BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Change Their Pole Attachment Tariffs	**)** **)** **)** **)** **)**	**Case No. 15-975-EL-ATA**

RESPONSE OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO OBJECTIONS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Pursuant to the Attorney Examiner's Entry dated August 7, 2015, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, the "Companies"), respectfully submit this Response to Objections of The Ohio Cable Telecommunications Association ("OCTA").

I. THE OCTA'S OBJECTION TO THE COMPANIES' USE OF SPECIFIC APPURTENANCE FACTORS IS UNFOUNDED.

The OCTA objects to OE's and TE's pole attachment rates "because its calculation has deviated from the Commission's accepted formula without adequate justification." (Objection at pp.3, 5) However, while OCTA acknowledges that the FCC considers the 15% presumption to be rebuttable, it simply fails to address all of the evidence provided by the Companies in response to OCTA's discovery requests. Specifically, the Companies not only provided a description of the calculation in response to Int-2-1, as stated in the Objections at p. 4, but the Companies also provided supporting documentation from the Companies' continuing property records in response to RPD 2-4. Altogether, the Companies provided OCTA with nearly two thousand pages of "proof of actual investment" including a separately detailed computation supporting the specific

appurtenance factors. OCTA conveniently omits this fact from its Objection and claims the Companies only provided the succinct narrative interrogatory response.[1]

Moreover, OCTA attempts to confuse the issue further by suggesting the Federal Communications Commission ("FCC") would not permit the Companies to issue pole attachment rental invoices based upon a calculated appurtenance factor.[2] Under FCC regulations, an attaching party may request information from a utility regarding the calculation of rental rates including the appurtenance factor used in invoicing for pole attachments, and if a dispute remained unresolved the attaching party could submit a complaint to the FCC. In such a complaint proceeding, the 15% and 5% ratios for electric and telephone companies, respectively, "shall be rebuttable presumptions to be utilized *in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances*."[3] Notably, the OCTA has not alleged that the Companies refused to provide requested information nor alleged that the Companies' calculation of the appurtenance factors is flawed. Instead, OCTA merely asserts that the OE and TE specific factors should be rejected for lack of proof. Interestingly, in the case OCTA cites for Commission adoption of the FCC formula to be used for an electric distribution utility tariff, the Commission deviated from the FCC formula by eliminating the appurtenance factor reduction altogether.[4]

Finally, OCTA's lack of objection to CEI's use of a calculated 18.75% appurtenance factor instead of the presumptive 15% is also notable. The Companies used exactly the same methodology to calculate all three companies' specific factors, and provided exactly the same supporting documentation in response to discovery, yet OCTA seemingly finds CEI's specific

[1] The Companies provided Staff with copies of its discovery responses on Aug. 5, 2015.

[2] The FCC does not require tariffs for pole attachments.

[3] *In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, at ¶ 19 (July 23, 1987) (emphasis added)

[4] Columbus & Southern Ohio Elec. Co., Case No. 81-1058-EL-AIR, Nov. 5, 1982, p.47 and Attachment 1.

factor perfectly acceptable, but objects to use of OE's and TE's factors. Under the FCC formula, the higher the appurtenance factor, the lower the rate. Apparently OCTA's true objection is only with the outcome, not the process. Unlike OCTA, the Companies' approach to this issue is consistent and supported by evidence, regardless of the direction of the result. Since OCTA does not apply its logic equally to CEI, its rhetoric rings hollow.

The Companies presented probative, direct evidence to OCTA proving the actual investment supporting specific appurtenance factors and applied its methodology consistently across the three operating companies in the same manner it follows in other states under FCC jurisdiction. OCTA's objection to the Companies' appurtenance factors is specious and should be rejected.

II. OCTA'S REQUEST TO AVERAGE FOUR YEARS OF TE AND CEI ADMINISTRATIVE EXPENSES IS CONTRARY TO THE ATTORNEY EXAMINER'S ENTRY AND SHOULD BE REJECTED.

OCTA asserts that TE and CEI 2014 Administrative Expenses were "extraordinarily high" and therefore should not be used to set the current year's rates. OCTA provides a table of Administrative Expenses for years 2011 through 2014, and claims the "4-year simple average administrative carrying charge would help balance out these anomalies." However, OCTA neither explains how its recommendation complies with the Commission's Entry ordering all pole owners in Ohio to submit rates computed using 2014 data, nor provides any basis to show that the 2014 expense level is "anomalous" on a going forward basis. OCTA also fails to point to any FCC authority which would suggest that the formulaic use of any given reported year is "unfair" and should be replaced by use of a four-year average carrying charge. OCTA does not allege malfeasance, imprudence or anything improper on the part of the Companies; it merely wants a

rate lower than that produced by a straightforward implementation of the formula ordered by the Attorney Examiner in this proceeding.

