BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of 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

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tw telecom of ohio llc's
MEMORANDUM CONTRA APPLICATION FOR REHEARING
OF THE ELECTRIC UTILITIES

Pursuant to Ohio Revised Code Section ("R.C.") 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35(B), tw telecom of ohio llc ("TWTC") submits its Memorandum Contra to the Application for Rehearing of the Ohio Power Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, The Dayton Power & Light Company, and Duke Energy Ohio, Inc. (collectively the "EDUs"). TWTC urges the Commission to deny the application for rehearing filed by EDUs in its entirety for the forgoing reasons.

Commission Jurisdiction to Promulgate Rule 4901:1-3-01 through Rule 4901:1-3-06

The EDUs claim that the Commission lacks the statutory authority to promulgate the rules adopted by its July 30, 2014 Finding and Order. This claim is without merit for several reasons.

First, this claim is nearly two decades late. As was pointed out in the comments of TWTC and the OTA, the Commission's rules governing utility facility access, including electric utilities, have been in place since at least 1996, without challenge by the EDUs. OTA Reply Comments at 3; TWTC Comments at 3. The Commission has re-affirmed the applicability of its facility access rules to electric utilities as recently as October 31, 2012, in Case No. 12-922-TP-ORD, again

without any objection from the EDUs. The EDUs have long since conceded the Commission's authority to promulgate these rules.

Beyond this clear defect in the EDU's position, the specific arguments now raised by the EDUs challenging the Commission's authority are also wrong. The EDUs try to narrowly circumscribe R.C. 4905.51 by asserting that "[t]his statute does not support generic rules, but, rather, contemplates provision of due process that is specific to a dispute between the utility pole owner and a particular joint user." EDUs Memorandum in Support at 2. To the contrary, this section of the Revised Code is far more expansive than the narrow reading offered by the EDUs. The language in this code section is actually very broad – "every public utility *shall* … for *reasonable* compensation, permit the use of such equipment by any other public utility *whenever* the public utilities commission determines, as provided in section 4905.51 of the Revised Code, that the public convenience, welfare, and necessity require such use or joint use … ." R. C. 4905.51(a), italics added. This language is the core of the joint use provision in Title 49 – the language in the second paragraph emphasized by the EDUs is really only gloss providing respective rights and responsibilities of the parties to the resulting joint use agreement, and the Commission's rules are entirely consistent with both paragraphs.

The question of public convenience, as applied to facility access, already has been determined by federal law, and the Commission's duties and obligations under federal law have been explicitly incorporated into state law through R.C. 4927.03. and 4927.04, as well as 4927.15. Indeed, 47 U.S.C. 224 (c) leaves jurisdiction over utility facility access in the hands of individual states *only* where such states can certify to the FCC that it regulates rates, terms and conditions for such access "*through rules and regulations implementing the State's regulatory authority over pole attachments … .*" The Commission's current facility access rules at Ohio Admin. Code

4901:1-7-23 and the new rules now under consideration are those *rules and regulations implementing the State's regulatory authority over pole attachments.* The EDUs actually seem to be arguing that the Commission lacks any basis in Title 49 to make the requisite certification to the FCC that prevents federal preemption of state authority over facility access in the first place. It is noteworthy that in his March 14, 2014, Memorandum to the Commission's Chief Legal Counsel, the Director of Regulatory Policy for the Common Sense Initiative (CSI) essentially recognized this same point by observing:

> [I]t seems evident that pole attachments will be subject to regulation, either through these proposed PUCO rules or through existing FCC rules. Moreover, … it does appear that the PUCO has structured the rules in a way to avoid overregulation by providing a framework for the negotiation between the parties to an attachment, but avoiding direct PUCO involvement unless and until those negotiations break down.

In other words, *either* the Commission has facility access rules in place, *or* the FCC retains its jurisdiction over Ohio pole attachments.

Additionally, the Commission's rules are entirely consistent with the authority contained in both 4905.51 and 4905.71. The Commission's rules do nothing to change the basic arrangements contemplated by these code sections, as alluded to by the CSI Memorandum – it remains the case that joint use among utilities is to be conducted through agreements, and access for non-utilities remains through tariff provisions. The EDUs claim that the Commission is somehow not "implementing the mechanisms provided for" under 4905.51 and 4905.71is baseless – this is exactly what the Commission is doing by implementing these rules. The Commission's rules only set the necessary expectations as to just, reasonable and *compensatory* rates as well as terms and conditions that satisfy the public convenience and necessity. Such regulatory guidance is the essence of the Commission's supervisory authority over public utilities under its jurisdiction[1] and

[1] See also, Reply Comments of the AT&T Entities, p. 15.

federal law requires that the Commission do no less.

