

**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,) Case No. 13-579-AU-ORD
Conduits, and Rights-of-Way by Public)
Utilities.)

**MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING
OF OHIO POWER COMPANY, OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, THE TOLEDO EDISON COMPANY, THE
DAYTON POWER AND LIGHT COMPANY, DUKE ENERGY OHIO, INC., AND
THE AT&T ENTITIES
FILED BY FIBER TECHNOLOGIES NETWORKS, L.L.C.**

I. INTRODUCTION

On April 3, 2013, the Public Utilities Commission of Ohio (Commission) opened a rulemaking proceeding to consider adopting a new chapter of rules, Chapter 4901:1-3 of the O.A.C., dedicated to the regulation of access to poles, ducts, conduits, and rights-of-way provided by public utilities. At a workshop held on April 17, 2013, several stakeholders, including Fiber Technologies Networks, L.L.C. (Fibertech) offered comments on the proposed rulemaking and suggested content for inclusion in the rules.

On May 15, 2013, the Commission issued proposed rules and established deadlines, which were subsequently amended, for comments and reply comments on the proposed rules. Fibertech submitted its initial comments on the proposed rules for Chapter 4901:1-3, O.A.C., on July 12, 2013, and its reply comments on August 29, 2013.

On July 30, 2014, the Commission issued a Finding and Order (July 30 Order) which revised a number of the proposed rules and adopted Chapter 4901:1-3, O.A.C., as set forth in the

Appendix to the July 30 Order. On August 29, 2014, Fibertech filed an Application for Rehearing and Request for Clarification of certain issues in the July 30 Order. On the same day, 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. (collectively, the Electric Utilities), as well as the AT&T Entities, also filed applications for rehearing of the Commission's July 30 Order. Fibertech respectfully requests that the Commission deny the applications for rehearing filed by the Electric Utilities and the AT&T Entities as discussed herein.

II. ARGUMENT

A. The Commission has the requisite statutory authority to promulgate Rules 4901:1-3-01 through 4901:1-3-06.

The Electric Utilities contend that Rules 4901:1-3-01 through 4901:1-3-06 are unlawful because the Commission lacks the statutory authority to promulgate them. The Electric Utilities' argument lacks merit, raises no new issues, and should be dismissed by the Commission.

In support of their argument that the Commission does not have the requisite statutory authority to promulgate Rules 4901:1-3-01 through 4901:1-3-06, the Electric Utilities contend that the Commission only indicated two statutes, Sections 4927.03 and 4927.15, Revised Code, when responding to the Common Sense Initiative Business Impact Analysis form. While the Commission listed only Sections 4927.03 and 4927.15, Revised Code, in response to Question 2 of the Regulatory Intent section of the form, the Commission elaborated in its response to Question 5, regarding the purpose behind Chapter 4901:1-3, that it has long had statutory authority over utility-to-utility pole attachments through Section 4905.51, Revised Code, and over non-utility-to-utility pole attachments through Section 4905.71, Revised Code. Section 4905.71, Revised Code, provides, in pertinent part, as follows:

Every telephone or electric light company that is a public utility . . . shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or placement of same in conduit duct space . . . [.]

As referenced in the language above, the Commission possesses regulatory authority over pole attachments as provided in Section 4905.71, Revised Code (as well as Section 4905.51, Revised Code). The language utilized by the Commission in its response to Question 5 of the CSI Business Impact Analysis form clarifies that the Commission depended heavily upon Sections 4905.51 and 4905.71, Revised Code, as authorizing statutes for Chapter 4901:1-3, O.A.C. Further, as noted by the Commission in the CSI Business Impact Analysis, the Commission has either had a guideline or O.A.C. rule in place covering pole attachments since 1995. Therefore, the regulation of pole attachments is not a new or unauthorized area of regulation for the Commission, as the Electric Utilities suggest.

