

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Commission's Review of :
Chapter 4901:1-3 Ohio :
Administrative Code : Case No. 19-834-AU-ORD
Concerning Access to :
Poles, Ducts, Conduits, :
and Rights-of-Way. :

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WORKSHOP

before Mr. Jay S. Agranoff and Ms. Stacie Cathcart,
Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-B,
Columbus, Ohio, called at 10:00 a.m. on Tuesday,
May 21, 2019.

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STAFF:

Ms. Michelle Green

Mr. Mick Twist

Mr. Jason Well

Ms. Marianne Townsend

Ms. Robin Russell

- - -

1 Tuesday Morning Session,
2 May 21, 2019.

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4 EXAMINER AGRANOFF: Why don't we go on
5 the record.

6 My name is Jay Agranoff and with me is
7 Stacie Cathcart and we are Attorney Examiners in the
8 Legal Department here at the Commission and we were
9 assigned to preside over this particular proceeding.
10 With us today are members of the Commission's Staff
11 Telecommunications Division. We have Michelle Green,
12 Mick Twist, Jason Well, Marianne Townsend, and Robin
13 Russell.

14 We are here this morning for the workshop
15 as outlined in the February -- in the April 11, 2019,
16 entry issued in Case No. 19-834-AU-ORD which is
17 captioned in the Matter of the Commission's Review of
18 Chapter 4901:1-3 Ohio Administrative Code Concerning
19 Access to Poles, Ducts, Conduits, and Rights-of-Way.

20 Today's workshop is being transcribed,
21 and it is being held in accordance with Section
22 121.82 of the Revised Code which requires the
23 Commission to evaluate the rules against the business
24 impact analysis and provide that analysis to the
25 Common Sense Initiative Office.

In incorporating the CSI requirements into our rule review, the Commission has determined that it is appropriate for Staff to hold a workshop with interested stakeholders. The purpose of the workshop is to get your feedback on the Commission's current rules concerning access to poles, ducts, conduits, and Rights-of-Way.

This workshop is your initial opportunity to give your feedback of the Staff's proposal and any other recommendations on how the rules could be improved. Also I want to emphasize that anything that you hear today is only a Staff proposal. The Commission will still issue the proposed rules for comment via an upcoming Commission entry.

The same comment and reply process that the Commission has traditionally used will apply once the comment entry is issued. Nothing that is said today will be considered binding on any of the entities.

In terms of the positions on an issue, the purpose of today's workshop is merely to open a dialogue among the interested entities and Staff, but the workshop is not intended to serve as a substitute for a formal comment process.

Now, at a very high level, the Commission

1 issued an entry on April 11, 2019, in which it
2 identified Staff's issues that it believed would be
3 appropriate for comment at today's workshop. These
4 issues included the potential incorporation of one
5 touch make-ready time frames consistent with 47 CFR
6 Subchapter A, Part 1, Subpart J, Sections 1.1402 and
7 1.1411(j).

8 Another issue that was identified was
9 incorporation of overlashing requirements consistent
10 with 47 CFR, Subchapter A, Part 1, Subpart J, Section
11 1.1415.

12 Another issue was the addition of the tax
13 formula language.

14 The fourth issue was the addition of
15 procedural rules regarding the process for the filing
16 and approval of revisions to pole attachment tariffs.

17 And the last issue was the manner in
18 which the rate disputes that may occur would be
19 resolved.

20 I have a sign-in sheet that is right over
21 there at the table when you first entered. If you
22 have not already signed it, please make sure you do
23 so before the conclusion of today's workshop. If you
24 have a comment that you would like to share with the
25 Commission Staff, I would ask that you come over to

1 the dais right over here in front of me and provide
2 your name, the organization that you are
3 representing, and then if you do have any prepared
4 statements, that you provide that to the court
5 reporter; and then it will be your opportunity to
6 basically provide whatever input, comments, feedback
7 that you would like to share with the Commission
8 Staff.

