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**

THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION'S RESPONSE TO THE ELECTRIC UTILITIES' APPLICATION FOR REHEARING

The Ohio Cable Telecommunications Association ("OCTA") respectfully submits this Response to the Application for Rehearing of Ohio Power Company, Ohio Edison Company, the Cleveland Electric Illuminating Company, the Toledo Edison Company, the Dayton Power and Light Company and Duke Energy Ohio, Inc. ("Electric Utilities" or "Utilities").[1]

I. INTRODUCTION

Since the inception of this docket, the Public Utilities Commission of Ohio's ("PUCO" or "Commission") and Staff have endeavored to craft new pole attachment, conduit and right-of-way rules dedicated to balancing the interests of all market participants, encouraging the deployment of advanced services, ensuring the safety of the public and honoring the policy goals of the Common Sense Initiative in supporting the development of small businesses in Ohio. The adoption of Ohio Admin. Code Chapter 4901:1-3 ("New Attachment Rules" or "Rules") is proof positive they have succeeded.

[1] OCTA takes no position on the relief requested in the Applications for Rehearing filed by AT&T Entities and Fiber Technology Networks, L.L.C., except where specifically relevant to and addressed by the arguments herein.

While any newly adopted rule may require certain tweaks to ensure appropriate application and regulatory efficiency, the Electric Utilities' broadside challenges to the New Attachment Rules, and the Commission's authority to adopt them, are without merit. The Commission has ample authority to regulate public utilities and enact the Rules, which are largely a codification of existing, long-standing practices that ensure Ohio's regulatory environment is symmetrical and consistent with pole-attachment regimes in neighboring states, and across the nation. These practices have been tried and tested over the past thirty years and continue time and again to be upheld as lawful and reasonable regulation. Similarly, the existing Ohio rate formula that itself has withstood decades of utility challenges like those of the Electric Utilities here is fully compensatory to the pole owner and is – by far – the most prevalent across all states. [2] It should stand.

[2] Twenty-one States (including the District of Columbia) displaced FCC jurisdiction with their own pole attachment regulation. *See* 47 U.S.C. § 224(c); *States That Have Certified That They Regulate Pole Attachments,* Public Notice, WC Docket No. 10-101, 25 F.C.C.R. 5541, 5541-42 (2010). Although the States are entitled to adopt other rate calculation formulas, almost every state exercising pole attachment jurisdiction has adopted or relies heavily on the same formula, or a similar formula, to that used by the FCC to set reasonable pole attachment rates for cable operators: **Alaska**, *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 - 3 AAC 52.940,* Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002); **California,** *Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service,* R.95-04-043, 1.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998); **Connecticut,** *Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access,* Docket No. 05-06- 01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep't of Pub. Util. Control 2005); **District of Columbia,** *Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbia,* Order No. 12796 (2003); **Idaho,** Id. Code § 61-538; **Illinois,** Ill. Admin. Code § 315.20; **Kentucky,** *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Ky. Pub. Serv. Comm., No. 251, at *8 (Sept. 17, 1982); **Massachusetts,** *A Complaint and Request for Hearing of Cablevision of Boston Co.,* D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998); **Michigan**, *In the Matter of the Application of Consumer Power Company,* Case

II. JURISDICTION

A. The Commission has the Requisite Authority to Adopt the New Attachment Rules Governing Pole Attachments

The Commission, in adopting the New Attachment Rules, acted well within its jurisdictional and statutory authority. As stated in its Finding and Order, the Commission's New Attachment Rules address the regulation of pole attachments and implement the mechanisms provided under the Ohio Rev. Code §§ 4905.51 and 4905.71.[3] The Electric Utilities essentially contend that the Commission lacks the authority to promulgate the New Attachment Rules because the referenced code provisions do not explicitly provide that authority.[4] That argument requires that the code

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Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis *26* (1997), *reh'g denied,* 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm 'n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm 'n,* No. 113689 (Mich. Sup. Ct. Aug. 31, 1999); **New Jersey**, *Regulations of Cable Television Readoption with Amendments: N.J.A. C. 14:18,* Docket No. CX02040265 (2003); **New York,** *In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095,* 997 N.Y. PUC Lexis 364 (1997); *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tar Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers,* Case 01-E-0026 (2001); **Ohio**, *Re: Columbus and Southern Electric Company,* 50 PUR 4th 37 (1982); **Oregon,** *Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety,* AR 506; 510 at p. 10 (2007); **Utah,** UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006); *In the Matter of an Investigation into Pole Attachments,* 2006 Utah PUC Lexis 213 (2006); **Vermont,** Vt PSB Rule 3.703; *Vermont Policy Paper and Comment Summary on PSB Rule 3.700* (2001) at 6; and **Washington**, Rev. Code Wash. § 54.04.045.

