

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio
Power Company to Initiate Phase 3 of its
gridSmart Project**

Case No. 19-1475-EL-GRD

REPLY COMMENTS OF OHIO TELECOM ASSOCIATION

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Reply Comments of Ohio Telecom Association

I. Introduction

As part of its application seeking cost recovery for its gridSmart plan, Ohio Power Company (“Ohio Power”) is seeking authorization to overbuild a fiber communications system funded with a nonbypassable customer charge. It intends to lease a portion of the system it does not use to internet service providers. Application at 4. In initial comments, most intervenors¹ urged the Commission to reject the proposal because it is illegal and unreasonable.²

Two commenters, however, present positions suggesting some support for Ohio Power’s proposal. In its Review, the Staff of the Public Utilities Commission of Ohio (“Commission”) questioned the legality of the Ohio Power communications system proposal, but its legal argument for disallowing Ohio Power to lease dark fiber to third parties is not stated correctly and the misstatement opens a path for approval of the proposal with “safeguards” that would be unlawful. Staff’s Review and Recommendation at 5-6 (Sept. 9, 2020) (“Staff Review”). Ohio Partners for Affordable Energy (“OPAE”) seems to go farther based on its support for the expansion of broadband in unserved areas, but its legal analysis and recommended safeguards are not clear and are likely unsound. Comments of Ohio Partners for Affordable Energy at 4-6 (Sept. 9, 2020) (“OPAE Comments”). Thus, nothing contained in the only comments that

¹ Ohio Power and Ohio Energy Group did not file initial comments. The Smart Thermostat Coalition, Direct Energy, Environmental Law and Policy Center and the Ohio Environmental Council filed comments, but did not address the fiber communications system proposal.

² Comments of Ohio Telecom Association *passim* (Sept. 9, 2020) (“OTA Comments”); Comments of AT&T Ohio *passim* (Sept. 9, 2020); Initial Comments of Interstate Gas Supply, Inc. at 9-11 (Sept. 9, 2020); Comments by the Office of the Ohio Consumers’ Counsel at 10-12 (Sept. 9, 2020); Initial Comments of the Ohio Cable Telecommunications Association *passim* (Sept. 9, 2020) (“OCTA Comments”); Joint Comments of The Kroger Co. and the Ohio Manufacturers’ Association Energy Group at 3-10 (Sept. 9, 2020); Comments of IEU-Ohio at 6-9 (Sept. 9, 2020).

marginally support Ohio Power's effort to subsidize entry into competitive communications with ratepayer dollars provides a reasoned or lawful basis for approval.

II. Staff Review

In its Review, the Staff indicates concerns regarding the fiber proposal that fall into three general areas. First, it notes that "Ohio Revised Code 4928.17 prohibits [Ohio Power] from providing noncompetitive retail electric service and supplying a non-electric product or service, unless it has been authorized as part of a corporate separation plan approved by the Commission." Staff Review at 5. Second, Staff offers its belief that middle mile telecommunications service in areas of Ohio Power's service territory without readily available broadband service is not likely competitive and suggests that Ohio Power include such information in its corporate separation plan. *Id.* Third, the Staff recommends "safeguards to mitigate risk to ratepayers if [Ohio Power] is ultimately authorized to move forward with the project." *Id.* These safeguards include a bar on the provision of last mile telecommunications services and a demonstration that there are internet service providers willing to provide retail service to customers. *Id.* at 5-6. Additionally, the Staff recommends that the Commission direct Ohio Power to credit all revenue associated with the leasing of dark fiber to the gridSmart rider since the project would be funded by electric service ratepayers. *Id.* at 6.

The Staff's review of Ohio Power's fiber proposal is flawed in several respects.

Initially, the Staff's position that R.C. 4928.17 may permit *Ohio Power*, the electric distribution utility, to provide a nonelectric service if it is authorized by its corporate separation plan does not state the applicable law correctly. R.C. 4928.17(A) provides that, except as may be provided in a standard service offer or as part of a transition plan (clearly no longer applicable to this Application), an electric distribution utility may not "*engage, either directly or through an*

affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or *in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service*” unless it operates under a corporate separation plan consistent with state electric policy and, among other requirements, “[t]he plan provides, at minimum, for the provision of the competitive retail electric service or nonelectric product or service through a fully separated affiliate of the utility.” (Emphasis added.) As applied to this case, R.C. 4928.17 requires the nonelectric service, the lease of dark fiber, to be provided by a separate affiliate unless the Ohio Power electric security plan authorizes the proposal. Because the current electric security plan does not and could not authorize the construction and lease of the overbuilt dark fiber,³ Ohio Power could not be lawfully authorized to provide a nonelectric service under R.C. 4928.17(A).

Second, the Staff’s misstatement of the applicable legal requirements opens the door to an observation that the provision of broadband service may not be competitive in unserved areas and a recommendation that Ohio Power add this information to its corporate separation plan. Presumably the point of this recommendation would be to conform actual rollout of the fiber system to the representation that Ohio Power will build in unserved areas, but otherwise it is unclear why the Staff believes the addition of this information to the corporate separation plan is necessary.