Moreover, OCTA's recommended approach could leave parties arguing every year that the instant year's reported numbers yield an "unfair" result. Parties would likely present contrasting opinions about how much deviation in the FERC Form 1 accounts warrants an override, and how many years should be included to derive an average acceptable to that party. OCTA's recommendation also would increase the potential for dispute instead of reducing it—defeating the FCC's specific purpose for adopting formulaic rates, as well as the PUCO in following the FCC ratesetting methodology.[5] Despite having previously declared the carrying charge component "uncontroversial",[6] OCTA now introduces controversy that could bog down proceedings making the formula rate approach more like a rate case, thereby defeating the purpose of formula rates. The Commission should reject OCTA's recommendation to use a historical average carrying charge rate as being without basis and contrary to the purpose of the formula rate.

III. OCTA'S REQUEST FOR GRADUALISM IS UNSUPPORTED BY THE RECORD AND CONTRARY TO THE COMMISSION'S PREVIOUS ORDERS.

OCTA "urges the Commission to apply the concept of rate gradualism or rate continuity in this proceeding" if the Commission determines that the correct rate results in more than a 20% increase above the current rates. (Objection at p. 7) OCTA claims the rates calculated by the Companies "will be large enough to cause disruption, fall on the suppliers and end users, and the

[5] Id. p.47 ("In the view of (Ohio Cable and Telecommunications) Association witness McDaniel, "[t]he FCC has…accepted the principle that pole attachment rate setting methodology should be simple and geared to reducing the potential for dispute""

[6] OCTA Reply Comments p. 12, Case No. 13-579-AU-ORD.

burden has not been met by FirstEnergy that the significant increase must be implemented all at one time." (Objection at p. 8) These claims are baseless and irrelevant.

First, OCTA attempts a calculation of the statewide impact that is fundamentally flawed. OCTA multiplies an average assumed increase of 60% by the total number of non-joint use pole attachments in the state to claim "this would require absorbing over $9 million in increased costs immediately." (Objection at p. 9) OCTA's calculation, however, is wrong. Specifically, OCTA fails to subtract the attachments of Competitive Local Exchange Carriers ("CLEC"), who are not eligible to attach pursuant to tariffs due to their status as public utilities. Thus, the statewide impact to OCTA's members, even if the other numbers used by OCTA in its assumption were accurate, is significantly less than what OCTA has estimated in its flawed calculation.

Second, OCTA engages in gross hyperbole when it warns that its members' customers "would have to reduce their purchases of cable or other family budget items." Objection at p.9, 10. OCTA should be ashamed of making such an unsupported claim. According to a report based on the "Television and Cable Factbook 2015," well over 2.6 million households in Ohio have cable,[7] and there are likely also many business subscribers. Thus, even assuming OCTA's inflated $9 million rate impact (which was shown above to be both wrong and significantly overstated), the monthly bill impact would be no more than $0.28 per month.[8] Such a small cable bill impact is not likely to cause a disruption in services or present any kind of family budgeting crisis as OCTA predicts, particularly when considering that OCTA members often provide cable, telecommunications and internet services in a bundled package at a monthly cost of well over $150

[7] Website: http://www.tvb.org/media/file/Cable_UEs_by_State.pdf.

[8] Coincidentally, the National Cable & Telecommunications Association estimates the price of viewing cable at $0.25/hour (NCTA website: https://www.ncta.com/positions/delivering-video-value. The "crisis" on end users is roughly the equivalent of one viewing hour per month.

per month in some instances. Further, because the cable companies serving the most consumers in Ohio are very large multi-state corporations, there is no reason to believe the burden on suppliers is so substantial as to cause them to disrupt services in Ohio.

Third, OCTA is simply wrong to assert that the Companies bear the burden of proof of commercial necessity that the "increase must be implemented all at one time." The Commission ordered all pole owners in the State to update their tariff rates using the FCC formula and 2014 data, and that is exactly what the Companies have done. Moreover, OCTA is also wrong to assert "there is no support in the record to immediately impose the full increase." In the underlying rule review proceeding in Case No. 13-579-AU-ORD, the OCTA itself argued at length that a "two-rate world creates artificial competitive imbalances." (OCTA Initial Comments at p.13) Yet the OCTA's proposal for its members to enjoy a lower "gradualism"-based rate than their non-pole owning public utility competitors would effectuate an imbalance that would persist for years under its proposal. Once again, the OCTA asks the Commission for relief from implementation of the very position it previously advocated.