9 Are there any questions?

10 If not, if the first person would like to
11 come forward and provide their input, I would
12 appreciate it. There has to be somebody that wants
13 to share. Well, if not, this is going to be very
14 quick.

15 Okay. Well, it looks like --

16 MR. THOMAS: Twist our arms.

17 MS. PETRUCCI: Good morning. Good
18 morning, your Honors, and Staff. I am Gretchen
19 Petrucci. We are here on behalf of the Ohio Cable
20 Telecommunications Association, and with me I have
21 Dave Thomas. We are going to split topics that were
22 referenced in the entry and give you some suggestions
23 and ideas going forward.

24 First of all, I would like to let you
25 know that the OCTA in general is very supportive of

1 the existing rules, and today we are going to again
2 talk about the items that are listed in the April 11
3 entry and provide some specific targeted comments for
4 particular portions of existing rules.

5 And as I said, Dave Thomas is going to
6 take care of the first couple of issues, so I am
7 going to turn it over to him.

8 MR. THOMAS: Good morning, everyone, and
9 thanks so much for this opportunity to address you
10 all today. My name is Dave Thomas, and I represent
11 the OCTA here. And for better or worse, I have spent
12 much of the last 30 years doing pole attachments
13 around the country, so sympathies would be greatly
14 appreciated for that.

15 I have been involved in Ohio on behalf of
16 OCTA in the past, I think going back as far as 15
17 years, and participated in some of the dockets that
18 have led to the current rules that we have in place
19 here. And I do practice a lot before the FCC, as
20 well before a number of other Public Utilities
21 Commissions. And if I may, I think Ohio has been
22 very ahead of the curve in how it has approached
23 these issues in a very thoughtful and I would say
24 incremental way, not sort of rushing into crazy
25 things but really studying the issues and coming up

1 with rules that certainly from the perspective of
2 OCTA and its members has worked quite well for, you
3 know, their businesses and for the broadband
4 deployment initiatives that they are so much at the
5 center at.

6 With specific regard to the issues that
7 are teed up for us today, I want to address the issue
8 of the one touch make-ready briefly, overlashing, and
9 then we also have another issue that we would like
10 maybe for the Commission to consider including in
11 some -- in its rulemaking notice when it issues that
12 and that is a question of audits. And so I'll just
13 kind of work through those three issues in that order
14 and I said fairly -- fairly briefly.

15 With respect to one touch make-ready,
16 it's, I guess, the position of the OCTA on this at
17 this point this is very much a work in progress and
18 very new, and we would urge that the Commission
19 proceed with caution about in adopting the one touch
20 make-ready rules like those at the FCC here for Ohio.

21 There's a lot of history that went into
22 the FCC's adoption and a lot of reasons why the FCC
23 adopted and OCTA and its members believe that the
24 motives for doing that were very strong and very
25 sound which is to encourage competition, encourage

1 the deployment of broadband in an as efficient and
2 economical way as possible but that it was perhaps
3 done even though it took about three years to do it
4 somewhat hastily at the end of the day without really
5 sort of appreciating all of the intricacies of the
6 practical issues associated with deployment on
7 utility poles.

8 And one can say that, well, geez, how
9 complicated can utility poles really be; you know,
10 it's a 40- or 45-foot piece of wood stuck in the
11 ground with wires bolted into it. How complicated is
12 that? Well, it's -- as the Commission well knows
13 from its prior proceedings, it's extremely
14 complicated because it's not in a protected
15 environment. You have -- you have different
16 companies, different workers accessing the pole. The
17 pole is subject to the elements. It's subject to
18 changes in surrounding land use, so it's -- it is a
19 truly dynamic, if not chaotic, environment and that's
20 true from the standpoint of joint use as well.

21 So I guess in this regard, we would urge
22 the Commission to be somewhat cautious in how it
23 approaches one touch make-ready and adopting a whole
24 one touch make-ready scheme here in Ohio.

