BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

# COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

/s/ *Robert M. Endris*
Robert M. Endris (#0089886)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5728
(330) 384-3875 (fax)
rendris@firstenergycorp.com

*Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*

## I. INTRODUCTION

There has been a growing recognition, both nationally and in Ohio, that broadband deployment can provide benefits to local communities. The Companies support reasonable efforts to enhance broadband deployment. However, the rush to enhance deployment too often has been at the expense of the safety and reliability of the electric system and has unfairly burdened electric ratepayers with costs caused by communications attachers. This has been especially true for decisions by the Federal Communications Commission, which has frequently ignored the input of electric industry experts in favor of its core constituency of telecommunications providers. Attachers hope to persuade the Public Utilities Commission of Ohio ("Commission") to essentially adopt the new FCC regulations, including those which remain pending on reconsideration or have been appealed to the courts. The Commission should resist such biased advocacy that ignores the input of electric utilities, and instead should fairly balance the interests of all Ohioans including electric utilities and the customers they serve.

The majority of the pole infrastructure to which telecommunications providers seek to attach is available[1] because electric distribution utilities ("EDUs") have exercised the authority and responsibility entrusted to them under Ohio law to enforce appropriate engineering and construction standards necessary to provide safe and reliable electric service to customers at reasonable prices.[2] Several of the proposed amendments intended to accelerate deployment have the unintended consequence of undermining pole owners' authority to maintain the integrity of the infrastructure and reliable service to customers.[3] As explained more fully below, the Commission

[1] The primary purpose of the Companies' pole infrastructure is to deliver electric service to electric customers.
[2] EDUs have long been recognized as the most expert authorities on safety and reliability of the grid. Broadband deployment should not suddenly displace decades of deference to that expertise.
[3] The operative statutes require that attachments not degrade the utility service. *See* RC 4905.71 ("so long as the attachment does not interfere, obstruct, or delay the service and operation of the company or carrier"); and RC 4905.51 ("and that such use or joint use will not result in irreparable injury to the owner or other users of such equipment or any substantial detriment to the service to be rendered by such owners or other users.")

should reject or modify Staff's proposed amendments, and make other adjustments as proposed herein.[4]

## II. RECOMMENDATIONS

**4901:1-3-01 Definitions.**

Staff's proposed definition of "Overlashing" includes the overly broad phrase "fiber optic cables or similar incidental equipment such as fiber-splice closures" that may lead to confusion or disputes over the definition. In particular, the term "similar incidental equipment" is not defined or specifically limited and thus is susceptible to disputes over conflicting interpretations. The Companies respectfully recommend the Commission tighten the new definition to clearly indicate equipment that qualifies for overlashing as follows:[5]

> (N) "Overlashing" means the tying or lashing of an attaching entity's additional fiber-optic cables or **~~similar incidental equipment such as~~** fiber-splice closures to the attaching entity's own existing communication wires, cables, or supporting strand already attached to poles.

**4901-1-3-02 Purpose and scope.**

The proposed amendment regarding suspension of an application is confusing and therefore it is difficult to understand the proposed administrative process. As a result, the Companies ask that this section be rewritten to provide clarity the intended process and that the rewritten section be circulated for additional review and comments.

**4901:1-3-03 Access to poles, ducts, conduits and rights-of-way.**

While overlashing may be a viable practice under the right circumstances and procedures, the proposed rules do not provide adequate protection against degradation of the system. The "if

[4] The Companies do not necessarily oppose Staff's recommended amendments not specifically addressed herein; however, the Companies reserve their right to address any and all matters as appropriate in their Reply Comments.
[5] The Companies denote all suggested edits in bold type, striking through deletions and underlining additions.