Further, the Electric Utilities note in their application for rehearing that they previously raised the same concerns outlined in their application for rehearing in their initial comments.¹ By the Electric Utilities' own admission, the Commission has already considered and rejected their jurisdictional arguments. As such, the Commission should reject the Electric Utilities' argument that the Commission lacks the statutory authority to promulgate Rules 4901:1-3-01 through 4901:1-3-06 and deny the Electric Utilities' request for the Commission to withdraw them.

B. Rules 4901:1-3-03(A) and (B) are lawful and reasonable, and the Commission should impose the penalties set forth in Section 4905.54, Revised Code, in connection with rule violations.

Rules 4901:1-3-03(A) and (B) provide response timelines and timelines for survey, estimate, and make ready for access applications. In their application for rehearing, the Electric

¹ Electric Utilities' Application for Rehearing at 3.

Utilities contend that the penalties that may be imposed pursuant to Section 4905.54, Revised Code, for a public utility's failure to abide by the timelines in Rule 4901:1-3-03 are unduly burdensome and disproportionate to the harm that could result from noncompliance therewith, and that the Commission should exempt pole owners from the penalties in Section 4905.54, Revised Code, in connection with violations of Rule 4901:1-3-03. The Electric Utilities' argument is not compelling.

As evidenced by the language of the statute, Section 4905.54 prescribes that "[e]very public utility . . . shall comply with every order, direction, and requirement of the public utilities commission made under authority of [Chapter 4905] and Chapters 4901, 4903, 4907, and 4909 of the Revised Code . . . [.]". Thus, the violation of any Commission rule authorized by Chapters 4901 through 4909 of the Revised Code may result in a fine of \$10,000 per day, per violation. Having established the rules for access in Chapter 4901:1-3 pursuant to, among other provisions, Sections 4905.51 and 4905.71, Revised Code, the Commission should not take action to diminish their effectiveness. The possibility of a forfeiture of up to \$10,000 per day, per violation serves as an effective deterrent against noncompliance with Commission regulations. As the Commission recognized in its July 30 Order, "it is in the public interest to ensure that not only do all attachers have nondiscriminatory access to poles, ducts, conduit, and rights-of-way, but that all attachers are afforded such access on terms and conditions that are just and reasonable."² Holding public utilities accountable for their actions or inactions is not unduly burdensome and is the exact purpose for the rules. Without the penalties, an entity that has been denied access by a pole owner's noncompliance with the rules is without recourse and the pole owners are without consequences for their actions or inactions.

² July 30 Order at 10.

Moreover, the Electric Utilities minimize the harm that could result from the pole owners' failure to comply with the timelines established by the rules, rendering the timeframes meaningless and negatively affecting the attaching entity, as well as the competitive market as a whole. Pole and conduit access delays significantly affect a competitive provider's ability to market to potential customers and provide the services they desire within the timeframes they expect or a contract dictates. When a provider is prevented from fulfilling a contractual obligation or offering a firm start date for service because of a pole owners' failure to process applications or complete make-ready work in a timely manner, it is extremely difficult to sell and/or provide its services to customers. Under this scenario, both the competitive provider and the end-user customers suffer the consequences of diminished competition because of meaningless access timeframes. Additionally, unreasonably lengthy access to poles and conduits due to non-compliance with established timelines restrict economic development and growth opportunities. Having adopted Chapter 4901:1-3, the Commission should retain this tool for enforcing compliance with its regulations.

C. **The 45-day deadline imposed in Rule 4901:1-3-03(A)(4) provides more than sufficient time for pole owners to act upon requests for access, and does not pose a risk to the safety and reliability of the electric grid.**

In an effort to frighten the Commission into retracting the timelines established in its rules, the Electric Utilities argue that the final sentence of Rule 4901:1-3-03(A)(4), which provides that "[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[.]" threatens the safety and reliability of the electric grid. The Electric Utilities' assertion is unfounded and their attempt to coerce the Commission to eliminate the provision in question would contravene the Commission's clear intent for including the provision.

