BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, And Rights-of-Way by Public Utilities	**)** **)** **)** **)**	**Case No. 13-579-AU-ORD**

MEMORANDUM CONTRA OHIO CABLE TELECOMMUNICATIONS ASSOCIATION MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, APPLICATION FOR REHEARING

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Pursuant to Ohio Admin. Code 4901-1-35,[1] 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") respectfully submit this Memorandum Contra Ohio Cable Telecommunications Association ("OCTA") Motion for Clarification or, in the Alternative, Application for Rehearing ("AFR"). The Electric Utilities oppose each of the grounds upon which OCTA asserts that the Commission's February 25, 2015 Entry (the "February Entry") is unlawful and unreasonable because it does not require electric distribution utilities and telephone companies to treat this tariff compliance filing as an application for an increase in rates and because it does not expressly provide a process for comment by OCTA. This Memorandum Contra addresses OCTA's untimely attempt to reinvent Ohio's statutory framework for PUCO regulation of non-discriminatory access to utility poles in the public right of way in the implementation phase of this rulemaking docket.

I. THE COMMISSION SHOULD DISMISS OCTA'S REQUEST AS UNTIMELY AND THEREFORE PROCEDURALLY DEFECTIVE.

Although the OCTA couches its filing as a "Motion for Clarification, or, in the Alternative, Application for Rehearing" of the February Entry pursuant to O.A.C. 4901-1-12, it is in reality simply a belated challenge to Rules adopted in the July 30, 2014 Finding and Order (the "July Order") and reaffirmed in the October 15, 2014 Entry on Rehearing (the "October Entry") in this proceeding. Moreover, the Commission considers a motion for clarification of a Commission

[1] Despite OCTA's efforts to couch its request as a "Motion for Clarification" submitted pursuant to O.A.C. 4901-1-12, it is clearly challenging the provisions of the Rule adopted in the Commission's Finding and Order issued July 30, 2014, and reaffirmed in the Entry on Rehearing issued October 15, 2015. The Electric Utilities accordingly respond pursuant to O.A.C. 4901-1-35.

order to be an application for rehearing regardless of how the motion is styled. *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 015-376, EL-UNC, Entry on Rehearing, June 6, 2006, at 2; ("On May 10, 2006, AEP filed a request for clarification of the opinion and order in this case…The Commission believes that the AEP request for clarification should be treated and considered as an application for rehearing."); *In re Matter of Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, Dec. 6, 2006, 2006 Ohio PUC LEXIS 746, *107-108 ("[W]ith increasing frequency in recent years, parties have filed motions for clarification following the issuance of a Commission order. Parties have sought reversal of substantive determinations made by the Commission in several of the motions. The Commission finds such requests not filed as part of an application for rehearing to be inappropriate. The staff proposed that a motion for clarification be considered an application for rehearing if the Commission's response resulted in any revision of the Commission's order. The Commission finds that the more appropriate action is just to eliminate motions for clarification. Therefore, future motions for clarification of a Commission order will be denied. "); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure, Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC, Entry on Rehearing, Sept. 12, 2007, 2007 Ohio PUC LEXIS 633, *8-9 ("USP styled its filing as both an application for rehearing and a motion for clarification of the July entry. The Commission recently found that motions for clarification of a Commission order are not appropriate [citing Case No. 06-685-AU-ORD].

Rather, an application for rehearing is the appropriate means by which to seek further understanding of the intent and effect of a commission order. Since USP's motion for clarification is part of its application for rehearing, the Commission will consider the motion as an additional argument for rehearing.")

On July 30, 2014, the Commission approved O.A.C. 4901:1-3-03(B)(5)(2) which established the requirement that utilities must provide no less than sixty days written notice to attaching entities of an increase in the rental rates. OCTA did not timely challenge this provision as unreasonable or unlawful. Nor did OCTA timely challenge O.A.C. 4901:1-3-04(D)(2) or 4901:1-3-04(D)(3) approved in the July Order, which established use of the rate formulas set forth in 47 C.F.R. 1.1409(e)(1) and 47 C.F.R. 1.1409(e)(3), respectively. OCTA did not challenge the Commission's decision to implement these provisions via a future entry to address "the filing of tariffs consistent with the adopted rule." July Order at p.41. It is apparent in the discussion below regarding the merits of OCTA's request that its challenges go to the heart of the Rules approved in July 2014, and the entire regulatory framework for pole attachments, not the Commission's February 25, 2015 Entry implementing those Rules.

