

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.)

ENTRY ON REHEARING

The Commission finds:

- (1) On July 30, 2014, the Commission issued its Finding and Order in this proceeding adopting rules concerning access to poles, ducts, conduits, and rights-of-way by public utilities, as set forth in the appendix to the Finding and Order.
- (2) Applications for rehearing to the July 30, 2014 Finding and Order were filed on August 29, 2014, by the following entities:
 - (a) 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, the AT&T Entities);
 - (b) 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 the Electric Utilities); and
 - (c) Fiber Technologies Networks, LLC (Fibertech).
- (3) On September 10, 2014, memoranda contra were filed by the following entities:
 - (a) Frontier North Inc. (Frontier North);
 - (b) The Ohio Cable Telecommunications Association (OCTA);
 - (c) The Ohio Telecom Association (OTA);
 - (d) The AT&T Entities;

- (e) tw telecom of ohio llc (tw telecom);
 - (f) Fibertech;
 - (g) PCIA-The Wireless Infrastructure Association and The HETNET Forum (PCIA); and
 - (h) The Electric Utilities.
- (4) R.C. 4903.10, among other things, provides that any affected person, firm, or corporation may make an application for rehearing within 30 days following the journalization of the order. The Commission may grant and hold a rehearing on the matters specified in the application if, in its judgment, sufficient reason appears.
- (5) Pursuant to its Entry on Rehearing of September 25, 2014, the Commission determined that sufficient reason has been set forth by the entities seeking rehearing to warrant further consideration of the matters specified in the applications for rehearing. Accordingly, the applications for rehearing were granted.
- (6) With respect to adopted Rule 4901:1-3-02(A)(1), the AT&T Entities point out that while the text of the July 30, 2014 Finding and Order denoted July 1, 2014, as the reference date for federal law and the Federal Communications Commission's (FCC) rules, the rule itself has an April 1, 2014, reference date. The AT&T Entities submit that the date in the adopted rule should be changed to July 1, 2014, to reflect the Commission's determination as set forth in the Finding and Order.
- (7) In regard to the AT&T Entities' application for rehearing specific to adopted Rule 4901:1-3-02(A)(1), the Commission finds that the application for rehearing should be granted and that the adopted rule be amended consistent with the attached appendix to reflect the reference date of July 1, 2014.
- (8) With respect to adopted Rule 4901:1-3-03(A)(4), the AT&T Entities submit that the time frames for pole attachments do not uniformly reflect the 60-day time frame adopted for larger orders. Specifically, the AT&T Entities note that while the rule provides a public utility with 60 days to deny in writing an application for larger orders to attach facilities to

poles, this same 60-day time frame for larger orders was not repeated in the last sentence of the division of the rule. As a result, the AT&T Entities submit that absent this clarification, the 45-day automatic approval process would apply to all orders regardless of size.

- (9) In regard to the AT&T Entities' application for rehearing specific to adopted Rule 4901:1-3-03(A)(4), the Commission finds that the application for rehearing should be granted and that the adopted rule be amended consistent with the attached appendix.
- (10) With respect to adopted Rule 4901:1-3-03(B)(7)(a) and (b), the AT&T Entities note that the rule allows for the deviation from the time limits specified in the rule in those situations where either a pole attachment agreement provides for longer time frames or where an emergency exists. The AT&T Entities submit that an additional exception should be included in order to allow the parties to agree on a case-by-case basis to extend the time frames. In support of its request, the AT&T Entities state that such a modification may reduce the number of waiver requests that may otherwise need to be filed.
- (11) While OCTA appreciates that parties may come to an agreement on a case-by-case basis to extend the time frames for processing an application, it opposes adding such language to the rule as it creates the expectation that the required deadlines will be longer. OCTA contends that agreements to extend time frames should be utilized in limited circumstances with respect to individual projects. Fibertech dismisses the inclusion of language allowing for the mutual agreement to extend the time frames set forth in the rules. In support of its position, Fibertech contends that attaching entities do not have equal footing when an application is under consideration. Therefore, Fibertech submits that an attaching entity does not have the ability to deny a pole owner's request for more time to consider an application to attach.
- (12) The AT&T Entities' application for rehearing specific to adopted Rule 4901:1-3-03(B)(7)(a) and (b) need not be adopted as the concept of mutually agreeing to longer time

limits is already incorporated into the adopted rule. Moreover, the Commission clarifies that we always anticipated that parties could mutually agree on a case-by-case basis to extend the applicable time frames.

