform a survey which provides identification of present attachments and any modification to the pole, duct, conduit, or right-of-way that must be performed to accommodate the requested attachment.

(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 make-ready work within fourteen 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 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 twenty-two days after the estimate is presented.

(b) An attaching entity may accept a valid estimate and make payment within twenty-one days from receipt of the estimate.

(c) Upon receipt of a written dispute or request for additional information regarding the scope of work or allocation of costs of the work from the attaching entity, the twenty-one day period to accept a valid estimate and make payment will be held in abeyance pending resolution of the dispute or inquiry to the public utility.

(3) Make-ready

DRAFT - NOT FOR FILING

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

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

(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 that is as prompt as possible, but not longer than sixty days after notification is sent (or one-hundred and five days in the case of larger orders, as described in paragraph (B)(6) 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 if make-ready is not completed by the completion date set by the public utility, the attaching entity requesting access may complete the specified make-ready pursuant to paragraph (B)(4) of this section.

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

(vi) State any applicable engineering and construction standards.

(b) For wireless attachments above the communications space, including those on pole tops, the notice shall:

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

(ii) Set a date for completion of make-ready as promptly as possible, but no longer than ninety days after notification is sent (or one-hundred and thirty-five days in the case of larger orders, as described in paragraph (B)(6) of this section).

(iii) State that any entity with an existing attachment may, consistent with paragraph (B)(5) of this section, modify the attachment

DRAFT - NOT FOR FILING

consistent with the specified make-ready before the date set for completion.

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

(v) State any applicable engineering and construction standards.

(c) Public utilities may deny access where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(4) 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 at its own expense a contractor to complete a survey. If a public utility fails to provide an estimate pursuant to paragraph (B)(2) of this section or does not complete make ready pursuant to paragraph (B)(3)(a)(ii) of this section, the attaching entity requesting attachment in the communications space may, as specified in section (C) of this rule, hire a contractor at its own expense to complete the make-ready.

(5) For wireless attachments above the communications space, a public utility shall ensure that make-ready is completed by the date set by the public utility in paragraph (3)(b)(ii) of this section. Only the public utility or its direct contractor may perform make-ready work above the communications space.

(6) 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

DRAFT - NOT FOR FILING

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 treat multiple requests from a single attaching entity as one request when the requests are filed within thirty days of one another.

(7) A public utility may not deviate from the time limits specified in this section unless:

(a) Before offering an estimate of charges, the parties have a pole attachment agreement specifying time frames for an estimate and acceptance that exceed those set forth in this section.

(b) During performance of make-ready for good and sufficient cause it is infeasible for the public utility to complete the make-ready work within the time frame prescribed in this section.

(i) Good and sufficient cause for deviation from the time limits may allow utilities to cope with an emergency declared by a governmental entity but not 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 commission rulemaking, that affect pole attachments.

(ii) A public utility that so deviates shall promptly 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.

(8) If safety violations are found to exist on a pole requested for attachment, the

DRAFT - NOT FOR FILING

attacher that is found not to be in compliance with the utility's applicable engineering and construction standards shall be financially responsible for correction of the violation. The pole owner shall be responsible for performing the actual correction.

(C) Contractors for survey and make-ready

(1) A public utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes 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 in the communications space 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 or telephone company may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(D) 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

DRAFT - NOT FOR FILING

landowners.

(E) The commission reserves the right to require that any or all arrangements between public utilities and between public utilities and private landowners related to poles and conduit be submitted to the commission for its review and approval, pursuant to sections 4905.16 and 4905.31 of the Revised Code.

(F) 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, consistent with the utility's then-current engineering practices and standards.

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.

(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 a rate, term, or condition is just and reasonable in complaint proceedings or in tariff filings. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the

DRAFT - NOT FOR FILING

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 pole attachment 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) The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(1), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for pole attachments.

(3) The commission will apply the formula set forth in 47 C.F.R. 1.1409(e)(3), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code for determining a maximum just and reasonable rate for conduit occupancy.

(4) With respect to the formula referenced in D(2) 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.

(5) Relative to joint use agreements, the default rates may be negotiated or determined by the Commission in the context of a complaint case.

(E) 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, 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

DRAFT - NOT FOR FILING

modification rendered possible the added attachment.

(F) 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 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 4901-9 of the Administrative Code, shall apply. The commission shall issue a 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.

All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way consistent with rule 4901:1-3-03(A)(1). 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 according to procedures established in rules 4901:1-7-8 through 4901:1-7-10 of the Administrative Code.