Two states — **Arkansas** and **New Hampshire** — have not yet adopted a pole attachment rate formula. *See* Ark. Code Ann. §§ 23-4-1001 *et seq.*; *Re Act: 740 of 2007,* Ark. Pub. Serv.

[3] Finding and Order at ¶9 (July 30 2014).

[4] Application for Rehearing of Ohio Power Company, Ohio Edison Company, the Cleveland Electric Illuminating Company, the Toledo Edison Company, the Dayton Power and Light Company and Duke Energy Ohio, Inc. at 2-3 ("Electric Utilities' Rehearing App.").

provisions on which it is based be detached, isolated and disengaged from other parts of the Revised Code (and basic administrative law and principles of statutory construction). When the Code provisions are read properly, and in context with other relevant provisions of Chapters 4901and 4905, the Commission's authority is obvious.

For example, Ohio Rev. Code § 4901.02 provides that "[t]he Commission shall possess the powers and duties specified in, *as well as all powers necessary and proper to carry out the purposes of,* Chapters 4901, 4903, 4905 . . . of the Revised Code." (emphasis added) The purpose of Sections 4905.51 and 4905.71 is to vest power in the Commission to regulate complaints and tariff proceedings regarding pole attachment rates, terms and conditions of public utilities, and telephone and electric light companies.[5] Thus, in light of Section 4901.02, it follows that the Commission shall have all powers necessary and proper to carry out the purposes of Sections 4905.51 and 4905.71. Adopting rules and standards for the purpose of overseeing pole attachment complaints and tariff proceedings is necessary, proper and in accordance with the Commission's powers and duties under Chapter 4905, and therefore authorized pursuant to Ohio Rev. Code § 4901.02.

More specifically, Ohio Rev. Code §4905.04 provides that the Commission is vested with "the power and jurisdiction to supervise and *regulate* public utilities, and to require all public utilities to furnish their products and render all services exacted by the commission". (emphasis added). The legislature provided additional authority in Section §4905.06, by specifying that the Commission has general supervision over all public utilities, including the manner in which their

[5] Ohio Rev. Code §§ 4905.51 and 4905.71.

properties are leased, operated, managed and conducted and the supervision of compliance with *all* laws. There is little doubt that the New Attachment Rules: are for the purpose of regulating public utilities; address the requirements of how public utilities shall render the service of poll attachments and conduit occupancy; relate to the Commission's supervision of how poles and conduit are managed and operated; and address the compliance by public utilities with the obligations of Section 4905.51 and 4905.71.

Additionally, Section 4901.13 provides that the Commission has authority to adopt rules to govern its proceedings and to regulate the mode and manner of investigations and hearings related to parties before it. The Commission's New Attachment Rules are not general rules created in a vacuum, but were implemented to govern its tariff and complaint proceedings under Sections 4905.51 and 4905.71. As such, the Commission's authority to promulgate the New Attachment Rules is supported by several provisions of the Revised Code (that the Electric Utilities ignore), not merely Ohio Rev. Code §§ 4905.51 and 4905.71.[6]

B. The Commission's Jurisdiction is not Limited to Tariff and Complaint Proceedings

In addition to ignoring the other relevant provisions of the Revised Code, the Electric Utilities focus on selected language of Sections 4905.51 and 4905.71, arguing that the Commission's oversight and actions must be limited to situations where parties have failed to come

[6] Furthermore, the Commission, by and through its general supervisory powers over all public utilities, has the power to inspect "any property, equipment, . . . plant, . . . machinery, device, and the lines of any public utility.". Ohio Rev. Code § 4905.06 "The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for the protection of the public safety." *Id* Thus, to the extent the Rules address safety concerns, additional statutory authority supporting the Commission's jurisdiction can be found in Ohio Rev. Code § 4905.06.