- (13) With respect to its first assignment of error, Fibertech submits that the Commission's Finding and Order is unlawful and unreasonable in that it establishes timelines pursuant to adopted Rules 4901:1-3-03(B)(1)-(B)(3) that are too lengthy to encourage the continued success of competitive facilities-based telecommunications providers in the state of Ohio and the rapid deployment of high-capacity broadband services and, therefore, are in violation of R.C. 4905.71 and R.C. 4927.02. While recognizing that the time frames in the adopted rules generally mirror those in the FCC's rules, Fibertech submits that the time frames in the FCC rules were established largely to ensure completion of deployment within the allowable two-year time frame of the broadband stimulus projects funded by the federal government in recent years. Fibertech asserts that absent the lengthy deployment time periods required to ensure federal dollars, the access time frames adopted by the FCC would have been condensed.
- (14) The AT&T Entities note that Fibertech's assignment of error fails to consider the significant burden on pole owners of shorter time frames for survey, estimate, and make-ready work. The Electric Utilities assert that the Commission should reject Fibertech's application for rehearing due to the fact that the request conflicts with the electric companies' core operations, which focus on the provision of safe, reliable, and efficient service to electric customers in Ohio.
- (15) In regard to Fibertech's first assignment of error, the Commission finds that Fibertech has failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. In establishing the time frames set forth in the adopted rules, the Commission has already considered the arguments expressed by Fibertech regarding the need for timely access to the pole and balanced those with the positions stated by the pole owners.

- (16) In its second assignment of error, Fibertech asserts that the Commission's Finding and Order is unlawful and unreasonable in that it fails to establish a rule permitting competitive telecommunication providers to utilize temporary attachments to utility poles prior to the completion of make-ready work in violation of R.C. 4905.71 and R.C. 4927.02. In support of its position, Fibertech states that the use of temporary attachments in situations where the utility is unwilling or unable to timely complete make-ready work will allow for network deployment in a prompt and predictable manner and potentially reduce the need for the Commission to resolve disputes regarding the noncompliance with timelines.
- (17) The AT&T Entities opine that the Commission properly rejected Fibertech's request for a rule allowing temporary attachments. In support, the AT&T Entities contend that temporary attachments create significant operational problems for both the pole owner and the subsequent attacher. The AT&T Entities submit that temporary attachments are not as reliable, safe, or stable as permanent attachments. Further, the AT&T Entities and the Electric Utilities state that often the attaching entity fails to remove the attachment or appropriately convert the temporary attachment to a permanent one. As a result, the pole can be damaged and its life expectancy decreased. The AT&T Entities and the Electric Utilities also describe how if a temporary attachment is not removed, the subsequent attacher may be denied access to the pole, or may bear the cost of a new and larger pole if there is not adequate space. Finally, the Electric Utilities assert that Fibertech's proposal is not supported by the record in this proceeding, is unnecessary due to private contractual rights, and because Commission-authorized remedies are already available to attachers.
- (18) In regard to Fibertech's second assignment of error, the Commission finds that Fibertech has failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. In its Finding and Order, the Commission has already considered the arguments expressed by Fibertech regarding the perceived benefits of temporary attachments.

- (19) In its third assignment of error, Fibertech submits that the Commission's Finding and Order is unlawful and unreasonable in that it limits the use of a utility-approved contractor only in the communications space. According to Fibertech, such a limitation is a violation of R.C. 4905.51, R.C. 4906.71, and R.C. 4927.02. Fibertech asserts that often make-ready is required in the electrical space in order to make room for attachments in the communications space or elsewhere, including the pole top, where wireless attachments are often located. Fibertech notes that in its Finding and Order, the Commission approved the use of wireless attachments, including those on pole tops. According to Fibertech, absent the ability to use utility-approved contractors to perform electrical make-ready work outside of the communications space, an attaching entity will be left with no remedy other than to engage in a lengthy complaint process. Fibertech submits that safety concerns regarding work performed outside of the communications space would be minimized due to the fact that utility-approved contractors would be the individuals performing the work.
- (20) The AT&T Entities assert that the limitation set forth in the adopted rule is reasonable and properly follows the limitation adopted by the FCC in its 2011 decision, *In the Matter of 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, rel. April 7, 2011, FCC 11-50, ¶42. The Electric Utilities contend that Fibertech's request to use utility-approved contractors to complete make-ready work in the power space should be denied. In support of their position, the Electric Utilities believe that the right of an attaching entity to file a complaint with the Commission when an electric utility does not perform power space make-ready work in a timely fashion is a sufficient remedy. Further, the Electric Utilities submit that the Commission should not prioritize an attacher's self-help remedy over the interest of the electric utilities to protect the safety and reliability of the electric distribution facilities. The Electric Utilities also assert that it would be unreasonable to allow attachers to utilize utility-approved contractors in the power

space when some electric companies do not use contractors but only permit their own crews in the power space.