Finally, the OCTA is simply misguided to suggest that because the Companies had not sought an increase in the pole attachment rates to cover the TPP and real estate taxes that "one can assume that the prior rate, or the prior rate with a modest increase, may cover all of the utility's legitimate costs." (Objection at p.10) There is no evidence that the "largest cost factor" in the Companies' increase is due to TPP and real estate taxes.[9] It has been many years since the Companies updated these tariff rates, during which time nearly all of the formulaic cost components have increased, particularly as reliability and safety standards have advanced. While

[9] OCTA admits that these taxes are not new and have not increased recently in apparent contradiction to its assertion that these taxes are the largest factor causing the increase. Regardless, the FCC formula uses the actual taxes paid approach and so it is therefore appropriate to fully reflect TPP and real estate taxes in the formula rate.

the Commission has previously noted that the CATV formula has been deemed to be compensatory by the Courts,[10] there is no similar authority that rates substantially below the CATV formula as proposed by OCTA have been deemed to be compensatory.

The Commission previously has noted that "gradualism is not a dispositive factor when establishing rates"[11] and it should reject the OCTA's request to make gradualism the dispositive factor to create an artificial competitive imbalance in its favor.

IV. OCTA's INSISTENCE THAT OVERLASHING BE PERMITTED IS UNTIMELY, UNWARRANTED AND SHOULD BE REJECTED.

At pages 12, 23, and 25, OCTA argues that Ohio Edison, Cleveland Electric, and Toledo Edison, respectively, should be required to explicitly permit an attachment process called "overlashing." While "overlashing" is not described or defined by OCTA, the Companies understand it basically consists of wrapping or attaching a new cable or fiber to an existing series of wireline pole attachments. Overlashing can significantly affect the loading on a pole, and if the pole is already at its limit could create safety and reliability problems. There are at least three reasons why OCTA's recommendation should be rejected. First, the Ohio Rules do not address overlashing in any fashion. Not once during the Rulemaking proceeding did OCTA suggest that the Rules or tariffs should explicitly permit overlashing. Instead of introducing the concept in the Rulemaking where all interested stakeholders could address the risks of such a practice and the proper processes to follow, OCTA now objects to the Companies' existing approved tariff

[10] *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,* Finding and Order, July 30, 2014, p.41.

[11] *In re: Ohio Edison Company, et al.*, Opinion and Order, Case No. 07-551-EL-AIR, et al., January 21, 2009 at page 29, footnote 3.

language that has been in place for two decades or more and that have never been the subject of a complaint before the Commission.

Second, the OCTA's proposed tariff amendment language appears designed to allow any new party to overlash to any existing pole attachment. This would create a multitude of problems because the pole owner would not have reviewed the impact of additional loading on poles, would not have given permission for the new attachment, and may not even have an agreement with the new attacher. In support of its proposed language, the OCTA argues that "overlashing an existing pole attachment is not an attachment to a pole controlled by the public utility and is not accessing a pole, duct, conduit or right-of-way." This is logically inconsistent with the rules and tariffs obligating non-discriminatory access: if overlashing is not accessing a pole, duct, conduit or right-of-way, then there exists no obligation to allow the new attachment to occupy space on the pole.

Finally, the OCTA opines that the Companies' tariffs should explicitly permit overlashing because the "FCC has found that overlashing does not require an attachment application and that prior notice is up to the parties to negotiate." OCTA Objection at p. 14. Neither the Ohio General Assembly nor the Commission has ceded jurisdiction over pole attachments to the FCC. And unlike the FCC, the Commission has the additional responsibility to regulate electric distribution utilities' and to provide for the safety and reliability of the electrical system. It would be unwise and inconsistent to treat the replacement of an existing wireline with double the thickness, weight and loading as a modification, but to define overlashing an additional cable having the same effect of doubling the thickness, weight and loading to not be a modification. Even more so to then require as little as 15 daysnotice before overlashing would occur.

The OCTA's proposal to force overlashing to be permitted by the Companies' tariffs should be rejected.

V. OCTA'S OBJECTION TO THE SEPARATE AGREEMENT FEATURE IN OHIO EDISON'S TARIFF CONTRADICTS THE STATUTORY AND REGULATORY FRAMEWORK.