to an agreement on pole attachment rates, terms or conditions, or upon the filing of a complaint or tariff proceeding.[7] In response to the Commission's assertion that "through its adopted rule, the Commission is implementing the mechanisms provided for under [Sections 4905.51 and 4905.71]," the Electric Utilities counter that the Rules "do not establish procedures by which pole attachment complaints will be resolved or tariffs will be considered." Instead, according to the Electric Utilities, the Rules would "prescriptively regulate those relationships through 'general rules' in the absence of a complaint or tariff proceeding."[8] The Electric Utilities further contend that the Commission acknowledged its statutory limitations by stating it shall determine the justness and reasonableness of a rate, term or condition in complaint proceedings or in tariff filings.[9] The Utilities then argue that the Commission's use of the rate formula "unwinds" the Commission's supposed acknowledgment of its statutory limitations by "predetermining the result of any rate dispute."[10]

The Electric Utilities' argument misapplies basic principles of statutory construction. Their interpretation of Sections 4905.51 and 4905.71 focuses solely on the language regarding complaint resolution, as opposed to reading the statutes in conjunction with *all* provisions concerning the Commission's powers and duties. Furthermore, the Utilities' insistence that the Commission can prescribe reasonable conditions and compensation in the context of a complaint or tariff proceeding

[7] Electric Utilities' Rehearing App. at 3-4.

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.*

– but not adopt guidelines to the parties prior to the dispute – does not make sense.[11] In addition to the fact that this view is belied by a straight-forward reading of the Code, the consequences of the utilities' construction would be a pervasive lack of regulatory certainty and increased litigation for all stakeholders.

With regard to the Utilities' assertion that the Rules "do not establish procedures by which pole attachment complaints will be resolved or tariffs will be considered,"[12] Ohio Rev. Code § 4901.13 provides that that the Commission has authority to adopt rules to govern its proceedings and to regulate the mode and manner of investigations and hearings related to parties before it. Thus, the Commission may adopt rules for two purposes: 1) to *govern* its proceedings; and, 2) to regulate the *mode and manner* of investigations and hearings.

The common meaning of the term "govern" is "to officially control and lead (a group of people): to make decisions about laws, taxes, social programs, etc., for (a country, state, etc.)"[13] In contrast "mode" is defined as the "possible, customary, or preferred way of doing something,"[14] while "manner" is defined as "the way that something is done or happens."[15] When construing a

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[11] Ohio Rev. Code § 1.49 (A) and (E); *See also United Dominion Ind. Limited v. Commercial Intertech,* 943 F.Supp. 857 (S.D. Ohio 1996) *citing State v. Sidell,* 282 N.E.2d 367, 368 (1972); *Crowl v. DeLuca,* 278 N.E.2d 352, 356 (1972). ("In interpreting an ambiguous statute a court may consider the object to be attained as well as the 'consequences of a particular construction.'")

[12] Electric Utilities' Rehearing App. at 4.

[13] "Govern," Merriam-Webster.com. http://www.merriam-webster.com/dictionary/govern. (site last visited Sept. 10, 2014).

[14] "Mode," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/mode. (site last visited Sept. 10, 2014).

[15] "Manner," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/manner. (site last visited Sept. 10, 2014).

statute, words and phrases shall be read in context and construed according to their common usage,[16] and it is presumed that every part of a statute is intended to be effective.[17]

Thus, the plain language of Section 4901.13 authorizes the Commission to promulgate rules to "govern," or "make decisions about laws" for its proceedings, as well as rules to regulate the "mode and manner" *i.e*., "the preferred way" that "something is done." The Commission is authorized to adopt substantive rules that *govern* the proceedings, as well as procedural rules that *regulate the manner* in which the investigations and hearing will be conducted. To restrict the rules to only procedural matters defies the principles of code construction and renders half of Section 4901.13 redundant and ineffective. It would also deprive all stakeholders (including the Electric Utilities) of helpful guidance, and would generate an absurd outcome.[18]

III. THE NEW ATTACHMENT RULES ARE LAWFUL, JUST AND REASONABLE AND ARE SUPPORTED BY THE RECORD

A. The Pole Attachment Rate Formula is Lawful, Just and Reasonable

The overwhelming jurisprudence confirms that the formula adopted (yet again) here in Ohio is fully compensatory to the pole owner. It correctly and fully allocates reasonable costs associated

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[16] Ohio Rev. Code § 1.42; *See Gallenstein v. Tessa*, 138 Ohio St.3d 240, 244, 2014-Ohio-98, ¶17 (Pursuant to Ohio Rev. Code § 1.42, terms should be read in context and construed according to common usage unless this term has acquired a technical or particular meaning.)