- (21) In regard to Fibertech's third assignment of error, the Commission finds that Fibertech has failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. In its Finding and Order, the Commission has already considered the arguments expressed by Fibertech regarding the perceived benefits of allowing a utility-approved contractor to perform work outside of the communications space.
- (22) In its fourth assignment of error, Fibertech asserts that the Commission's Finding and Order is unlawful and unreasonable in that it fails to establish time frames for access to conduit. Fibertech asserts that the adoption of time frames for the access to conduit is equally as important as the access to poles in order to be able to commit to reasonable service delivery dates. According to Fibertech, this is particularly important in urban areas, town centers, and large public venues, where utility poles are far less prevalent and conduit access is required. Finally, Fibertech states that conduit access time frames are necessary due to unreasonable restrictions set forth by conduit owners on competitive providers who are trying to gain conduit access. Absent such time frames, Fibertech believes that significant opportunities exist for conduit owners to refuse access to competitive providers, thereby limiting the options available to customers and impeding competition.
- (23) The AT&T Entities reiterate their previously stated position that the Commission should follow the FCC's prior determination not to apply the same timelines applicable to pole attachments when considering the appropriate time frames for accessing ducts and conduit. OTA responds that the Commission correctly rejected the setting of time frames for access to conduit due to the fact that access to conduits presents different and unique issues than access to poles.
- (24) In regard to Fibertech's fourth assignment of error, the Commission finds that Fibertech has failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. Further, as

noted by the Commission in its Finding and Order, while timely access to ducts and conduits is necessary to foster a competitive broadband marketplace, conduit access poses different issues than pole access and that the establishment of conduit time frames should not be implemented at this time due to lack of record evidence.

- (25) In its fifth assignment of error, Fibertech asserts that the Commission's Finding and Order is unlawful and unreasonable in that it adopts a time frame for the resolution of pole attachment complaints which is not reasonably calculated to provide complainants with swift resolution of their complaints and is unnecessarily lengthy given the other timelines in adopted Rule 4901:1-3. Fibertech submits that access to poles and conduit is very time sensitive. Therefore, Fibertech contends that a complaint process that takes almost a year to complete is not reasonable and is a violation of R.C. 4905.51, R.C. 4905.71, and R.C. 4927.02. Further, Fibertech opines that in order to be consistent with the Ohio's Common Sense Initiative established in January 2011, the 360-day complaint process must be shortened in order to not serve as an impediment for businesses to operate in the state of Ohio. In support of its position, Fibertech notes that pursuant to R.C. 4928.143, the Commission must issue an order within 150 days of the filing of an application for approval of an electric security plan (ESP). Fibertech emphasizes that despite being a more complex proceeding, the 150 days for ESP cases is less than the 360 days provided for under this complaint rule.
- (26) The AT&T Entities assert that the Commission properly adopted 360 days as the outer limit for consideration of a complaint. In taking this position, the AT&T Entities note that some complaints may be decided sooner.
- (27) In regard to Fibertech's fifth assignment of error, the Commission finds that Fibertech has failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. Further, the Commission emphasizes that the 360-day time frame set forth in the adopted rule is the maximum amount of time for the resolution of a complaint case. It is certainly the Commission's expectation to not utilize the full amount of

time under normal circumstances. Finally, although Fibertech relies on R.C. 4928.143 in support of its recommendation for a shorter resolution period, the Commission notes that unlike the cited example, there are no applicable statutory time frames regarding pole attachments.

- (28) Noting that the Commission's Finding and Order provided for the pole top access for wireless attachments, Fibertech seeks clarification as to whether the Commission intends to expand the definition of "communications space" in adopted Rule 4901:1-3-01(F) to include the pole top in order to accommodate wireless facilities.
- (29) The AT&T Entities believe that the Commission should reject Fibertech's request that pole tops be included in the definition of "communications space." In support, the AT&T Entities submit that the Commission and the FCC both differentiated between "communications space" and the pole top and established different procedures. The Electric Utilities assert that Fibertech's request would be inconsistent with the National Electric Safety Code, industry practice and standards, and the meaning of "communications space" as utilized by the FCC. Additionally, the Electric Utilities believe that the request is unnecessary because the rules already indicate that pole top attachments are allowed when consistent with the pole owner's engineering construction standards and where access is not otherwise denied for insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes. Finally, the Electric Utilities reference the Commission's clear intention within the rules to distinguish between the "communications space" and the electrical supply or power space.
- (30) In regard to Fibertech's request for clarification, the Commission finds that the definition of "communications space" in adopted Rule 4901:1-3-01(F) should not be expanded to include pole tops. In reaching this determination the Commission recognizes that pole top access is distinguishable from communications space access. This distinction is clearly evidenced by the fact that the communications space is located in a different position on

the pole and there are unique time frames set forth in the adopted rules for access to the communications space as compared to the time frames established for access to the pole tops.