damaged, then fix" approach promulgated by the FCC and proposed here makes electric customers suffer risk of service degradation so that a communications attacher can avoid time and expense.[6] The proposed amendments for overlashing in Section 4901:1-3-03(A)(7) present a number of serious problems, specifically: 1) not requiring removal of unused wires; 2) not requiring the pole owner's pre-approval before overlashing; 3) the mere 15 days' advanced notice in place of the 45-day survey timeline for an Application; 3) allowing overlashing attachments to poles with pre-existing violations by other attachers; 4) not explicitly giving pole owners the final say for disputes over capacity, safety, reliability or engineering issues (in contrast to 4901:1-3-03(C)(4)); and 5) attachers not having to pay for costs incurred by the pole owner for review. These problems have been illustrated in comments filed by a large number of diverse electric utilities in FCC proceedings.[7] The Companies note there is no evidence that overlashing can be expedited without negative unintended consequences. Indeed, there is no existing evidentiary record in Ohio proceedings about overlashing at all—neither in support nor in opposition, and certainly not regarding the impacts on safety and reliability—that would warrant prohibiting an approval process. This prohibition would be both counterintuitive and irresponsible, and any reliance on the FCC's judgment should give way to a fresh evaluation by the Commission's expertise in electric utility safety and reliability.

Any policy regarding overlashing should be accompanied by a requirement that unused attachments of communications wires and cables be removed from poles.[8] Space and loading are the factors of pole capacity. Overlashing consumes the loading capacity of poles in addition to

[6] Under this construct pole owners would be expected to "police" their poles in ways that are expensive and for which attachers have refused or litigated to avoid paying in the Companies' other jurisdictions.
[7] *See*, for example, Comments filed in Docket No. 17-84 by,: Arizona Public Service, Consumers Energy, Eversource, Exelon, FirstEnergy Corp., Hawaiian Electric, Kansas City Power and Light, NorthWestern Energy, Portland General Electric, Puget Sound Energy, South Carolina Electric and Gas, The AES Corporation, ; Edison Electric Institute, Utilities Technology Council,and many more.
[8] Comments of the Utility Coalition on Overlashing, WC Docket No. 17-84, January 17, 2018, p. 26.

increasing the mid-span sag of the lines. Many existing fiberoptic and ILEC copper wires and cables were installed decades ago and are near or beyond their expected useful or economic lives.[9] Overlashing new fiber optic bundles[10] to deteriorated or unused wires will present a barrier to market entry as new attachers face significant make-ready costs that would have been obviated by the removal of retired or useless wires. Promulgating rules that cause poles to become or remain overburdened and thus unable to support new attachments will frustrate the goal of enhancing broadband deployment. Overlashing unused wires is not a capacity fix—it is a capacity constraint.[11]

The proposed overlashing amendments unreasonably place too much discretion in the hands of attachers. Meanwhile, pole owners will be tasked with even more intrusions upon—and obligations to guard—the safety and reliability of the electric system.[12] In the Companies' experience, communications attachers are lacking in electric distribution system engineering design skills and knowledge, as well as questionable in safety considerations for their workers.[13] By only giving notice instead of requesting approval of a permit or license, an existing attacher whose own attachment knowingly or unknowingly[14] constitutes a pre-existing violation could give

---

[9] See, for example, *Petition of the Communications Workers of America for a Public On-the-Record Commission Investigation of the Adequacy and Reliability of Service Provided by AT&T Services, Inc.*, Case No. 19-1314, AT&T Ohio's Motion to Dismiss, p. 6 ("In other words, a large cable that contains 100 pair of lines may have no lines that are used to provide any service to customers. That is the situation with examples 1, 2 and 14 – no working lines.")

[10] Fiber optic bundles have increased in number from a standard of 48 fibers to now ranging up to 288 fibers in a single bundle. This size and weight increase is accompanied by a corresponding increase in ice and wind loading.

[11] New attachers can readily observe vertical space on a pole but cannot readily observe loading.

[12] For example, during a recent field audit the Commission's Safety Monitoring and Enforcement Division auditor discovered that a communications provider had set a communications-only pole too close to Ohio Edison Company's energized lines. Instead of contacting the party who set the pole in violation, the Commission auditor contacted Ohio Edison to pursue remediation.

[13] See, for example, *CWA v. AT&T Ohio*, Petition at p. 2, ("In the course of its investigation, CWA uncovered numerous instances of facilities throughout Ohio in a dangerous state of disrepair that pose a safety hazard to utility employees and the public at large."); Memorandum Contra AT&T Ohio's Motion to Dismiss by the Office of the Ohio Consumes' Counsel, p. 3,(" And the PUCO should not risk residential customers' physical safety and service quality based solely on AT&T Ohio's word.")