In the July 30 Order, the Commission stated that “[t]o 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.”³ By including this provision in the rule, the Commission has indicated to pole owners that their failure to act within the prescribed timelines will not be ignored. Effectively, the Commission has given its timelines teeth, as discussed above. By requesting that the Commission eliminate this provision, the Electric Utilities ask the Commission to effectively return to the status quo where, in many circumstances, attaching parties must ultimately file a complaint with the Commission in order to force a pole owner to act on its request to attach. Such an outcome would undesirably reverse the progress achieved by the adoption of the timelines. The Commission should not accede to such a request.

Further, the Electric Utilities’ assertion that the “last sentence of Rule 4901:1-3-03(A)(4) threatens the safety and reliability of the electric grid”⁴ is unfounded. Indeed, the need for any “attaching entity” to attach to a pole because a pole owner has not taken action on its application within the 45-day timeline is entirely avoidable: all that is required of the pole owner is taking action within 45 days timeline, which, as explained previously by Fibertech, provides more than sufficient time for response. The Electric Utilities speculate about reasons for which an electric utility “might fail to respond to an application for [a] pole attachment within the 45 days[;]” however, the fact remains that the rule provides them with an amount of time to act on an application for access that is greater than necessary. The Commission’s decision to include the provision at issue in Rule 4901:1-3-03(A)(4), in order to clarify any ambiguity in the rule and simultaneously discourage pole owners from using stall tactics to prevent access, was well-

³ July 30 Order at 11.

⁴ Electric Utilities’ Application for Rehearing at 8.

founded, reasonable, and should not be reversed based on mere suggestion that it will negatively impact the reliability of the electric grid.

- E. The provisions of Rule 4901:1-3-03(B)(7) recognize the importance of timely access, encourage electric utilities to comply with the timelines imposed by the Commission, and reasonably permit determinations of what constitutes “good and sufficient cause” for deviation from timeframes on a case-by-case basis.

The Electric Utilities contend that Rule 4901:1-3-03(B)(7) is unlawful and unreasonable to the extent it does not recognize the impact of weather and other force majeure events on the workforces of electric utilities. In support of their contention, the Electric Utilities argue that Rule 4901:1-3-03(B)(7) unlawfully imposes stricter standards on them in the commercial pole attachment context than are imposed in the electric distribution reliability context under Rule 4901:1-10-10(B)(4)(c), O.A.C. The Electric Utilities further imply that the Commission’s good faith attempt to establish and enforce the access timelines in Chapter 4901:1-3 misguidedly elevates the goal of expediting pole attachment processing and access over power restoration efforts and reliability standards. The Electric Utilities’ arguments are unfounded, exaggerated, and ignore the possibility, as envisioned by the rules, for their simultaneous attention to power restoration and reliability efforts and unimpeded, timely broadband deployment.

The Electric Utilities request that the Commission revise Rule 4901:1-3-03(B)(7)(b)(i) to clarify that “major events” as defined in Rule 4901:1-10-01(T) constitute good and sufficient cause for deviation from the time limits imposed in Chapter 4901:1-3. This request is not advisable. As currently drafted, the determination of what constitutes “good and sufficient cause” under Rule 4901:1-3-03 is made on a case-by-case basis. The Commission should not specify, as suggested by the Electric Utilities, that an entire category of circumstances may alleviate pole owners from complying with the timelines established in Rule 4901:1-3. Given

that one of the goals behind Chapter 4901:1-3 is timely access to poles, ducts, conduit, and rights-of-way, the Commission should not prematurely determine that any class of events alleviates pole owners from complying with the rules' timelines. The flexibility the Commission has provided in the context of Rule 4901:1-3-03(B)(7) properly balances the competing interests at stake. Therefore, the Commission should not broadly determine, as the Electric Utilities request, that "major events" as defined in Rule 4901:1-10-01(T), O.A.C., will always constitute good and sufficient cause for deviation from the time limits in Rule 4901:1-3-03.

F. Rule 4901:1-3-03(B)(8) logically and reasonably renders pole owners, rather than parties seeking access, responsible for correcting the safety violations of third-party attachers.