- (31) Fibertech seeks clarification as to the level of specificity required under adopted Rule 4901:1-3-03(A)(4), when a public utility denies access to its poles, ducts, conduit, or rights-of-way based on engineering purposes or standards. Fibertech notes that while the Commission, in its Finding and Order, stated that a denial should be specific and should include all relevant evidence and information supporting the denial, it did not specifically require pole owners to identify the engineering standards applied when denying a request.
- (32) The AT&T Entities do not believe that the requested clarification is necessary. In support, the AT&T Entities submit that Fibertech's request discounts several factors that may be pertinent to the denial of access, including internal company standards and the need to relocate other attaching entities' facilities that are on a pole.
- (33) In regard to this request for clarification, the Commission agrees with Fibertech that the level of specificity required under adopted Rule 4901:1-3-03(A)(4), when a public utility denies access to its poles, ducts, conduit, or rights-of-way based on engineering standards, must include an identification of the engineering standards applied. The Commission notes that engineering standards are just one of a number of reasons upon which a denial of access can be based.
- (34) In their first assignment of error, the Electric Utilities again argue that the Commission lacks the statutory authority to promulgate pole attachment rules as adopted in Ohio Adm.Code Chapter 4901:1-3. Specifically, the Electric Utilities assert that nothing in R.C. 4927.03, 4927.15, 4905.51, or 4905.71 specifically confers authority on the Commission to adopt rules. Arguing that the Ohio Supreme found in *Canton Storage and Transfer Co., Inc. v. Pub. Utilities Comm'n of Ohio*, 72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995) that the Commission may only exercise the jurisdiction conferred

upon it by statute, the Electric Utilities urge the Commission to withdraw adopted Rules 4901:1-3-01 through 4901:1-3-06.

- (35) tw telecom, PCIA, OTA, OCTA, Fibertech, and Frontier North reject the Electric Utilities' contention that the Commission lacks jurisdiction to issue the adopted rules. PCIA and OTA assert that the Commission properly certified its regulation of rates, terms, and conditions for pole attachments to the FCC pursuant to 47 U.S.C. 224. tw telecom and Fibertech note that the Commission's rules governing utility facility access, including electric utilities, have been in place since at least 1996 and are, therefore, not new regulations. tw telecom, OTA, OCTA, Fibertech, and Frontier North agree that the Commission has jurisdiction to adopt pole attachment rules in order to carry out the purposes of R.C. 4905.51 and R.C. 4905.71. Additionally, the Commission's general supervisory authority outlined in R.C. 4905.04, R.C. 4905.05, and R.C. 4905.06 authorize the Commission to adopt rules governing pole attachments to implement R.C. 4905.51 and R.C. 4905.71 states PCIA, OTA, OCTA, and Frontier North. Finally, tw telecom argues that either the Commission has properly certified to the FCC its authority to regulate rates, terms, and conditions relative to pole attachments or the FCC would continue to retain jurisdiction over Ohio pole attachments.
- (36) The Electric Utilities have raised nothing new on rehearing that was not fully considered and addressed in the July 30, 2014 Finding and Order. As stated in the Finding and Order, the Ohio General Assembly has vested exclusive jurisdiction over pole attachment disputes in the Commission through R.C. 4905.51 and 4905.71 and nothing within those statutes prohibit the Commission from establishing general rules to address the regulation of pole attachments, conduits, and rights-of-way in the absence of negotiated agreements. In fact, it is through these adopted rules that the Commission implements the mechanisms provided for under these statutes to ensure that the rates, terms, and conditions for pole attachments are just and reasonable. Nonetheless, nothing in the adopted rules prohibits public utilities and attaching parties from continuing to negotiate and operate pursuant to joint use or negotiated agreements as those entities have done in the

past. Additionally, the General Assembly has conferred broad statutory jurisdiction over public utilities, including the Electric Utilities, to the Commission through R.C. 4905.04, 4905.05, and 4905.06 in order to supervise, regulate, protect, inspect, and prescribe any rule the Commission finds necessary for the protection of public safety and welfare. Therefore, the Electric Utilities' reliance on *Canton Storage*, 72 Ohio St.3d at 5, 647 N.E.2d 136 is incorrect. The Electric Utilities first assignment of error is denied.

- (37) In their second assignment of error, the Electric Utilities assert that adopted Rule 4901:1-3-03(A) and adopted Rule 4901:1-3-03(B) are unlawful and unreasonable. Specifically, the Electric Utilities opine that while the deadlines set forth in these rules are similar to those established by the FCC in *In the Matter of the Implementation of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51 (April 7, 2011), the consequences of a pole owner's failure to comply with the deadlines in adopted Rule 4901:1-3-03(A) and adopted Rule 4901:1-3-03(B) could be far more severe than noncompliance with the FCC's deadlines due to the potential applicability of R.C. 4905.54. According to the Electric Utilities, the FCC affirmatively declined to adopt provisions specifying that compensatory damages could be awarded where an unlawful denial or delay of access was established. However, potential penalties could arise from the application of R.C. 4905.54 and the Electric Utilities opine that such penalties would be unduly burdensome. Therefore, the Electric Utilities urge the Commission not to impose penalties pursuant to R.C. 4905.54.