[17] Ohio Rev. Code § 1.47. *McClintock v. Gould,* 2013-Ohio-5117, 5 Ne.3d 1027, at ¶12 (Ohio Rev. Code § 1.47(B) provides that: "In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective[.]" In other words, we must presume the legislature intended that every word in a statute have some legal effect.)

[18] *See State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 909 N.E.2d 610, *citing In re T.R.*, 896 N.E.2d 1003, ¶ 16 ("[w]hen interpreting a statute, courts must 'avoid an illogical or absurd result.'")

with pole attachments, a long-standing principle that provides more than mere recovery for incremental costs associated with the attachments, but also a fully allocated portion of the capital costs associated with pole ownership as well.

The Electric Utilities contend that Rule 4901:1-3-04(D), which incorporates the FCC's cable rate formula for pole attachments, is unreasonable because it results in under-recovery of pole costs, higher utility rates, and the cross-subsidization of the operating expenses of attaching entities by electric customers.[19] These arguments have been repeatedly made and repeatedly rejected. As stated in prior comments,[20] the rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is "just and reasonable" and fully compensatory for utilities and does not create a subsidy for electric ratepayers.[21] To the contrary, the FCC formula provides more than

[19] Electric Utilities' Rehearing App. at 2, 14-15.

[20] OCTA hereby incorporates by reference the discussion of the pole attachment rate formula provided in the Reply Comments of the Ohio Cable Telecommunications Association at 6-12 ("OCTA's Reply Comments").

[21] *See, e.g., Florida Power Corp.*, 480 U.S. 245 (rejecting a claim that the Pole Attachment Act violates the Takings Clause); *Alabama Power*, 311 F.3d 1357 (rejecting an as-applied Fifth Amendment challenge to the Commission's rate methodology for pole attachments); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) (finding that the FCC methodology under the Pole Attachment Act provides just compensation); *2011 Pole Attachment Order*, 26 FCC Rcd 5240, 5322 ("We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates."); *Connecting America, The National Broadband Plan*, Chapter 6.1 "Improving Utilization of Infrastructure" at 128. (FCC 2010), http://download.broadband.gov/plan/national-broadband-plan-chapter-6-infrastructure.pdf (site last visited Sept. 10, 2014).

the incremental charges associated with pole attachments, and provides the utility with recovery of the capital costs of the poles that otherwise would be borne by the electric ratepayers alone.[22]

In the late 1970s Congress, in response to the concerns of the cable industry, enacted the Pole Attachment Act to establish a range of just and reasonable pole attachment rates. The range of rates set out by Congress granted the FCC the discretion to fix rates somewhere between the incremental costs of the utility and the cable operator's share of the utility's fully allocated costs. On the low end of the range, the incremental costs consist of those costs incurred by the utility due to the presence of attachments (such as make-ready charges). The fully allocated costs include all of the operating expenses and capital costs associated with pole ownership and are typically much higher. Thus, the well-established basis for setting the maximum reasonable pole attachment rental rate is the measure of the fully allocated costs incurred by a pole owner in owning and maintaining poles in addition to the make-ready charges.[23]

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

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

The Ohio formula is cost-based, relying on the utility's actual, documented pole-related costs, and allocates to the attaching party its appropriate share. The formula is already set at the high end of the range that Congress set for the FCC.[24] Congress permits the FCC to charge up to the higher "fully allocated" rates which it decided to do; and this Commission followed suit since 1982[25]

The Electric Utilities' arguments that the use of the FCC's cable formula is unreasonable and creates cross-subsidization of the attaching entities expenses lacks credibility in light of the overwhelming, generations-long and crystal-clear precedent to the contrary.[26] The request for rehearing of Rule 4901:1-3-04(D) should be denied.

B. The New Attachment Rules Access Requirements are Lawful, Just and Reasonable

1. The Commission's Support Structure Access Timelines Are Supported by the Record and Long-Standing Industry Practice and Should be Sustained

Just as the pole attachment rate is and has been the prevailing methodology for calculating costs for some 30 years, the new rule requirements (consistent with similar recent actions of other regulatory authorities) regarding access to poles simply represent Ohio's codification of tried-and-true industry practice.

The Electric Utilities argue that the newly adopted make-ready timelines lack record support because the record is "devoid of complaints from prospective broadband customers that they are

[24] *See* 47 U.S.C. § 224(d); S. Rep. No. 95-580, at 19-20 (1977).