[14] Many attachments may have been compliant at the time of attachment, but advances in engineering and construction standards—driven in part by more stringent reliability performance rules established by the Commission—now render

permission to a third-party to overlash. Charging for damages after-the-fact leaves electric customers at risk in the interim until corrective action restores reliability. And it has been the Companies' experience that too often the only leverage sufficient to induce attachers to pay for the costs they cause is to pre-condition attachment on the determination and completion of necessary make-ready work. The Companies note that pre-payment for incremental costs is a standard feature of Commission rules and the Companies' tariffs for electric service, and incremental pole attachment costs should be treated similarly.[15] The outcome of the proposed amendment de-emphasizes preliminary safety and reliability planning. Fixing damage afterward will require more resources to restore system integrity—and to restore service during an outage event—than it would to protect system integrity in the first place. Faster and cheaper communications attachments should not come at the expense of electric service reliability.

Moreover, giving pole owners a mere fifteen days to review poles that have been noticed for overlashing means that in order to perform their statutory role in protecting system integrity the Companies must give overlashers priority processing over pending applications from other attachers as well as potentially diverting resources from providing safe and reliable electric service. This review priority, together with Staff's proposed amendments that overlashers not pay for incremental costs incurred by the utility, gives overlashing parties a distinct advantage over their competitors. Under the proposed amendments an existing attacher could add overlashing to the point of maximum loading without cost from the public utility, and then charge attachment rates to newcomers far in excess of the pole owner's tariff rates—in effect becoming an unregulated

such attachments a pre-existing violation. Changes in standards are typically grandfathered until the next time a pole is modified. The increased loading of an overlash is, in fact, a modification of the pole that requires remediation.

[15] See, e.g., 4901:1-9-07(D)(2)(b), Ohio Admin. Code ("The customer shall be responsible for the incremental costs of premium services *prior to the start of construction*.")(emphasis added)

reseller of the right-of-way capacity. This is contrary to, and incompatible with, the overarching goal of these regulations to provide for non-discriminatory access to poles.[16]

To correct these issues, the Companies propose in the first instance that overlashing be treated the same as any other pole attachment, and that the entirety of proposed subsection 4901:1-3-03(A)(7) be amended as follows to ensure that overlashing receives proper review, analysis, and licensing:

(7) Overlashing

**Overlashing is accomplished by following the same procedures as other requests for attachment as set forth in this chapter. Each instance of overlashing shall be treated as a separate attachment for rental purposes.**

In the alternative, the following amendments are offered to improve the ability of pole owners to protect against degradation of the pole assets,[17] and to require overlashing parties to pay for the incremental costs they cause to be incurred:

(7) Overlashing

(a) A public utility **~~shall not~~ may** require approval for:

(i) An existing attaching entity that overlashes its existing wires on a pole; or

(ii) For the third party overlashing of an existing attachment that is conducted with the permission of an existing attaching entity.

(b) A public utility may **~~not prevent~~ delay** an existing attaching entity from overlashing **to allow time for a public utility or ~~because~~** another existing attaching entity **~~has not fixed~~ to fix** a preexisting violation. **~~A public utility may~~**

[16] 4901:1-3-03(A)(1), O.A.C., states: ("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.")

[17] The Companies inspect their poles every ten years. Poles that fail inspection are scheduled for replacement by the utility, and should not be burdened with additional load from overlashing until after the construction is completed.

~~**not require an existing attaching entity that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attaching entity.**~~

(c) A public utility may require ~~**no more than fifteen**~~ **up to forty-five** days' advance notice of planned overlashing. If a public utility requires advance notice for overlashing then the public utility must provide existing attaching entities with advance written or electronic notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attaching entity. If after receiving advance notice the public utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the attaching entity seeking to overlash within the ~~**fifteen day**~~ advance notice period and the attaching entity seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the attaching entity's view, a modification is unnecessary. **The pole owner may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.** A public utility may ~~**not**~~ charge a fee to the attaching entity seeking to overlash for the public utility's review of the proposed overlash.