It is telling that the EDUs can cite to no prohibitions against the promulgation of these rules. Sections 4927 and 4928 of Title 49 are replete with provisions that proscribe Commission action or regulation – rules concerning facility access are not one of them. Indeed, both R.C. 4927.03 and 4927.04 make it abundantly clear that the General Assembly expects the Commission to carry out its obligations under federal law, and its rules and regulations governing facility access are an enumerated obligation under federal law.

Reasonableness of Rule 4901:1-3-03(A)&(B)

The EDU's argue that Rules 4901:1-3-03(A)&(B) are unlawful and unreasonable because the obligations here imposed on the EDUs will expose them to financial liabilities through the operation of R.C. 4905.54 that are not found in the FCC's regulations. EDU Memorandum in Support at 5.

The fatal flaw in the EDUs' argument here is that they *already* face the hazard of the penalties and other liabilities found in R.C. 4905.54 because this section of Title 49 also applies to Ohio Admin. Code Section 4901:1-7-23. Simply put, no additional burdens are presented by the new rule – perhaps the burden is made even clearer, but little if anything is being added as a new burden.

Beyond this fact, the Commission should accord little or no weight to the fact that the FCC's regulations do not carry monetary penalties. This rulemaking addresses Ohio law, and the General Assembly has seen fit to include teeth in Ohio regulation, and, has been demonstrated by TWTC in this case, those teeth are required in the case of facility access against some EDUs, as the examples provided by TWTC in its Initial Comments illustrate.

The EDUs also claim that Rules 4901:1-3-03(A)&(B) lack of record support. EDU

Memorandum in Support at 6-7. Here again, the EDUs are simply ignoring the comments provided in this case by a broad range of entities that require access to utility facilities. The comments provided to the Commission in this rulemaking proceeding adequately corroborate the evidence relied upon by the FCC, highlighting the reasonableness of the Commission's decision to closely follow the FCC's guidance on the matter. In its Initial Comments, TWTC provided specific, documented evidence of instances where EDUs have determined to simply ignore the Commission's current regulation of facility access. To this point, TWTC is encouraged that the EDU's rightfully concede the point that R.C. 4905.54 would apply to instances where a regulated utility fails to abide by the Commission's facility access rules.

Access Timelines – Rule 4901:1-3-03(A)(4)

The Commission must also reject the EDUs claim that Rule 4901:1-3-03(A)(4) is unreasonable and threatens the safety and reliability of the electric grid. This argument is meritless and the EDUs seek to render the rule ineffective. The last sentence of Rule 4901:1-3-03(A)(4) states 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 granted." It is beyond exaggeration to claim that this sentence threatens the safety and reliability of the electric grid. The simple approval of an application does not translate into the creation of an unsafe situation if for no other reasons than approval of an application is merely one step in a longer process. Mistakes can be corrected well before they become safety hazards, and if the EDUs cause the mistake, it should be their burden to ensure that safety is not compromised as a result without interfering with the reasonable timelines for processing applications.

Among the reasons provided as to why an electric utility may possibly fail to respond to an application for pole attachment within 45 days, the EDUs cite "simple human error, a computer

server failure, a glitch in an electronic notification system or a weather event that does not suspend deadlines." EDU Memorandum in Support at 8. Implied in the argument offered by the EDUs the notion that facility access is some kind of poor relative of "regular" utility service and should be treated accordingly under the Commission's rules. To the contrary timely and nondiscriminatory access to facilities is a requirement under Ohio and federal law and is just as much a part of "just and reasonable" service as the dependable provision of retail service. "Simple human error" is no more an excuse than would be such errors that disrupt retail services, and the Commission would not likely suspend its service standards in such a case. It is expected and reasonable that public utilities process applications for pole attachments in a timely and lawful manner, and, as the comments in this proceeding amply demonstrate, these standards need the clarification provided by this stand-alone facility access rule. The 45 day deadline, pursuant to this rule, provides the proper incentive for pole owners to meet established standards and timeframes.