In its March 27, 2015 filing the OCTA effectively requests the Commission to modify the above provisions by inserting the further requirement for a lengthy burdensome rate case process whenever applying the CATV formula results in an increase in the tariff rate. Moreover, OCTA feigns surprise as if the February Entry created a new possibility that "under the new rule an electric distribution utility or a telephone company could file a proposed pole attachment rate or conduit occupancy rate in its tariff amendment that would be an increase over its existing pole attachment rate or conduit occupancy rate." AFR at 5, 6. This possibility has existed from the outset of this proceeding. OCTA has requested rehearing of the wrong Entry and its erroneous

request is more than 8 months late, therefore its current Application for Rehearing is procedurally defective as untimely pursuant to the 30-day limit imposed by Section 4903.10, Revised Code, and O.A.C. 4901-1-35.

The Commission recently addressed proper treatment when the title of a party's filed document disguises its intent when it refused to consider a Memorandum Contra filed by the Ohio Partners for Affordable Energy because it was in reality an untimely interlocutory appeal.[2] There is no discretion to grant an application for rehearing that is not filed within the 30-day statutory deadline and, consequently, the Commission must deny OCTA's Application for Rehearing as untimely. Regardless, OCTA's requests are without merit and should be denied for the reasons stated below. Either way, OCTA's rehearing/clarification request should be denied.

II. THE COMMISSION SHOULD REJECT OCTA'S REQUEST TO TREAT THIS TARIFF COMPLIANCE FILING AS AN APPLICATION FOR AN INCREASE IN RATES.

A. Pole Attachments Are Not a Utility Service and a Generically-Applicable Pole Attachment Rate Formula Is Not a Utility Service Rate Change

OCTA alleges that the Commission's February Entry is unreasonable and unlawful "to the extent the Commission in its Entry permits an electric distribution utility or a telephone company

[2] In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications; and Tariffs for Generation Service, Case No. 14-841-EL-SSO; In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20, Case No. 14-842-EL-ATA, Opinion and Order, p.10, April 2, 2015 ("Upon review of OPAE's filing, it is evident by its wording that OPAE's intent was to essentially file its own interlocutory appeal; however, since it was past the time for the filing of an interlocutory appeal, OPAE termed it a "memorandum contra." Such a pretense is not appropriate and, therefore, the Commission finds that OPAE's memorandum contra should not be considered in our determination of this interlocutory appeal issue.")

to increase its pole attachment rate or conduit rate without following the statutorily mandated procedure for a rate increase contained in Sections 4909.18-4909.19, Revised Code or through a self-complaint process in Section 4905.26, Revised Code." AFR at 2. OCTA's allegation simply ignores the framework for regulation of pole attachments established by the General Assembly in Sections 4905.51 and 4905.71, Revised Code and implemented by the Commission in O.A.C. 4901:1-3. The Electric Utilities note that the regulation of pole attachments is not about the provision of public utility services to retail customers, but, rather, is the means of ensuring non-discriminatory access by other retail service providers to utility structures located in the public right-of-way.[3] Simply put, Electric Utilities and telephone companies do not have an obligation to serve attaching entities upon request — O.A.C. 4901:1-3 is clear that a public utility is not required to increase capacity to accommodate an attaching entity—instead, the obligation is to provide non-discriminatory access to available space on poles. It would be inappropriate to consider all of the statutes and rules generally and specifically applicable to public utility services as applying to pole attachments because they are distinguishable from one another and serve different purposes.

First, although OCTA acknowledges that Section 4905.71, Revised Code defines the Commission's authority to regulate the charges, terms and conditions of access to public utility poles and the requirement for utilities to file tariffs applicable to entities other than public utilities, OCTA fails to properly identify the statutorily defined manner of such regulation. The statute clearly describes a complaint process whereby the Commission "*may*, upon complaint of any persons in which it appears that reasonable grounds for complaint are stated, or upon its own

[3] *See*, for example, *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, (rejecting a market value takings claim based in part on the right of government to grant use of public right-of-way).

initiative, investigate such charges, terms, and conditions and conduct a hearing to establish reasonable charges, terms, and conditions, and to resolve any controversy that may arise among the parties as to such attachment." 4905.71(B), Revised Code (emphasis added). There is no requirement in Section 4905.71 for utilities to treat a change in the rental charges in pole attachment tariffs as an application for a rate increase under Section 4909.18 that would trigger burdensome filing requirements along with the publication and investigation requirements of Section 4909.19. OCTA has simply inserted its own opinion that "[P]ublic utilities *must* follow the rate increase application procedure set forth in Section 4909.18, Revised Code, or, follow the self-complaint process in Section 4905.26, Revised Code if they want to increase existing pole attachment and conduit occupancy rates." AFR at 6 (emphasis added). OCTA's view is simply wrong. While Section 4905.71 unmistakably grants the Commission the *discretion* to conduct a hearing upon such a complaint about a utility's tariff—the Commission exercise of that discretion certainly does not constitute an application for a rate increase triggering the mandatory "Standard Filing Requirements" as OCTA asserts. The General Assembly would have provided for applicability of R.C. 4909 here if it had intended to do so; it did not.