***

(e) An overlashing party shall notify the affected public utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected public utility at least 90 days from receipt in which to inspect the overlash. **The public utility may charge a fee to the overlashing party for the inspection.** The public utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the public utility discovers damage**, or standards** or code violations caused by the overlash on equipment belonging to the public utility, then the public utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The public utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

With respect to make ready construction, the Companies note that the existing rules implement the Commission's determinations made in the initial proceeding adopting this Chapter, Case No. 13-579-EL-ORD, to require that only electric utilities and their direct contractors may

perform make-ready construction in the power space.[18] However, because the relevant provision is prefaced as applicable to wireless attachments above the communications space, some attachers may mistakenly conclude that the requirement only applies to pole-top wireless installations. The Companies respectfully recommend the Commission move the phrase in 4901:1-3-03(B)(5) to subdivision (C)(2) in order to clarify that it applies to all make-ready in the power space, not just for wireless attachments, as follows:

> (B) Timeline for Access to Public Utility Poles
>
> ****
>
> (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 (B)(3)(b)(ii) of this rule. ~~**Only the public utility or its direct contractor may perform make-ready work above the communications space.**~~
>
> (C) Contractors for Survey and Make Ready
>
> ***
>
> (2) If an attaching entity hires a contractor for purposes specified in paragraph (B) of this rule, it shall choose from among the public utility's approved list of contractors. **Only the public utility or its direct contractor may perform make-ready work above the communications space.**

**4901:1-3-05 Complaints.**

The Companies are concerned that proposed amendments in this section reflect a detrimental bias in favor of Incumbent Local Exchange Carriers ("ILECS") at the ultimate expense of electric utilities and their ratepayers. The selection of a single term (the unilateral EDU rental rate to ILECs) from among dozens of terms and conditions included in such agreements changes the bargains in agreements that have been in place for decades. These agreements include

[18] 4901:1-3-03(B)(5), O.A.C., states: "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 (B)(3)(b)(ii) of this rule. *Only the public utility or its direct contractor may perform make-ready work above the communications space."* (emphasis added)

numerous obligations on EDUs that are not provided to non-ILEC attachers. The Companies would have negotiated very different terms and conditions if they knew that the maximum they could charge as rental rates to ILECs is the FCC's new telecom rate.

In addition, Staff's proposed amendment would not require that joint use agreements be newly-negotiated or newly-renewed. In contrast, the FCC's implementation of a similar rule requires that joint use agreements be newly-negotiated or newly-renewed after the effective date of its new rule in order to trigger the presumption that the ILEC is similarly situated to a CLEC.[19] In a newly-negotiated joint use agreement the Companies would have an opportunity to negotiate to include provisions to directly invoice an ILEC for the various net material benefits currently embedded in the cost-sharing provisions in these decades-old agreements.[20] Thus, the Companies would charge directly for such benefits as clearing vegetation along pole lines owned by ILECs, or the frequent inspection of ILEC-owned poles that the Companies perform because the Commission's regulation and monitoring of electric utilities is vastly more stringent than it is upon ILECs.[21] ILECs own many poles to which no electric facilities are attached. Joint use poles owned by ILECs are better-maintained than their non-joint use poles because of the Companies' efforts compared to the degradation that AT&T's own workforce described in pleadings.[22]

Moreover, the lack of a reciprocal protection in the proposed amendment for EDUs who are attached to ILEC poles means there is no corresponding relief guaranteed for electric utilities

[19] Third Report and Declaratory Ruling, WC Docket No. 17-84, para. 123.
[20] Notably, charging the same rental rate while retaining material benefits in joint use agreements gives ILECs a competitive advantage over CLEC and cable competitors.
[21] AT&T Ohio, for example, argues that the Commission cannot regulate the reliability of its telecommunications services other than for Basic Local Exchange Service, *CWA v. AT&T Ohio*, AT&T Ohio's Reply in Support of its Motion to Dismiss, p.3, ("The Commission has jurisdiction only over AT&T Ohio's BLES….").
[22] *CWA v. AT&T Ohio*, Complaint, p. 4 ("The state of deterioration is so advanced that poles are literally falling over.…"). Although the CWA recently filed a voluntary dismissal, AT&T's description of bargaining negotiations could be the reason, rather than a sudden reversal of the complained-of practices leading to safety and reliability degradation.

and their ratepayers.[23] The proposed amendment is thus contrary to the existing provision that joint use agreements be negotiated.[24] The existing agreements would be rendered involuntary if only one party is granted a regulatory "trump card" to overturn a single provision while every other provision remains intact. Further, Section 4905.51, Rev. Code, requires public utilities to allow other public utilities to jointly use poles for reasonable compensation. It is both unreasonable and damaging to long-standing business relationships to leave EDUs contractually bound by multi-faceted agreements that may incentivize complaints through a regulatory intrusion changing only one provision in only one direction.