Disconnection of Service – Rule 4901:1-3-03(A)(5)(a)

The Commission should also reject the EDUs argument regarding Rule 4901:1-3-03(A)(5)(a). The EDUs are outliers in claiming that Rule 4901:1-3-03(A)(5)(a) conflicts with Rule 4901:1-10-17, relating to the disconnection of services for nonpayment. The EDUs are simply ignoring the fact that Rule 4901:1-3-03(A)(5)(a) applies to pole attaching entities, and Rule 4901:1-10-17 applies to "consumers" and the "pubic. Rule 4901:1-10-17(B) also provides that the Commission may require electric utilities to "furnish other or additional service, equipment, and facility upon … (1) [t]he Commission's own motion." There is no conceivable ambiguity in the application of Rule 4901:1-3-03(A)(5)(a) versus Rule 4901:1-10-17(B). The EDUs are simply wrong to claim that the notice requirements conflict in these two rules. The remaining allegations are fruitless, and need not be repeated herein.

Make-Ready Timelines – Rule 4901:1-3-03(B)(7)

The Commission also should reject out-of-hand the EDUs assertion that Rule 4901:1-3-03(B)(7) is unlawful and unreasonable because it does not allow electric utilities to deviate from make-ready deadlines due to "routine seasonal storms" that could possibly be "severe and require utilities to deploy large portions of their workforce and contractors to restore power to affected areas." EDU Memorandum in Support at 10. It is unnecessary to modify this rule to merely allow utilities to deviate from make-ready deadlines due to routine seasonal storms or what is categorized as a major event. This rule should remain according to the Commission's Order. The EDUs are confusing the permitted deviations contained in this subjection, with the more general formal waiver provisions found in Rule 4901:1-3-02(D), (E) and (F). If a major event truly causes a force majeure for an EDU, they can always come to the Commission for a formal waiver. This is the only reasonable way for the Commission to walk the line between giving the EDUs a pass every time there is a storm in some part of their service territory and providing a reasonable way for EDU's to avoid an infraction in the event of a demonstrable force majeure. It is apparent from the structure of this rule that this is the course of action the Commission intended in the first instance.

Rate Formula - Rule 4901:1-3-04(D)

The EDUs object to the Commission's adoption of the FCC's cable rate formula as the single, unified pole attachment rate guideline on the basis that it will create unfair cross-subsidies and lead to higher rates for electric consumers. The EDUs go so far as to protest that they "are *not* defending a profit motive." EDU Memorandum in Support at 15. Certainly, the Commission is able to spot crocodile tears when it encounters them, and combined with the other professed acts of beneficence by three of the EDUs currently pending before it, the Commission, must feel like it

is drowning in them. First of all, Ohio law requires that attachment rates provide "just and reasonable" rates, which is the same standard that the FCC was obligated to apply when it promulgated its formulae. The EDUs cannot begin to explain how the FCC's cable rate formula does not produce a just and reasonable result – rather, they make baseless claims about "cross subsidies" and raise the specter of rate increases. The EDUs have not, and cannot, rebut the painstaking discussion contained in the Reply Brief of the OCTA herein, regarding the flaws in the EDUs' proposed alternative formula. Reply Comments of the Ohio Telecommunications Association at 11 - 15. That discussion is dispositive of any notion that the FCC's cable formula would produce anything other than just and reasonable compensation for pole-owning entities.

Underscoring the hollowness of the EDUs' arguments regarding the adoption of the cable rate, the Commission need look no further than the glaring disparities in rates offered by certain EDUs themselves. Ohio Edison has a tariffed pole attachment rate of $4.69 for a R.C. 4905.71 attachment (P.U.C.O. No. 11, Original Sheet No. 51, p. 1 of 6), but demands as much as $34.88 per attachment from telecommunications carriers. Either Ohio Edison is willing of its own volition to provide massive cross-subsidies to non-utility attachers, to the detriment of its electric customers, or it is trying to obtain arbitrary and unreasonable (and unlawful) compensation from telecommunications carriers – there is simply no other way to harmonize these two situations and the EDUs have no grounds to complain about a rate that will land somewhere between these two extremes. At a minimum, this situation underscores the dire need for the Commission to act swiftly in disposing of the EDUs baseless application for rehearing and implement its new rules as soon as possible.

WHEREFORE, TWTC urges the Commission to deny the application for rehearing of the EDUs for the reasons stated herein.

Respectfully submitted on behalf of
tw telecom of ohio llc

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CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing MEMO CONTRA was served by electronic mail or regular mail this 10th day of September 2014.

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Summary: Memorandum Contra The Application for Rehearing of the Electric Utilities electronically filed by Mr. Thomas J O'Brien on behalf of tw telecom of ohio llc