Second, in its October 15, 2014 Entry on Rehearing in Case No. 13-0579-AU-ORD (the "October Entry") the Commission confirmed its establishment of a formula rate approach to regulating just and reasonable charges in pole attachment tariffs. The February Entry simply represents the PUCO's implementation of its previous July 30, 2014 Finding and Order (the "July Order") and October Entry issued in this lengthy proceeding. There is nothing in the February Entry that indicates the Commission was rethinking its Finding and Order and wanted to change it – doing so in a rulemaking context would have, at a minimum, necessitated notice and comment to interested parties. Notably, in its July Order and October Entry the Commission adopted the

rate formula found in 47 CFR 1.1409(e)(i) for both pole attachment tariff rates *and* for Competitive Local Exchange Carrier pole attachment agreement rates. The Commission's adoption of a formula rate approach is thus a simple tariff compliance process providing 60-day Commission Staff review of routine updates, with entities attaching by tariff or agreement having the right under Sections 4905.51 and 4905.71, Revised Code to file a complaint about any rate, term, or condition. OCTA's request, by contrast, would impose a lengthy burdensome rate case proceeding instead of the simple formulaic rate approach approved in the Commission's earlier decisions.

Third, the 60-day Commission Staff review outlined in the February Entry is entirely consistent with O.A.C. 4901:1-3-3(A)(5)(b), which requires that "A public utility shall provide all attaching entities no less than sixty days written notice prior to:…(b) Any increase in pole attachment rates." As noted in its AFR, OCTA filed initial and reply comments and participated in Case No. 13-579-AU-ORD. AFR at 5. OCTA also filed a Memorandum Contra the Electric Utilities' Application for Rehearing of the July 30 Order. Despite a 19-month proceeding and multiple opportunities to comment, OCTA never once raised an issue with the provision for a 60-day written notice process for increasing pole attachment rental rates or suggested that any such change must be treated as an application for an increase under Section 4909.18, Revised Code triggering burdensome filing requirements.[4] Such out-of-time requests that run afoul of the statutory construct for establishing pole attachment charges should be rejected by the Commission.

B. OCTA Confuses the Filing of a Formula Rate with its Implementation.

[4] The 60-day written notice provision was included in the Commission's initial May 5, 2013 Entry requesting comments on its Draft proposed rules, and was adopted in the July 30, 2014 Finding and Order.

Throughout this proceeding, OCTA has been a fervent supporter of the FCC formula and the Commission's power to establish that formula for use by power and telecommunications utilities. OCTA devoted several pages of its first rehearing request to an argument captioned "The Commission's Jurisdiction Is Not Limited to Tariff and Complaint Proceedings."[5] OCTA's argument then was that the Commission could impose the formula on all utilities without regard to whether or not voluntary rate negotiations had ever occurred because it had broad authority to do so. OCTA further argued that the formula was a "cost-based" rate and compensatory to pole owners.[6]

Yet now, in this second rehearing request at pages 5-7, OCTA reverses course and argues that if the formula results in a pole attachment rate that is above a utility's current tariff level, the Commission is constrained and cannot permit such a change to go into effect without requiring the utility to undertake a full rate case where presumably all of its services to residential, commercial and industrial customers also would be under review. The Electric Utilities note that rate cases are lengthy, burdensome, and can cost utilities and customers millions of dollars to litigate.

OCTA's arguments betray a patently obvious attempt to gain the benefits of the formula rate whenever the result is a pole attachment rental fee decrease but to avoid any instance where there would be a pole attachment rental fee increase by making it simply too costly and burdensome to pursue. In this regard it should be noted that OCTA does not appear to recognize that if its position were upheld, utilities could not implement the formula to create a rental decrease either without triggering the same statutes, i.e., utilities cannot unilaterally *reduce* rates either.

[5] OCTA Rehearing Request, Sept. 10, 2014, pp. 5-8.

[6] Id., at 8-11.