The second basis for the Electric Utilities objection is that adopted Rule 4901:1-3-03(A) and adopted Rule 4901:1-3-03(B) are not supported by the record evidence in this proceeding since, in their opinion, there is nothing in the record to support the belief that prospective broadband customers are underserved due to delays by public utilities in processing requests for attachments. While recognizing that these rules are premised on the FCC's rules, the Electric Utilities contend that the record in this case is different than that of the FCC's proceeding and that the FCC's rules are

currently the subject of a pending petition for reconsideration before the FCC.

- (38) The AT&T Entities, PCIA, and OCTA point out that nothing in the adopted rules mandate that each rule violation will result in forfeiture let alone the maximum \$10,000 forfeiture set forth in R.C. 4905.54. Therefore, the AT&T Entities, PCIA, and OCTA assert that the Commission has the discretion to set a forfeiture, if any, at the level it deems appropriate based on the Commission's assessment of the severity of the violation in a separate proceeding where all parties will have due process. The AT&T Entities, tw telecom, and PCIA state that the Commission properly relied upon the existing record in this case as well as the conclusions reached by the FCC in its rules docket. The AT&T Entities note that the Commission has the authority to adopt generally the FCC's rules while tweaking them where appropriate to reflect local circumstances.

Fibertech avers that holding public utilities accountable for their actions or inactions is the exact purpose of the rules. Fibertech submits that in the absence of penalties, a pole attacher is without recourse and a pole owner will have no consequences for their actions or inactions. Further, Fibertech submits that 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 time frames they expect. tw telecom points out that, while the Electric Utilities state that they are concerned about the application of the R.C. 4905.54, the application of the statute currently exists in the context of the Ohio Adm.Code 4901:1-7-23. Therefore, tw telecom believes that the new rule does not set forth any additional burdens.

- (39) After further considering arguments raised by the Electric Utilities in their application for rehearing regarding the lawfulness and reasonableness of adopted Rule 4901:1-3-03(A) and (B) as these subparts relate to R.C. 4905.54, the Commission finds that rehearing should be denied. The Electric Utilities assert that when subparts (A) and (B) are read in conjunction with R.C. 4905.54, they could be subject to penalties of up to \$10,000.00 per violation of these subparts. The Commission agrees that while utilities may be

subject to penalties of up to \$10,000.00 per violation of its pole attachment rules, this is the *maximum* forfeiture that may be imposed and that many mitigating factors must be considered in determining the appropriate forfeiture. Further, the Commission agrees with OCTA that a respondent facing the prospect of a forfeiture is entitled to an administrative hearing during which the occurrence of a violation by a preponderance of the evidence must be proven. Utilities are subject to no greater risk of forfeiture under the Commission's adopted pole attachment rules than they are under any existing Commission rule to which they are already subject. Further, utilities have the same rights of due process under the adopted pole attachment rules as they currently do under the Commission's existing rules. Accordingly, the Commission declines to deny itself of its authority to impose forfeitures for violations of its pole attachment rules. Further, while the Electric Utilities contend that the record in this proceeding fails to support adopted Rule 4901:1-3-03(A) and (B), the Commission finds no merit in this claim. As pointed out in multiple memoranda contra, the record supports the Commission's adoption of subparts (A) and (B) and the Commission properly relied on this record in adopting its rules. Accordingly, the application for rehearing relative to this assignment of error is denied.

- (40) In their third assignment of error, the Electric Utilities assert that adopted Rule 4901:1-3-03(A)(4) is unreasonable because it threatens the safety and reliability of the electric grid. Specifically, the Electric Utilities focus on the last sentence of the rule, 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." The Electric Utilities believe that, based on the record in this case, this sentence was not warranted. Additionally, the Electric Utilities note that the analogous FCC rule does not incorporate such a provision.

According to the Electric Utilities, there are a number of reasons that an electric utility might fail to respond to an application for a pole attachment. These reasons include simple human error, a computer server failure, a glitch in an electronic notification system, or a weather event that does

not suspend the deadlines. Regardless of the reason, the Electric Utilities assert that a failure to respond to an attachment application within 45 days should not result in an attaching entity being allowed to overload a pole, create a clearance violation, or otherwise impair the safety and reliability of the electric distribution system. Finally, the Electric Utilities do not believe that this rule is necessary since, pursuant to adopted Rule 4901:1-3-03(B)(4), the attacher may hire an approved contractor to perform a survey if the public utility fails to respond in 45 days of the filing of the application.