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

[26] *Supra*, notes 22 and 23.

underserved because of delays by public utilities in processing requests for attachments" and the Commission's decision is based on the FCC's rules, rather than the record in this proceeding.[27] These contentions lack merit. There is ample information in the record regarding the importance of timely completion of make-ready work for the proliferation of broadband, and support for use of the FCC's existing regulatory structure regarding access timelines.

As explained in OCTA's prior comments,[28] and echoed by OCTA[29] and Fibertech[30] during the Commission's April 17, 2013 Pole Attachment and Conduit Occupancy Workshop, timely access to poles is necessary to continue serving customers and accelerate the deployment of advanced services. The timelines established by the Commission impose reasonable requirements for application processing and make-ready work completion and should remain intact.

2. The New Attachment Rules Do Not Threaten Safety or the Integrity of the Electric Grid

The requirements regarding pole access, including the time periods for application review and make-ready completion, are reasonable and provide ample time to properly evaluate and address safety concerns prior to attachment. The Electric Utilities' arguments that some provisions

[27] Electric Utilities' Rehearing App. at 6-7

[28] OCTA's Reply Comments at 2-4.

[29] Transcript of Commission's Pole Attachment and Conduit Occupancy Workshop, Case No. 13-579-AU-ORD at 24:12-25:4 ("Workshop Tr.") (Gillespie) ("[B]usiness being what it is, it's necessary to be able to overlash at a very short timeframe in order to meet the customers' needs to extend broadband.") (Apr. 17, 2013).

[30] Workshop Tr. at 10:6-11:20 (Hoare) ("Fibertech requires timely access to the poles to be able to serve its customers . . [S]maller customers who can also benefit from the fiber optic technology typically aren't willing to wait more than 30 – 60 days.")

of the rules prioritize pole attachments above safety concerns of the electric grid are based on erroneous interpretations of the Rules and lack any credible basis.

a. Routine Storms Are Not Good and Sufficient Cause to Extend Make-Ready Deadlines

The Electric Utilities assert that Rule 4901:1-3-03(B)(7) is unlawful and unreasonable to the extent that it does not allow electric utilities to deviate from the established make-ready deadlines due to weather or other *force majeure* events.[31] Although the rule contemplates that "for good and sufficient cause" a public utility may deviate from the required make-ready time periods, the rule specifically states that "routine or foreseeable events such as repairing damage caused by routine seasonal storms" is not good and sufficient cause. The Electric Utilities complain that "routine seasonal storms" often require the attention of "large portions of their workforce and contractors" thereby preventing them from completing required make-ready within the allotted time period.[32] The Electric Utilities essentially claim that this means the Commission "has mandated that make-ready deadlines take precedence over the restoration of electric service."[33]

The Utilities' argument should be rejected for several reasons.

First, the rule does not explicitly state that "Major Events" would not qualify as good cause to extend make-ready time periods; rather, it merely clarifies that "routine seasonal storms" are not sufficient cause to miss make-ready deadlines. The Electric Utilities appear to contend that "routine seasonal storms" are akin to "major events" and "*force majeure* events." However, the rules define

[31] Electric Utilities Rehearing App. at 1 and 10-12.

[32] *Id.* at 10.

[33] *Id.* at 12.

a "major event" as encompassing outages of unusually long duration.[34] By definition, a "major event" would not be a "*routine storm."* Likewise, the definition of "*force majeure"* encompasses "Acts of God," such as "hurricane, flooding, earthquake, volcanic eruption, etc." Again, these are not *routine* events, and thus would not be excluded as good cause for failure to meet make-ready deadlines.

Moreover, Chapter 4901:1-10-10 of the Ohio Admin. Code requires public utilities to maintain sufficient resources to deal with "routine storms,"[35] and should outages occur, each electric utility is required to maintain an emergency plan to deal with restoration of services.[36] It is reasonable for the Commission to require electric utilities to maintain preparedness for *routine storms,* such that their normal operations are not significantly affected, as well as a plan to deal with emergencies and restoration of services. The Commission's exemption of *routine* storms from events that rise to the level of good cause for extending make-ready deadlines simply recognizes this fact.

There is no need to revise the New Attachment Rules to explicitly state that "major events" provide sufficient good cause for exempting a utility from the established make-ready deadlines. To the contrary, determinations regarding waiver of any established requirements should be made

[34] Ohio Admin. Code 4901:1-10-01(T).