The Companies would also note that the presumption and burden of proof in this proposed amendment are contrary to the burden of proof standard in every other form of complaint before the Commission. Other complainants are required to prove their assertions that statutes, rules, or tariffs have been violated.[25] The proposed amendment automatically shifts the burden to the respondent EDU merely upon the filing of a complaint. Further, the evidentiary standard in every other Complaint proceeding is a "preponderance of the evidence."[26] The proposed amendment, however, would raise the standard to "clear and convincing evidence." A "clear and convincing" evidentiary standard is not appropriate for administrative determination of the reasonableness of reciprocal terms in voluntarily negotiated agreements. Why should large sophisticated multistate corporations such as AT&T, Windstream, and Frontier enjoy such a foundational shift in burden of proof that a hundred years of statutes, regulations, and court review have not extended to other

[23] Nor is there any requirement that reduced joint use payments by ILECs be earmarked for incremental investment in broadband deployment to unserved or under-served populations in Ohio. For all intents and purposes, this amendment is simply a dividend payment to ILEC shareholders.

[24] See 4901:1-3-04(B), O.A.C., ("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.")

[25] See, for example, *In the Matter of the Complaint of John E. Blanchard v. The Toledo Edison Company*, Case No. 18-82-EL-CSS, Opinion and Order, p.3, (Citing *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189,214 N.E.2d 666 (1966)(" In complaint proceedings, the burden of proof lies with the complainant.").

[26] *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 49 Ohio St. 3d 123, 126 (1990); *Grossman,* 5 Ohio St. 2d at 190.

types of complainants in Ohio? The Companies respectfully recommend that the Commission eliminate proposed amendment 4901:1-3-03(B) in its entirety.

In the alternative, if ILECs were to be granted such a shift in the burden of proof/evidentiary standard for pole attachment complaint proceedings, logic and fairness dictate that the same burden shift be applicable in the reverse as well. In other words, an ILEC can only rebut presumptions in the rules using the same "clear and convincing evidence" standard set forth in proposed subdivision (B). The Companies thus respectfully recommend, in the alternative to eliminating Staff's proposed amendment, the following modification to proposed amendment 4901:1-3-05(B):

> (B) In complaint proceedings challenging pole attachment or conduit occupancy rates established in joint use agreements, there is a presumption that an incumbent local exchange carrier (ILEC) is similarly situated to an attaching entity that is not a public utility for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that ILECs may be charged no higher than the rate determined in accordance with paragraph (D) of rule 4901:1-3-04 of the Administrative Code. A public utility can rebut either or both of the two presumptions in this paragraph with clear and convincing evidence that the ILEC receives benefits under its joint use agreement with a public utility that materially advantages the ILEC over an attaching entity that is not a public utility on the same pole. **In such proceedings, an ILEC must present clear and convincing evidence to rebut any other presumptions under this Chapter.**

## III. CONCLUSION

The Companies urge the Commission to adopt the above recommendations that avoid undermining the Companies' ability to preserve system integrity in accordance with their obligations to provide safe and reliable electric service. As the Companies work towards a modern, resilient electric grid as envisioned by the PowerForward initiative, accommodating an increased number of communications attachments requires preserving the integrity of the pole system. The

Companies further recommend modifications to ensure that electric utilities are treated fairly in complaint proceedings consistent with the Commission's long-established precedent.

Respectfully submitted,

/s/ *Robert M. Endris*
Robert M. Endris (#0089886)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5728
(330) 384-3875 (fax)
rendris@firstenergycorp.com

*Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*

**CERTIFICATE OF SERVICE**

On August 15, 2019, the foregoing document was filed with the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document.

/s/ *Robert M. Endris*
*One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*

Summary: Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mrs. Ashlee E Waite on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company and Endris, Robert M Mr.