25 And I just wanted to break it down into

1 two big buckets. When you are talking about one
2 touch make-ready, you are talking about the
3 engineering piece of it, and you are talking about
4 the construction piece of one touch make-ready.

5 The engineering piece of it is
6 essentially all of the study and the data and the
7 information that is accumulated and put into an
8 application to apply to a pole or to a run of poles
9 and then that is taken by the utility, it's studied,
10 field visits are typically undertaken by the utility
11 and by other attaching parties, and then it's
12 determined whether or not it is safe to attach to
13 that particular pole. And I am speaking generically
14 about any communications facility. It might be a
15 fiberoptic line or a coaxial line down in the
16 communications space, or we could be talking about
17 what some might refer to as new fangled wireless
18 attachments that go up on the top of the pole, up,
19 you know, way many, many feet above where the typical
20 communication space is.

21 So you have the engineering piece, and
22 then you have the construction piece. And the
23 engineering piece is -- determines, well, yes, you
24 can attach to this pole, but in order to attach to
25 this pole, you need to do the following things or,

1 no, you can't attach to this pole but you can attach
2 at this location but you need to replace the pole.
3 So that's -- that's the -- that's sort of the end of
4 the engineering -- the engineering process.

5 Then there's the construction process
6 which is what we refer to in the industry as
7 make-ready and it's a complicated derivation, that
8 term. It's literally what you need to do to make the
9 pole ready for the attachment. And that is where
10 OCTA and the OCTA members have -- have concerns or
11 reservations with the current FCC rules because it
12 essentially allows a competitor -- competitor to be
13 making unilateral determinations, yes, that are
14 subject to oversight by -- by the utility company but
15 to make unilateral determinations about moving the
16 plant that belongs to other people.

17 I can see an environment in a time when
18 that actually would work, but I'm not sure that we're
19 there yet. The FCC rule went into effect only
20 yesterday, and I'm not talking sort of in an English
21 majory poetic license. It only went into effect --
22 it actually went into effect yesterday on the 20th of
23 May. And also the rules are subject to review, I
24 believe, before the Ninth Circuit Federal Court of
25 Appeals of California, so the ultimate legality of

1 the rules, they haven't been stayed, but the ultimate
2 legality of the rules is still in flux.

3 I guess the last point that I would make
4 on one touch make-ready is that it is already -- I
5 don't think that to -- well, let me back up. I
6 would -- in my own sort of personal view, one of the
7 commission missions of a public utilities commission
8 like this Commission is to do what it can to
9 facilitate broadband, to make it quicker for the
10 deployments to be made and less expensive.

11 And what I would suggest and maybe what
12 would be a good interim measure, or not even an
13 interim measure, or a good measure would be to
14 consider a rule, and we're still working on this, so
15 we would develop this I think more in the comment
16 cycle but to develop a rule where there was a unified
17 engineering process where the communications company
18 and the utility company would have the same
19 engineering firm do that work initially and that that
20 work then would be shared with the other stakeholders
21 of the other attachers on the poles.

22 As it is now, typically, and this does
23 vary from area to area and from utility to utility,
24 an applicant who wants to attach to a new pole,
25 conducts its engineering, it hands the output of that

1 engineering study to the utility company, and then
 2 the utility company goes and does its own engineering
 3 study, so it's done twice. So one way potentially,
 4 and, again, we are still working with this, that we
 5 can expedite access even under the existing time
 6 frames that are in the rules is by having a
 7 requirement that there be a single engineering study
 8 that's done by an organization that is acceptable
 9 first, you know, foremost to the utility pole owner
 10 because it's their infrastructure and they're sort of
 11 ultimately the guardians of safety and reliability
 12 here for all attachers and then to the utility -- I'm
 13 sorry, to the communications applicant itself.