- (41) tw telecom, PCIA, OCTA, and Fibertech reject the Electric Utilities assertions that the adopted rule will threaten the safety and reliability of the electric grid. tw telecom and OCTA note that an application approval is just one step in a longer process and that mistakes can be corrected before they become safety hazards. PCIA asserts that attachers must comply with engineering and safety standards that prevent the overloading of the poles.
- (42) The Commission finds that the Electric Utilities' third assignment of error should be denied. According to the Electric Utilities, the last sentence of the rule "threatens the safety and reliability of the electric grid." The Electric Utilities assume that if an application is deemed to be granted it will result in the attaching entity being allowed to "overload a pole, create a clearance violation or otherwise impair the safety and reliability of the electric distribution system." This assertion is unfounded as the Commission's rules contain safeguards to prevent such a scenario from occurring. If a request is deemed to be granted due to a utility's failure to respond to an application for pole attachment within 45 days, the rules allow the attaching entity to proceed with the survey and make ready work. However, the attaching entity is required to hire, at its own expense, a contractor that has been approved by the utility to perform the survey and/or make ready work. Further, the adopted rules require the attaching entity to provide the utility with a reasonable opportunity for a representative of the utility to accompany and consult with the contractor and attaching entity. Finally, the rules allow the utility's representative to make final determinations regarding

questions of capacity, safety, reliability, and generally applicable engineering purposes. The utility will, therefore, have sufficient opportunity to ensure the safety and reliability of the electric grid before an attaching entity places an attachment on its poles. In short, if an attaching entity is allowed to attach to the pole in a manner that threatens the safety and reliability of the electric grid, as the Electric Utilities assert, it is only through the neglect of the utility that this would happen.

- (43) In their fourth assignment of error, the Electric Utilities contend that adopted Rule 4901:1-3-03(A)(5)(a) is unlawful and unreasonable because it conflicts with Ohio Adm.Code 4901:1-10-17, which pertains to the disconnection of services for nonpayment. Specifically, the Electric Utilities assert that the requirement that utilities notify attachers 60 days prior to termination of service to attachers' facilities conflicts with the requirement in Ohio Adm.Code 4901:1-10-17 that utilities provide customers with notice of a pending disconnection at least five calendar days prior to disconnection or as provided in a utility's contract approved by the Commission. The Electric Utilities propose that this conflict be rectified by the Commission clarifying that, to the extent that the notice requirement set forth in adopted Rule 4901:1-3-03(A)(5) conflicts with the notice provision of Ohio Adm.Code 4901:1-10-17, the latter regulation shall continue to control.
- (44) tw telecom and OCTA believe that the Electric Utilities are incorrect in their contention that adopted Rule 4901:1-3-03(A)(5)(a) conflicts with Ohio Adm.Code 4901:1-10-17(B) relating to disconnection of services for nonpayment. In support of its position, tw telecom opines that adopted Rule 4901:1-3-03(A)(5)(a) applies to pole attaching entities and Ohio Adm.Code 4901:1-10-17 applies to "consumers" and the "public." OCTA asserts that Ohio Adm.Code 4901:1-10-17 applies to traditional nonresidential electric service, and not to cable system power to a utility pole. OCTA states that the longer sixty-day notice period is appropriate for facilities located on a utility pole, including those related to the provision of 9-1-1 service or a national Emergency Alert System. Finally, OCTA states that in providing no less than 60 days notice for termination of service to attachment

facilities, utilities will also be providing no less than five calendar days notice prior to disconnection of service.

- (45) Upon further consideration of the arguments raised by the Electric Utilities in their application for rehearing regarding Rule 4901:1-3-03(A)(5)(a), the Commission finds that the application should be denied. OCTA correctly points out that in providing "no less than sixty days written notice," utilities will, by necessity, also be providing notice that is not less than five calendar days." Accordingly, the Commission finds no conflict between the rules. Further, the Commission agrees with the OCTA and tw telecom that, while the context of adopted Rule 4901:1-3-03(A)(5)(a) is restricted to pole attachment facilities, Ohio Adm.Code 4901:1-10-17 applies to traditional nonresidential electric service. In making their argument, the Electric Utilities do not acknowledge that not only will the attaching entities lose service, but the customers of the attaching entities will also lose the services provided through the attachments as a result of the service termination. Such customers may include such vital entities as hospitals, police and fire stations, and public safety answering points. As such, it is essential that an attaching entity facing the prospect of termination be provided sufficient time to remedy the situation leading to the service termination or to provide its customers with sufficient notice to obtain service with another service provider. The Commission finds that the intent of the adopted rule is clear and that no further clarification is necessary.
- (46) In their fifth assignment of error, the Electric Utilities contend that adopted Rule 4901:1-3-03(B)(7) is unreasonable to the extent that it does not allow electric utilities to deviate from the make-ready deadlines due to weather and other force majeure events. In support of their position, the Electric Utilities assert that routine seasonal storms are severe and can require utilities to deploy a large portion of their workforce to restore power. As currently constituted, the Electric Utilities contend that the Commission has mandated that make-ready deadlines take precedence over the restoration of electric service. The Electric Utilities propose that this conflict be rectified by revising adopted Rule 4901:1-3-03(B)(7)(b)(i) to clarify that "good and

sufficient cause for deviation from the time limits" includes the repairing of damage caused by "major events" as defined by Ohio Adm.Code 4901:1-10-01(T).