[35] Ohio Admin. Code 4901:1-10-10 prescribes the measurement of each electric utility's service reliability, the development of minimum performance standards for such reliability, and the reporting of performance against the established standards.

[36] Ohio Admin. Code 4901:1-10-08.

on a case-by-case basis, as is contemplated by the Rule.[37] If a utility is unable to complete its make-ready obligations in a timely manner, the rule already provides for a process to petition for waiver.[38] Such waivers should be granted on a limited basis after review by the Commission as they require evaluation of specific circumstances surrounding the reasons for failure to comply with the Rules.

While OCTA agrees that restoration of electric service is of great importance to the safety and security of the grid, the Commission's rules do not compromise the safety of the grid or impose stricter standards in the commercial pole context than are imposed in the context of electric reliability, as the Electric Utilities contend. Should a "Major Event" or "*force majeure* event" occur, the electric utility may apply to the Commission for a waiver pursuant to 4903:1-03-02(E) (or for good and sufficient cause pursuant to 4903:1-3-03(B)(7)(b)) to extend the required deadline for make-ready work completion. No adjustment to the rule is necessary, and the Electric Utilities application for rehearing should be rejected. The Commission has fully accounted for the Electric Utilities' apparent concerns in the New Attachment Rules.[39]

[37] AT&T Entities urges the Commission to provide that the parties may agree, on a case-by-case basis to extend the time limits for processing applications and constructing pole attachments. While OCTA appreciates that the parties may come to such agreements, OCTA opposes adding such language to the Rule as it creates the expectation that the required deadlines will be longer. Such agreements are appropriate under limited circumstances with respect to individual projects. As a general rule, hard deadlines must be imposed in order to successfully continue the rapid deployment of advanced services in Ohio.

[38] *See* Ohio Admin. Code 4903:1-3-03(B)(7)(b) and 4903:1-03-02(E).

[39] While restoration of electric service is a top priority following a Major Event or *force majeure* event, restoration of telecommunications service is also of critical importance as cable systems play an integral role in our nation's civil defense system through the Emergency Alert System (EAS).

b. Forty-Five Days for Application Approval is Reasonable

The Electric Utilities also contend that Rule 4901:1-3-03(A)(4) is unreasonable because it threatens the safety of the electric grid.[40] Rule 4901:1-3-03(A)(4) requires that a public utility respond to an application for access to poles within 45 days of submission of a complete application. A utility may deny access to poles on a nondiscriminatory basis where there is insufficient capacity of for reasons of safety, reliability and generally applicable engineering purposes.[41] If access is denied, the utility is required to confirm the denial in writing by the forty-fifth day.[42] A request that is not denied in writing within forty-five days of the request shall be deemed granted.[43]

The Electric Utilities argue that, because there are many reasons a utility might fail to respond to an application, this rule and practice will create a threat to the safety of the grid by allowing attachers access to poles. Specifically, they state that the nature of the attaching entity definition under the rules is "unlimited," thus, entities that are "complete newcomer[s]" would be allowed to "attach something unconventional in a dangerous location on a pole."[44] The Electric Utilities claim that it is unnecessary to deem an application granted because attachers have the right,

[40] Electric Utilities' Rehearing App. at 8.

[41] Ohio Admin. Code 4901:1-3-03(A)(1).

[42] Ohio Admin. Code 4901:1-3-03(A)(4).

[43] *Id.*

[44] Electric Utilities' Rehearing App. at 8.

pursuant to Rule 4901:1-3-03(B)(4) to hire an approved contractor to perform the pre-construction survey if the utility fails to respond within the 45-day period.[45]

The Utilities' alarmist position mischaracterizes the operation of the rule and is unfounded. As a threshold matter, the definition of "attaching entity" is not "unlimited" in nature. The Commission has limited attaching entities to "cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities and other entities . . . authorized to attach pursuant to sections 4905.51 and 4905.71 of the Revised Code."[46] Arguments that these entities, whether newcomers to the industry or generations-old, lack the technical expertise to make attachments in accordance with applicable safety standards seem far-fetched. Even if they lacked such knowledge, the rule provides numerous remedies, safeguards and incentives to prevent unsafe attachments.