14 Very quickly moving into the overlashing
 15 issue because I don't see a red light here, but if
 16 there were, it would probably be on by now,
 17 overlashing, the proposal to adopt the rules that are
 18 in 47 CFR, the OCTA certainly wouldn't have a problem
 19 with that. The -- many of the OCTA members operate
 20 in states where those rules are in effect today. And
 21 we think that some additional clarity in that area
 22 would be fine. And we're still thinking through our
 23 position on this, but we sort of lump that into our
 24 suggestion about -- on engineering issues. It's a
 25 practice that's used today. It's a practice that

expedites the deployment, and it's -- it's one that is -- is used in many, many places in Ohio today, so additional clarity would be helpful there.

The last thing that I just did want to raise was -- was audits. There are essentially two kinds of audits that are performed by utility pole owners. One is a -- what's essentially an inventory and a count of poles and attachments on those poles in their systems. And another was -- is of a more thorough variety which is typically called a safety audit where actually the poles are surveyed for compliance with the National Electrical Safety Code and with the utility's own safety standards.

In a nutshell what we would suggest here, and we will develop this again in comments, is that the -- there be plenty of notice about the purpose of the audit. Is it an attachment inventory, a pole inventory, or is it something else? And that there be plenty of opportunity for all of the attachers and all the stakeholders who are going to be expected to contribute financially to the audits that are being conducted by the utility to have input into the process and to the standards that are being used, even to the contractors that are being selected for that.

1 I feel the cane coming pulling me off
2 stage, so I'll leave it at that for now and thank
3 you. If you have any questions, we are, you know,
4 obviously here today; but we'll be here for the
5 duration of the proceeding. Thanks.

6 EXAMINER AGRANOFF: Thank you.

7 MS. PETRUCCI: I am going to touch upon
8 the other three issues that were listed in the entry,
9 specifically the tax formula language and adding it
10 to the pole attachment rules. And I think, as you
11 probably all recall, earlier this year the Commission
12 had issued a decision in which it did state that pole
13 owning applicant -- well, let me say applications to
14 adjust rates for pole attachments need to include
15 deduction for changes resulting from the Tax Code and
16 Job -- Tax Cuts and Jobs Act of 2017. That was in
17 Case No. 18-47-AU-COI and specifically paragraph 30
18 of the decision that was issued in October of last
19 year, October 24.

20 And because the Commission's spoken it
21 does make sense that the rules that, in fact, include
22 the rates, terms, and conditions requirements also
23 include that instruction for the Commission. So we
24 would encourage the Commission to adopt language in
25 Rule 3-04 specifically that corresponds with its

1 earlier decision in the Job Cuts and Tax
2 Investigation.

3 The next topic was the procedural rules
4 regarding the filing and approval of tariff
5 revisions. And, again, this is something that the
6 Commission had established a process back in 2016 by
7 entry, and the rules don't currently reflect the
8 process, although obviously it's in place and the
9 utilities have been acting under that and we've been
10 participating in a number of those proceedings.

11 But the audit -- it's an automatic
12 approval process and envisions a review period of 60
13 days, but the entry also included time frame for
14 filing objections and then an additional time frame
15 for the utility to file a response. There was the
16 opportunity for suspension if the Commission deemed
17 it necessary. The OCTA supports inclusion of the
18 automatic process in the rules in Chapter 3, and we
19 also recommend that certain additional changes to the
20 process be included at the time the automatic
21 approval process is added to the rules.

22 And those changes that I am going to
23 highlight for you here are based on the years of
24 experience we've had, in fact, two and a half years
25 since the automatic process has been put in place;

1 and, as I said, the OCTA has participated in several
2 of the tariff revision cases that have been filed.

3 And based on that experience, we have two
4 suggestions for you today. One is that the rules be
5 more specific and require the Applicants to include
6 additional information in the application. So if the
7 utility is going to be relying upon something that
8 differs from the formula, for instance, and one
9 example might be data that is in the company's own
10 records but not in its federal account data, what we
11 are recommending is that that information be included
12 with the application at the time of filing.