- (47) tw telecom, OCTA, and Fibertech assert that it is unnecessary to modify the rule in order to allow utilities to deviate from make-ready deadlines due to routine storms or a "major event." In support, these commenters state that in the event of a "major event," an electric distribution company can apply to the Commission for a formal waiver. Additionally, similar to the AT&T Entities' application for rehearing discussed supra, PCIA believes that it would be appropriate to allow the parties to extend the applicable time frames on a mutually agreeable case-by-case basis and that parties enter into such agreements in good faith.
- (48) The Commission finds that the Electric Utilities' fifth assignment of error should be granted in order to allow for a major event, as defined by Ohio Adm.Code 4901:1-10-01(T), to qualify as good and sufficient cause to deviate from the time limits set forth in the adopted rules. In reaching this determination, the Commission clarifies that the major event must occur within the state of Ohio in order to qualify as good and sufficient cause. Therefore, adopted Rule 4901:1-3-03(B)(7) shall be amended accordingly.
- (49) In their sixth assignment of error the Electric Utilities contend that adopted Rule 4901:1-3-03(B)(8) is unreasonable because it makes pole owners responsible for correcting safety violations of third-party attachers. The Electric Utilities submit that it has been their experience that attachers prefer the opportunity to correct existing violations by themselves. The Electric Utilities aver that since the third-party attacher is the cause of the violation, that entity, rather than the pole owner, should be responsible both operationally and financially for correcting the violation. Rather than the adopted rule, the Electric Utilities propose that the new attaching entity be given the option to correct the existing safety violation and hold the violator responsible for the costs associated with such correction. Finally, the Electric Utilities opine that dedicating workforce to address third-party attacher violations will divert

employees from focusing on the provision of safe and reliable electric service.

- (50) PCIA agrees that the initial responsibility for correcting a safety violation should lie with the attaching entity responsible for the violation, but that the ultimate responsibility to correct a safety violation should always lie with the pole owner at the violating attacher's expense. OCTA and Fibertech believe that placing responsibility for correcting pole violations on the pole owner is the most reasonable and expedient way to accomplish the desired result.
- (51) With respect to the Electric Utilities sixth assignment of error, the Commission finds that the Electric Utilities have failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. Further, we disagree with the position that a new attaching entity has any legal standing to force the non-pole owner, third-party violating attacher to correct a safety violation on an electric utilities pole. The most reasonable, expedient manner in which to correct a third-party safety violation is to place the responsibility for rectifying the safety violation on the pole owner who has recourse against the third-party violator.
- (52) In their seventh assignment of error, the Electric Utilities contend that adopted Rule 4901:1-3-04(D) is unreasonable because it unfairly and negatively impacts the electric customers whom the Commission is charged with protecting. Specifically, the Electric Utilities assert that while the FCC's telecommunications rate formula may yield rates that are nearly identical to the FCC's cable rate formula, this is only true in those scenarios in which the pole owner fails to rebut the presumption regarding the average number of attaching entities. The Electric Utilities submit that many pole owners rebut the presumption, with resulting rates in the range of 50 percent higher than the cable formula. In support of its preferred adjusted telecom rate formula, the Electric Utilities contend that the telecom rate inputs are well known and that the FCC telecommunications rate formula has been in effect for more than 15 years.

The Electric Utilities assert that adoption of the cable rate formula is unreasonable because it results in the cross-subsidization of attaching entities by electric customers due to an under-recovery of pole costs by electric utilities. As a result, the Electric Utilities state that electric customers will be forced to pay higher rates. Finally, the Electric Utilities request that the Commission state that the approved formula, based on the pole owner's cost data from the prior year, will be used to calculate on an annual basis the rent owed by attachers. Additionally, the Electric Utilities request that in the future entry requiring the filing of new tariff sheets consistent with the adopted rule, the Commission should require each pole owner to make a compliance filing to adjust its current rates to the rate formula that is ultimately adopted.