If an attachment application is deemed granted, the attaching entity is still required to complete a pre-construction survey and to submit any required make-ready work to the utility for completion prior to attaching. The purpose of allowing an attaching entity to hire an approved contractor (approved by the utility no less) to perform such survey if the utility fails to respond in the allotted time, is to ensure that safety concerns are addressed *prior to* attachment. If the application was not deemed granted after the 45- day period, and the attaching entity were not

[45] *Id.*

[46] Ohio Admin. Code 4901:1-3-01(A) (Sec. 4905.51 provides that public utilities are authorized attachers, while section 4905.71 states that any person or entity other than a public utility that is authorized and has obtained under law, any necessary public or private authorization and permission to construct and maintain the attachment. The Commission's definition does not expand the universe of attaching entities, it merely states the categories of statutorily permitted attaching entities and applies the rule requirements to all such attaching entities.)

permitted to proceed with the make-ready survey, the process would be halted indefinitely while waiting for the utility to respond.

Moreover, the utility will still have the opportunity to review the pre-construction survey and required make-ready prior to attachment, thereby giving the utility a second opportunity to vet any safety concerns. Clearly the intent of the rule is that these provisions operate together to prevent such delays. Further, the rule provides a disincentive for making unsafe attachments in the first place, because any attacher that makes a non-compliant attachment shall be financially responsible for correction of that violation. In short, Rule 4901:1-3-03(A)(4) is both reasonable and necessary for the continued processing of attachment applications in a timely manner, and does not pose a risk to the safety or integrity of the electric grid. The Electric Utilities claims otherwise should be disregarded.[47]

3. The Rules Do Not Conflict With Other Provisions Of The Ohio Revised Code

Rule 4901:1-3-03(A)(5) provides that attaching entities be given no less than sixty days' written notice prior to removal of their facilities or "termination of any service to those facilities . . . ." The Electric Utilities assert that this provision is in conflict with Rule 4901:1-10-17, which provides that electric utilities shall provide nonresidential customers with a written notice of

[47] OCTA, furthermore, supports Fibertech's request for rehearing to authorize the use of utility-approved contractors to complete make-ready work in both the "communications space" as well as the "electric space." Application for Rehearing and Request for Clarification of Fiber Technologies Networks, L.L.C. at 10 ("Fibertech's Rehearing App."). As Fibertech notes, make-ready work is often required in the electrical space in order to make room for attachments in the communications space or elsewhere, including the pole top. By permitting utility-approved contractors to complete make-ready for any attachment, including work bordering on, and in, the electric space, the Commission's objectives of facilitating modern communications infrastructure deployment would be advanced, the attachment process expedited – and potential strain on the pole owner's workforce alleviated. *Id.* at 10-11.

disconnection, which notice shall be postmarked not less than five calendar days before service is disconnected for nonpayment of tariffed service. The Electric Utilities request that the Commission address this matter by clarifying that the five-day notice requirement of Rule 4901:1-10-17 prevail, thereby reducing the notice period for discontinuing service to attachment facilities by 55 days. This request is wholly inappropriate as it eviscerates an important safeguard to continuous uninterrupted provision of electronic communications services to customers.

It is obvious from the context of the referenced provisions that Rule 4901:1-3-03(A)(5) is restricted to pole attachment facilities, while the more general Rule 4901:1-10-17 is referring to traditional nonresidential electric service (such as that provided to industrial and business customers), not to cable system power supplies on a utility pole. The longer notice period in Rule 4901:1-10-17 is particularly appropriate for facilities located on utility poles, which include any of a number of vital electronic communications services such as 911 and even the civil-defense applications such as the national Emergency Alert System.[48] Clearly, the very specific provisions of Rule 4901:1-3-03(A)(5) should be applied to pole-attachment facilities, while the more general Rule 4901:1-10-17 should be applied to traditional electric service.

Finally, there is no conflict between the general and specific rules for the simple reason that, in providing no less than 60 days' notice for termination of service to attachment facilities, utilities will necessarily also be providing "no less than five calendar days" notice prior to disconnection of that service. To ensure compliance, both directives could easily be accomplished and it neither

[48] *See* 47 C.F.R. §§ 11.1 *et seq.* (2013).

creates a conflict, nor is it appropriate, to modify or "clarify" the notice requirements of Rule 4901:1-3-03(A)(5).