The Commission should recognize that there is a clear distinction that is to be drawn between the implementation of a formula rate, which it has required herein through a regulatory process that was strongly supported by OCTA, and the application of that formula rate to adjust annually the rental fees calculated under the formula. At the FCC and in the other states where that formula or a variation is used, the rental fees for attachments change each year once the previous year's data is known. In its Reply Comments in this proceeding,[7] OCTA stated that:

> "because the formula is populated with the publicly-available data of the regulated pole owners, and the elements of its are so well-known, verifying new pole attachment rates has become a predictable and usually routine administrative process between pole owners and attachers. The net result has been that the formula has solved exponentially more controversies than ever have arisen to the level of full-on dispute over its 31-year history."

OCTA's new position would eliminate the supposed benefits it originally touted. Ignoring OCTA's dubious proposal that only an increase would trigger Section 4909.18, in any year that the new data resulted in a rental fee increase, a full rate case covering all utility services and attracting numerous intervenors representing diverse utility customer interests would be required in order to reset the pole attachment rental fee. That is diametrically opposite the concept of a formula rate and OCTA's past positions in this proceeding. OCTA's "clarification" and rehearing request should be denied.

[7] OCTA Reply Comments of Aug. 129, 2013, p. 7

III. THE COMMISSION SHOULD REJECT OCTA'S REQUEST TO DELAY THE EFFECTIVE DATE OF TARIFFS AMENDED PURSUANT TO THE COMMISSION'S ORDER.

OCTA also asserts that the February Entry is unreasonable and unlawful because it does not provide affected entities "sufficient time to review and comment on the filings." AFR at 2. OCTA further claims that sixty days is not enough time because "it is possible that 50 tariff amendments will be filed on May 1, 2015" and the OCTA "may have concerns that specific terms in an amended tariff are inconsistent with the pole attachment and conduit Rules or that the inputs used in the rate calculations are improper." This claim is entirely without merit.

First, the Commission concluded in its Orders and Entries that its Staff is fully capable of reviewing all tariff amendment filings and taking action as necessary within the sixty day window established in the February Entry. As the Commission noted in its July Order, "the CATV rate formula is well known and requires fewer inputs than the telecommunications rate formulas." July Order at 41. Indeed, as approximately 30 states are "FCC states" utilizing formula rates, each year hundreds of pole attachment rates are changed with sixty days written notice to attaching entities. The ease of reviewing well-known formulaic rates calculated using publicly-available data inputs was clearly considered by the Commission.

Second, pursuant to O.A.C. 4901:1-7-23, telephone companies were already subject to the rates, terms, and conditions in FCC rules, including use of the FCC CATV rate formula. The new O.A.C. 4901:1-3 Rules reflect very few differences from the FCC rules. Therefore, out of the "possible 50 filings" the OCTA claims will overburden its members, only a handful of filings are likely to include substantive amendments. Moreover, the February Entry provides that a utility's tariff amendments are subject to suspension. Finally, even if any specific terms in an amended tariff subsequently are found to be inconsistent with the pole attachment Rules, the complaint

procedures established by the Commission in O.A.C. 4901:1-3-05 are "appropriate for the purpose of specifically addressing complaint cases related to issues involving pole attachments in Ohio." July Order at 43.

Third, the burden OCTA complains of would be lessened even further should the Commission grant the recent Motion to Extend Tariff Amendment Filing Date of the Ohio Rural Broadband Association, Inc. filed in this proceeding on April 2, 2015. Assuming the Commission would retain the same sixty day review period in granting such an extension, more than half of the "possible 50 filings" would be staggered by thirty-one days. Thus, while OCTA would still have sixty days to review any given utility's tariff amendment filing, a little less than half of all possible filings would be filed by May 1, 2015, to be effective July 1, 2015, while the remainder would be filed by June 1, 2015, to be effective August 1, 2015.

The Commission's 60-day window is both reasonable and lawful. As OCTA notes, any utility failing to file an amended pole attachment tariff rates will be presumed as unjust and unreasonable and collected subject to refund. The Commission should therefore reject OCTA's unfounded request to delay the effective date of amended tariff applications so filed as ordered by the February Entry.

CONCLUSION

For the reasons set forth herein, the Electric Utilities respectfully request that the Commission deny OCTA's Application for Rehearing.

Respectfully submitted this 6th day of April, 2015,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 6th day of April, 2015 by e-mail, as noted below, on the parties listed below.

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Summary: Memorandum Memorandum Contra OCTA Application for Rehearing Jointly Filed by Ohio Electric Utilities electronically filed by Mr. Robert M. Endris on behalf of Burk, James W. Mr.