³ The Staff Review does not address the exception from the corporate separation requirement for terms approved as part of a standard service offer, but that exception is inapplicable to the proposal by Ohio Power to provide middle mile fiber communications to third parties for at least two reasons. First, it was not authorized under the current electric security plan. OTA Comments at 14; OCTA Comments at 10. Second, the construction and lease of fiber communications system to a third party could not be authorized as a term of an electric security plan. When it approves an electric security plan, the Commission can authorize cost recovery for only those items which are permitted by R.C. 4928.143(B). If a given provision does not fit within one of the categories listed in the division (B)(2) of R.C. 4928.143, the authorization of cost recovery for it is not lawful. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 510, ¶ 32 (2011). Since no provision of R.C. 4928.143(B) authorizes the Commission to approve the recovery of the cost of a communications service unrelated to distribution, the exception to the corporate separation provision is inapplicable.

The additional information would have no effect on the lawfulness of the Ohio Power proposal. R.C. 4928.17 prohibits Ohio Power from providing a nonelectric product or service (that is not properly included in an electric security plan) whether it is competitive or not. In this case, therefore, the “competitiveness” of internet service in unserved or underserved areas in Ohio is not relevant to the analysis of the legality of Ohio Power’s proposal.

Even if a determination of the competitiveness of internet service was relevant, however, the provision of the information recommended by the Staff would be inadequate to judge the “competitiveness” of broadband service in unserved or underserved areas. Another example is instructive. Many urban and rural areas in Ohio lack easy access to full service grocery stores,⁴ but the grocery business itself is highly competitive.⁵ Likewise, competitive retail broadband service, for which there are over 200 providers in Ohio alone, is not a noncompetitive service because some businesses or homes are not within the footprint of a wired or cellular broadband service provider.⁶ Lack of ubiquity does not equate to lack of competitiveness of an industry.

Finally, the Staff’s recommended safeguards highlight some of the real problems that Ohio Power’s customer-subsidized entry into the telecommunication market would present. For example, the Staff’s recommendation to bar Ohio Power from engaging in retail last mile broadband service implies competition will be at risk if Ohio Power’s anticompetitive ambitions are fully realized and it enters the retail internet service provider business using ratepayer subsidized facilities. Similarly, the Staff’s recommendations that Ohio Power have a lessee for the middle mile fiber before it builds and that Ohio Power credit all lease revenue to the

⁴ <http://thefoodtrust.org/administrative/hffi-impacts/hffi-impacts-case-studies/ohio>

⁵ <https://www.strategyand.pwc.com/gx/en/insights/2011-2014/four-forces-shaping-competition-grocery.html>

⁶ Importantly, the lack of broadband service in rural areas is a problem that is being addressed by both federal and state agencies through competitive and competitively neutral funding programs. See OTA Comments at 19-20.

gridSmart rider imply that ratepayers will be exposed to stranded costs for the amounts Ohio Power cannot recover in the competitive market for broadband service. While these safeguards would make sense if there was some legal authority for approving Ohio Power's dark fiber proposal, they are unnecessary if the Commission simply follows the requirements of R.C. 4928.17(A) and denies authorization of the unlawful proposal to fund a competitive business with ratepayer dollars.

III. OPAE Comments

In its Comments, OPAE's support of the Ohio Power fiber proposal is predicated on the need for expansion of broadband access in unserved areas, but all commenters addressing the issue and Ohio Power itself are supportive of that outcome. Compare, for example, OPAE Comments at 5 with OTA Comments at 19-20. What remains unclear are the terms that OPAE would support to advance the common goal.

Two examples are instructive. First, OPAE does not clarify whether Ohio Power or an affiliate must be the corporate vehicle for the project. OPAE Comments at 6. Second, OPAE recommends that any revenue from the lease of facilities be returned to ratepayers (which may suggest that OPAE supports Ohio Power's construction and leasing of the dark fiber), but unlike the Staff recommendation it is unclear whether some or all the revenue would be returned to customers. Compare OPAE Comments at 4 (all revenue from leasing unused fiber should be returned to customers) and 6 (Ohio Power will receive a return on investment in the fiber communications system).

As these examples demonstrate, OPAE's support for broadband expansion generally does not clarify the fundamental legal and policy questions that the Commission must resolve as part

of this review. Accordingly, it should not serve as a basis for approving Ohio Power's proposal to fund an overbuilt fiber communications system with a nonbypassable charge.

IV. Conclusion

The initial comments in this proceeding demonstrate that Ohio Power's proposal to overbuild and lease a fiber communications system funded by a nonbypassable customer charge is unlawful and unreasonable. The attempts by either Commission Staff or OPAE to find a justification or conditions for Ohio Power to proceed do not show otherwise. Accordingly, the Commission should reject Ohio Power's proposal to overbuild its fiber communications system and enter the middle mile leasing business.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of the Reply Comments of Ohio Telecom Association upon the interested parties, this 25th day of September 2020. Copies of the filing were sent by email to the counsel for parties listed below.

/s/ Frank P. Darr

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