4. The Rules Strike a Just and Reasonable Balance Between the Rights and Responsibilities of Pole Owners and Attaching Entities

a. The Commission's Enforcement Authority is a Necessary Deterrent to Rule Violations

The Electric Utilities complain that pursuant to Ohio Rev. Code § 4905.54, a utility could be penalized for violations of the new pole attachment rules, whereas the FCC does not impose specific monetary penalties for noncompliance.[49] Ohio Rev. Code § 4905.54 provides in relevant part that "the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility . . . that violates a provision of those chapters[50] or that after due notice fails to comply with an order, direction or requirement the commission officially promulgated."[51] The Electric Utilities assert that the potential penalties for a public utility's failure to abide by the timelines set forth at Rule 4901:1-3-03 are unduly burdensome and vastly disproportionate to any potential harm that could result from such noncompliance. The Electric Utilities request that the Commission waive its authority to impose penalties for violations of Rule 4901:1-3-03 entirely.

[49] Electric Utilities' Rehearing App. at 6.

[50] Chapters referred to include 4901, 4903 and 4905 of the Revised Code. Ohio Rev. Code § 4905.54.

[51] Ohio Rev. Code § 4905.54.

The purpose of Ohio Rev. Code § 4905.54 is to "compel public utilities to comply with the regulatory rubric through the imposition of penalties and forfeitures."[52] Although a *maximum* forfeiture of $10,000 is available, the Commission has a number of moderating factors that it *shall consider* in determining the appropriate forfeiture including, "(1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the degree of the respondent's culpability; (4) the respondent's history of violations . . .; (5) the respondent's ability to pay; (6) the effect of the respondent's ability to continue in business; and, (7) such other matters as justice may require."[53] With the obligation to first consider these factors, there is no reason for the Commission to divest itself of a remedy provided by statute.

The Electric Utilities also ignore that a respondent has the right to an administrative hearing regarding the alleged violation, during which the Commission Staff must prove the occurrence of the violation by a preponderance of the evidence.[54] Thus, a public utility that is assessed a forfeiture of any amount has the right to contest the occurrence of the violation as well as the assessment of the forfeiture in light of the above listed factors.

In the unlikely event the Commission assesses a $10,000 fine for a utility's inadvertent failure to complete make-ready work within 45 days, the respondent will have its "day in court."[55]

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[52] *Discount Cellular v. Ameritech Mobile Communications Inc., et al.*, 113 Ohio St. 3d 394, 399 (2007-Ohio-2203).

[53] Ohio Admin. Code 4901:2-7-06.

[54] Ohio Admin. Code 4901:2-7-14 and 4901:2-7-20.

[55] To the extent the Electric Utilities complain of the possibility they may be fined excessively for failure to comply with the New Attachment Rules, such claim is premature as there has been no

b. Electric Utilities Should be Responsible for Performing Electric-Facility Make-Ready Necessary for Communications Attachments and the Correction of Safety Violations

Rule 4901:1-3-02(B)(8) requires that, in the event a safety violation is found, the attacher that is found to be in noncompliance shall be financially responsible for the costs of correcting the violation, while the pole owner shall be responsible for performing the actual correction. The Electric Utilities oppose this rule and suggest, that, rather than requiring utilities to be responsible for correcting safety violations, attaching entities should be required to correct existing violations in the communications space. Furthermore, the Utilities propose that, in cases where new attachments are being delayed as a result of an existing attacher's failure to correct a violation, the new attaching party be permitted to correct said violation and hold the violator financially responsible.[56] The Electric Utilities affirm that they reserve the right to correct such violations where attaching entities fail or refuse to correct them in a timely manner, but assert the primary responsibility should not lie with pole owners.

OCTA agrees that the timely correction of safety violations is the priority, but believes that placing the responsibility of correcting the violations with the pole owner is the best and most reasonable way to accomplish this end. Should an attacher wish to access a pole for maintenance or repairs, it must do so with the permission of the pole owner. This logically leads to the conclusion that the most efficient manner for completing such work is to vest responsibility for its completion with the pole owner, who will only need its own permission prior to commencing work.

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attempt to enforce the rules against any party at this time. *See Craun Transp. Inc., et al., v. Pub. Util. Comm. of Ohio,* 120 N.E.2d 436 (Ohio 1954).

[56] Electric Utilities' Rehearing App. at 13.

In light of a pole owner's superior access to poles and the fact that the pole owner is compensated for his work by the offending attacher, OCTA believes it is both expedient and reasonable to vest responsibility for correction of safety violations with pole owners.

IV. CONCLUSION

For these reasons, OCTA urges the Commission to deny the Electric Utilities Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case (those individuals are marked with an asterisk below). In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail or by regular U.S. Mail) on the 10th day of September 2014 upon all persons/entities listed below:

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