13 The utility also may propose a change in
14 terms and conditions, and we're recommending that if
15 there was a change in terms and conditions, there be
16 a full rationale to explain the basis for that
17 proposed change that it also be included in the
18 application at the time the application is filed.
19 Commonsense here the idea is that the application
20 include all the information that supports the
21 proposal that's being filed, and so we are
22 recommending that the rules make that more explicitly
23 clear.

24 The second suggestion we have for you
25 today is with regard to incorporating a shortened

1 discovery period. As I mentioned, the automatic
2 process is the 60-day period. It envisions that
3 objections are going to be filed within 21 days of
4 the application being filed. At times applications
5 have not provided full understanding of what's being
6 proposed, and when the OCTA, for instance, has looked
7 at them, they have had questions and wanted to
8 participate and if -- and have, in fact, filed to
9 intervene and serve discovery.

10 What happens is the discovery responses
11 aren't received before the objections are due and so
12 at times preliminary comments essentially or
13 preliminary objections that are based on preliminary
14 review are being filed, so with a shortened discovery
15 period, an interested party can understand what and
16 can learn and, therefore, provide more meaningful
17 objections to the Commission.

18 In addition, because of the way that the
19 timing currently works, even when in prior situations
20 where discovery was received, because the process
21 only envisions a set of objections and one set of
22 reply, there isn't that opportunity within that
23 60-day period unless leave or some other advanced
24 permission is given to be able to provide additional
25 information to the Commission based on the discovery

1 responses. So we think that with a shortened
2 automatically time frame, the concept of adjusting
3 the discovery cycle is necessary.

4 With regard to the last issue that the
5 Commission had in the entry which is regarding rate
6 disputes and how to resolve those, we are aware of
7 the shortened time frames that the FCC has
8 implemented for resolving rate disputes, and the OCTA
9 is supportive of a shorter time frame for resolving
10 disputes. We think that can be very beneficial.

11 We've also noted that the current rule,
12 which is Rule 3-5, identifies certain items that an
13 attaching entity can base its complaint on. There
14 specifically with regard to being denied access or
15 that a claim that a rate term condition for
16 attachment or pole oc -- conduit occupancy is not
17 just or reasonable.

18 We think that this particular rule should
19 not apply and that it -- those two are an exhaustive
20 list of reasons why an attaching entity can file a
21 complaint, and we also think that at a minimum an
22 attaching entity should be able to file a complaint
23 alleging a rule violation.

24 So to that end we are recommending that
25 Rule 3-05 be revised to, in fact, make sure that

1 the -- that a complaint from an attaching entity can
2 include but not be limited to being denied access of
3 the rate term condition for attachment or occupancy
4 if not just or reasonable and violating -- a
5 violation of the PUCO rules.

6 And we think with those adjustments that
7 that appropriately balances the opportunity to file a
8 complaint as well as the shortened time period that
9 will hopefully allow the parties to reach a
10 resolution more quickly.

11 And that's our comments. If you have any
12 questions.

13 EXAMINER AGRANOFF: Thank you.

14 Any questions from Staff?

15 MS. TOWNSEND: I have a question. Thank
16 you for coming in and we truly appreciate your
17 feedback.

18 I have a question for Mr. Thomas. You
19 mentioned audits, and I guess I want to understand a
20 little bit more of the thinking behind the audits.
21 Is it an audit that would be on an annual basis? I
22 mean, what are you thinking specifically as time
23 frames? And also is the audit reflective of a
24 trigger of some sort? You know, something that has
25 been found, you know, inadequate or deficient on the

1 pole that would require an audit? Or are these just
2 automatic audits that would happen on, you know, an
3 annual or semi-annual or whatever basis? And also
4 are you more concerned about the audit reflecting
5 properly on continuing property records? I think the
6 CPR, is that where this is going, you know? Is this
7 what this is directed at?