- (53) The AT&T Entities and PCIA submit that the Electric Utilities rehearing argument should be rejected inasmuch as the Commission's adoption of the FCC's cable rate formula is supported by the record and is not unreasonable. tw telecom rejects the Electric Utilities' claim that adoption of the FCC's cable rate as the unified pole attachment rate will result in unfair cross-subsidies and higher rates for electric consumers. OCTA states that the arguments raised by the Electric Utilities regarding the unreasonableness of the FCC's cable have already been repeatedly rejected. Frontier North asserts that the Commission's new pole attachment rate formula is just and reasonable and fully compensatory.
- (54) In regard to the Electric Utilities seventh assignment of error, the Commission finds the Electric Utilities have failed to raise any new arguments for the Commission's consideration and, therefore, the application for rehearing is denied. The arguments that the cable formula results in the under-recovery of pole costs and the cross-subsidization of attaching entities by electric utility customers have been repeatedly rejected.¹ Electric consumers are clearly better off

¹ See *Florida Power Corp.*, 480 U.S. 245; *Alabama Power*, 311 F.3d 1357; *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999); 2011 *Pole Attachment Order*, 26 FCC Rcd 5240, 5322; *Connecting America, The National Broadband Plan*, Chapter 6.1 "Improving Utilization of Infrastructure" at 128 (FCC 2010).

with attachments to electric poles at the fully allocated cable rate than without such attachments. Although the Electric Utilities continue to advocate for their proposed single unified pole attachment rate formula, these arguments were fully considered and rejected in the Commission's Finding and Order.

- (55) Finally, for the purpose of stylistic consistency throughout the rules, the Commission, on its own motion, has substituted the word "rule" for the word "section" in various places throughout adopted Chapter 4901:1-3.

It is, therefore,

ORDERED, That the applications for rehearing are granted, in part, and denied, in part, consistent with the above findings. It is, further,

ORDERED, That to the extent not specifically addressed herein, all other arguments raised in the applications for rehearing are denied. It is, further,

ORDERED, That adopted Rule 4901:1-3-02(A), adopted Rule 4901:1-3-03(A)(4) and adopted Rule 4901:1-3(B)(7) are amended in accordance with the above findings. It is, further,

ORDERED, That the Finding and Order is clarified consistent with Findings (12), (33), and (55). It is, further,

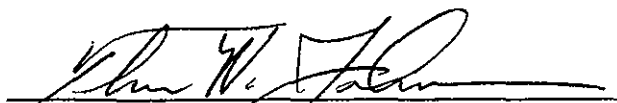
ORDERED, That the rules set forth in the appendix to the Finding and Order, on Rehearing, as amended by this Entry on Rehearing and attached hereto, be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That the final rules be effective on the earliest date permitted. Unless otherwise ordered by the Commission, the five-year review date for Chapter 4901:1-3 shall be in compliance with R.C. 111.15. It is, further,

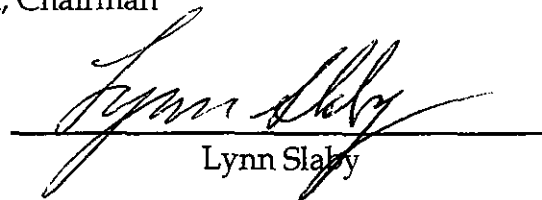
ORDERED, That notice of the adoption of this Entry on Rehearing and the attached appendix be sent to the Electric, Energy, and Telephone list serves. It is, further,

ORDERED, That a copy of this Entry on Rehearing and the appendix be served upon all commenters of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser

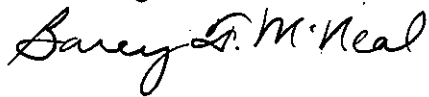

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

JSA/dah

Entered in the Journal

OCT 15 2014

Barcy F. McNeal
Secretary

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

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- (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.

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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 July 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 safety, reliability, and generally applicable engineering purposes.

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- (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 rule]. 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 [or by the sixtieth day in the case of larger orders as described in paragraph (B)(6) of this rule], 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 rule 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 an answer within seven days of the date the petition for temporary stay was filed. No further filings under this section rule will be

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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 rule), 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 rule, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this section rule, 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

Upon receipt of payment specified in paragraph (B)(2)(b) of this section rule,

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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 rule).
- (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 rule.
- (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 rule).
- (iii) State that any entity with an existing attachment may, consistent with paragraph (B)(5) of this section rule, modify the attachment consistent with the specified make-ready before the date set for completion.

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- (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 rule, 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 rule or does not complete make ready pursuant to paragraph (B)(3)(a)(ii) of this section rule, 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 rule. 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 rule:

 - (a) A public utility shall apply the timeline described in paragraphs (B)(1) through (B)(3) of this section rule 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 rule 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 rule to larger orders up to the lesser of three-thousand poles or five percent of the public utility's poles in the state.

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- (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 rule 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 rule.
 - (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 rule.
 - (i) Good and sufficient cause for deviation from the time limits may allow utilities to cope with an emergency declared by a governmental entity or for a major event as defined in paragraph (T) of rule 4901:1-10-01 of the Administrative Code, 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 rule for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

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

(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 rule is intended to abridge the legal rights and obligations of municipalities and landowners.

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- (E) The commission reserves the right 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 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 rule 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 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,

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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 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

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services) an equal amount to the pole attachment rate for which such company would be liable under this section rule, 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 rule 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.