The Electric Utilities argue that Rule 4901:1-3-03(B)(8) is unlawful and unreasonable because it holds pole owners responsible for correcting the safety violations of third-party attachers. The Electric Utilities' position is illogical and unreasonable and their request for rehearing on this issue should be denied.

In support of their position that pole owners should not be responsible for correcting safety violations caused by third-party attachers, the Electric Utilities state that, in their experience, "attachers prefer the opportunity to correct the violations themselves." The Electric Utilities' statement is baseless, as well as shortsighted in that it overlooks the negative implications for prospective attaching parties that have resulted from this policy. In many circumstances, when a prospective attaching entity seeks to attach to a pole that has existing National Electrical Safety Code (NESC) violations, the pole owner does nothing to encourage the violating attacher to correct the violation in order to enable the prospective attaching entity to access the pole. In fact, to date, some pole owners have required the prospective attaching party to pay to correct the violating attachers' attachments to render the pole compliant with the NESC

in order to enjoy the benefit of access to the pole. Given that the pole owner is the party which actually has the benefit of recourse for the economic implications of rendering the pole NESC-compliant, it is illogical to require any other party seeking access to the pole to be economically responsible for rendering the pole NESC-compliant before providing the attaching entity access to the pole and attaching to it. Requiring attaching entities to correct existing violations of their competitors prior to affording the attaching entities access to the pole is also anticompetitive and discriminatory in violation of the Commission's rules, the policy of the state, and Ohio law. As drafted, the Commission has placed the responsibility for enabling access with the proper party by requiring the pole owner, which has recourse, to be responsible for correcting the violation. Accordingly, the Commission should maintain this requirement in Rule 4901:1-3-03(B)(8) with the pole owner, and deny rehearing on this issue.

G. The timeframes for pole attachments establish timeframes by which pole owners are expected, for good reason, to comply.

The AT&T Entities contend that the timeframes for pole attachments adopted by the Commission in Chapter 4901:1-3 do not reasonably allow the parties to mutually agree to longer timeframes on a case-by-case basis. The AT&T Entities' position underscores the need, from the perspective of an attaching party, for firm timeframes for access.


Despite the AT&T Entities' representation that parties may want to "mutually" agree to extended timelines for consideration of their access applications or any element of those applications, attaching entities and pole owners are not on equal footing when an application is under consideration. Attaching entities are at the mercy of the pole owner for approval of their requests. Thus, if approached by a pole owner about extending a timeline for evaluation of its application, including the survey, estimate, or make-ready phases, if the attaching entity wants to resolve the matter amicably, it is, by and large, compelled to accede to the pole owner's request.

In contrast, Chapter 4901:1-3 provides timelines that attempt to level the playing field, so to speak, between pole owners and attaching entities. The Commission carefully considered the issues and competing perspectives at play in pole access scenarios when developing the rules in Chapter 4901:1-3 that establish access timeframes. The Commission should not eliminate the access timeframes established or provide a mechanism in the rules by which the parties can agree, "mutually," to adjust or suspend the rules' access timelines.

III. CONCLUSION

As discussed at length above, the grounds asserted by the Electric Utilities and the AT&T Entities in support of their respective Applications for Rehearing are without merit. Consequently, the Commission should deny their Applications for Rehearing. In accordance with the arguments asserted by Fibertech herein and in its Application for Rehearing, Fibertech respectfully requests that the Commission deny the Applications for Rehearing of its July 30 Order filed by the Electric Utilities and the AT&T Entities, and grant Fibertech's Application for Rehearing and Clarification filed in this matter.

Respectfully submitted,

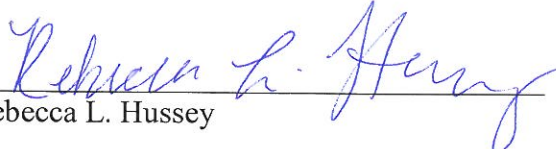


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on September 10, 2014.


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Summary: Memorandum Contra the Applications for Rehearing filed by the Electric Utilities and the AT&T Entities electronically filed by Ms. Rebecca L Hussey on behalf of Fiber Technologies Networks, LLC