8 Sorry. There was like three questions in
9 there so.

10 MR. THOMAS: Maybe more and the answer is
11 yes. No, seriously, everything that you mentioned
12 is -- is balled up in this. Contracts -- pole
13 attachment contracts between attaching parties and
14 utilities will have provisions relating to audits.
15 Sometimes audits are required by the regulator. For
16 example, in 2014, Louisiana passed some comprehensive
17 pole attachment regulations which included detailed
18 procedures regarding audits, but it also -- there was
19 rules in -- there were rules in there, if I am
20 remembering correctly, that required the parties --
21 the utility to establish like a baseline count.

22 So I guess just kind of off the top of my
23 head ticking through the issues, believe it or not, a
24 lot of utility companies don't know how many poles
25 are or should be in their continuing property

1 records. It's an issue that has occurred over time
 2 as the telephone companies have gotten not completely
 3 out of the business but their pole ownership numbers
 4 generally speaking and the ratios of poles that they
 5 owned relative to the utility -- the electric utility
 6 companies in the market declined and there -- there
 7 are various reasons for this but one of the reasons
 8 is that when a pole needs to be replaced because it's
 9 old or it needs to be replaced due to an accident or
 10 needs to be replaced for a taller pole, it's very
 11 often the electric company that replaces the pole.

12 So audits are needed by the utility
 13 company sometimes to administer their joint use
 14 agreements, sometimes to make sure their continuing
 15 property records are correct. So that's as to
 16 counting poles.

17 The changes in the continuing property
 18 records could have an effect on the pole attachment
 19 rates that we pay to, let's just pick on a couple of
 20 people, AT&T and AEP. So if there is a large shift
 21 of poles over from AT&T to AEP, I don't know that
 22 there are, we are just using them as an example, then
 23 the denominator in the pole attachment formula would
 24 be bigger on the calculation of the net bare pole,
 25 and the pole rate would go down.

1 By the same token, all things being
2 equal, that number went down on the telephone side,
3 the pole rate would go up. So that's, I think, a
4 couple of the issues that you raised in your
5 question.

6 Agreements will say every five years or
7 not to exceed every five years or three years or two
8 years, I think five years is kind of a -- an industry
9 norm that one finds in pole attachment agreements, I
10 do not know exactly what the situation is here in
11 Ohio, but my sense from past dealings is it's not all
12 that different here than it is in Pennsylvania, than
13 it is in Maine, than it is in Georgia on that regard.
14 And then -- then pole attaching agreements also have
15 typically a provision which says if the utility
16 company is concerned about your practice,
17 Mr. Communications Company, we reserve the right to
18 audit you.

19 And that in our view is a perfectly
20 reasonable provision to be in there. It's not a
21 widely abused process, but sometimes it is. And I
22 don't know that it's being abused in Ohio at all, but
23 I know there can be very naughty, difficult to
24 resolve issues associated with those -- with audits
25 and that's why we thought a little additional clarity

on that might be good as long as we are opening the books here on the regs.

Did that answer your questions?

MS. TOWNSEND: Yes, thank you.

EXAMINER AGRANOFF: Any other questions?

Thank you.

MS. PETRUCCI: Thank you very much.

EXAMINER AGRANOFF: Are there any other entities that would like to share their comments? Questions? Would the Staff?

If not, I want to thank you all for your participation today. And I will remind you that hopefully sometime in the near future the Commission will be issuing its entry calling for comments, and at that point in time you will have your opportunity to formally provide your input.

Thank you and have a good day.

(Thereupon, at 10:35 a.m., the hearing was adjourned.)

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CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter on Tuesday, May 21, 2019,
and carefully compared with my original stenographic
notes.

Karen Sue Gibson

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-6752)

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Summary: Transcript In the Matter of the Commission's Review of Chapter 4901:1-3 Ohio Administrative Code Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way, hearing held on May 21st, 2019. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.