OCTA objects to the separate agreement provision in OE's tariff because it believes the "statute envisions that, if a tariff exists, all the applicable rates/terms/conditions under the tariff will be contained in the tariff itself." OCTA Objection at p. 15. However, as can be seen in the Companies' application, this provision remains unchanged from the existing Commission-approved tariff. Moreover, the statutory language that OCTA cites as prohibiting the separate agreement has not changed since OE's pole attachment tariff was last approved by the Commission. OCTA's argument that OE's tariff does not comply with the statute is contradicted by the prior Commission approval of the tariff as well as the lack of any complaints about it.

OCTA opines additionally that Rule 4901:1-3-04(A) only allows attachments by entities other than public utilities either by tariff or else by agreement—but not both. OCTA mischaracterizes the Rule: this "either/or" dichotomy simply is not found in the Rule. Instead, the Rule states "[n]othing 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." Indeed, OCTA proposed to append the phrase "that are not inconsistent with the rates, terms, and conditions set forth in the public utility's tariff" to the above-cited Rule, but the Commission rejected OCTA's proposal.

Finally, OCTA complains about the requirement for a "separate, unknown agreement." OCTA Objection at p. 15. First, the agreements are certainly not unknown by the parties. In fact,

all of the OCTA members with attachments to OE's poles already have such agreements covering terms and conditions that are not addressed in the new Rules, and OCTA, notably, does not complain about any of the provisions in these existing agreements. Second, it is not at all uncommon for the Companies' various Commission-approved tariffs to be supplemented by individual agreements, e.g., interconnection agreements, partial service agreements, construction services agreements, and Rider ELR (Economic Load Response Program) contracts—none of which are attached to the approved tariffs. OCTA's proposal to eliminate or attach the agreement is nothing more than a solution in search of a non-existent problem.

VI. OCTA'S OBJECTION TO OHIO EDISON'S INSPECTION REIMBURSEMENT IS MISGUIDED AND IS NOT BASED ON THE FACTS.

OCTA is "contesting this claim to be able to impose a separate charge for all post-installation inspections." Objection at pp. 17, 28. Despite the fact that pole attachments in Ohio are not under FCC jurisdiction, OCTA cites to an FCC ruling for the proposition that "a separate fee is inappropriate when the pole attachment rate includes full costs." Objection at p. 18. However, OCTA's citation is incomplete with respect to context and ignores the very next sentence in the ruling: "We will look closely at make-ready and other charges *to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee*." (emphasis added)[12]

The FCC ruling goes on to state: "Such charges might be reasonable to the extent they represented actual costs for each individual agreement and if, and only if, the amount reimbursed to the utility is not included in the accounts used to calculate the annual rate."[13] The inspection

[12] *Texas Cable & Telecom Ass'n v. GTE Southwest*, 14 FCC Rcd 2975, 2984 (1999).

[13] Id.

costs at issue here are indeed actual incremental costs for each individual agreement and the reimbursed amounts are credited to the accounts used to calculate carrying charges in the annual rate. In other words, there is no double recovery because the costs are fully "zeroed out" of the annual rate. The Commission should reject OCTA's proposal to eliminate this provision from the OE and TE tariffs.

VII. THE BALANCE OF OCTA'S OBJECTIONS LARGELY AMOUNT TO DISTINCTIONS WITHOUT A DIFFERENCE OR THAT ARE CURED BY THE COMPANIES' REFERENCES TO THE RULES.

With the exception of Toledo Edison's minimum pole requirement, which the Companies agree to remove from the tariff, OCTA's objections largely amount to restating the Companies' existing language to parrot the Rules even though the existing language means essentially the same thing. Moreover, the Companies' proposed amendments specifically state that attachments shall be made pursuant to the Rules and existing laws.

OCTA also seeks to require every payment term to conform to the lone payment term provision in the Rules, namely, the payment of make-ready estimate. There is no special reason for example, to require the same 21-day term for payment of the annual rental invoice as for the make-ready invoice. Notably, neither OCTA nor its members attached to the Companies' poles has never before complained to the Commission that these existing payment terms are confusing or have caused any problems.

CONCLUSION

For the reasons set forth herein, the Electric Utilities respectfully request that the Commission approve the Company's amended tariffs as proposed by the Companies.

Respectfully submitted this 24th day of August, 2015,

On Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company,

/s/ James W. Burk

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 24th day of August, 2015 by e-mail, as noted below, on the parties listed below.

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Summary: Response Response of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to OCTA Objections electronically filed by Mr. Robert M. Endris on behalf of Burk, James W. Mr.