

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio)
Power Company to Initiate its gridSMART) Case No. 19-1475-EL-RDR
Phase 3 Project.)**

**REPLY COMMENTS OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

I. Introduction

A diverse group of parties oppose the application of Ohio Power Company to implement a third phase of gridSMART initiatives and the majority, including the Ohio Cable Telecommunications Association (“OCTA”), specifically oppose the utility’s proposal to install excess fiber capacity to third party providers (“fiber proposal”). In these reply comments, the OCTA responds to the comments about the fiber proposal filed by the Staff of the Public Utilities Commission of Ohio and by Ohio Partners for Affordable Energy (“OPAE”). Staff’s and OPAE’s support for the fiber proposal is flawed and unreliable for several reasons. First, they failed to recognize that AEP Ohio’s proposal does not comply with Ohio law and the recommended modifications will not cure the statutory problem either. Second, Staff’s belief that the telecommunications service AEP Ohio would provide is “likely not competitive” is not based on record evidence and is not consistent with Commission precedent. Staff’s belief, therefore, should not be a basis for finding the fiber proposal lawful. Lastly, Ohio’s pole attachment statute provides no relevant or applicable basis for approving the fiber proposal. As a result, the Commission should reject Staff’s and OPAE’s arguments, and instead find like the OCTA and the vast majority of commenters that the fiber proposal is unlawful, unjust and unreasonable. AEP Ohio’s fiber proposal should be rejected.

II. Argument

A. Staff's and OPAE's support of the fiber proposal should be rejected because they ignore that Ohio law prohibits the proposal.

Staff and OPAE support approval of the fiber proposal if additional documentation and certain conditions are imposed.¹ Staff Report at 4; OPAE Initial Comments at 5. However, Staff found that the fiber proposal involves AEP Ohio providing telecommunications services and AEP Ohio cannot provide both noncompetitive retail electric service and a non-electric product or service. Staff Report at 2, 5. OPAE seems to agree as well. OPAE Initial Comments at 6. Staff and OPAE, however, ignore that applicable Ohio law does not permit AEP Ohio's proposal as presented.

Given that AEP proposes to provide non-electric telecommunications services, Staff and OPAE overlook that AEP Ohio's existing authority as an electric light company does not allow it to provide telecommunications services to customers (including other telecommunications service providers). They also overlook that AEP Ohio did not request a telecommunications certificate² and did not present sufficient evidence for the Commission to grant such authority (even if it could). Neither seem to recognize that AEP Ohio is proposing to enter an entirely different line of utility service. They should have considered whether the fiber proposal *as presented* is permissible under Ohio law, but they did not conduct that fundamental analysis. The Commission, however, should do that analysis, and it should conclude that AEP's fiber proposal is not permitted by Ohio law.

¹ Staff recommends (a) additional documentation be included in AEP Ohio's corporate separation plan, (b) a prohibition on AEP Ohio providing telecommunications services directly to retail customers, (c) additional evidence that there are providers who will serve end-use customers, and (d) all fiber revenues received be credited to the ratepayers through the gridSMART Rider. Staff Report at 5-6. OPAE recommended that the fiber revenues be credited to the ratepayers. OPAE Initial Comments at 6.

² Per Ohio Revised Code Section 4927.05, telephone companies must have a certificate before operating in Ohio.

Staff does reference the corporate separation statute, stating “Ohio Revised Code 4928.17 prohibits the Company from providing noncompetitive retail electric service *and* a non-electric product or service unless in compliance with Ohio Revised Code 4928.17.” Staff Report at 5 (emphasis in original). Despite this acknowledgement of the law, Staff failed to find the fiber proposal noncompliant with Ohio Revised Code 4928.17. Staff, instead, recommended the utility modify its corporate separation plan to “be consistent with the statutory requirements before it begins offering the service.” That recommendation is inadequate. On its face, the fiber proposal does not comply because AEP Ohio does not intend to provide the non-electric telecommunication services through a fully separate affiliate; and the additional information mentioned by Staff will not bring the proposal into compliance. The Commission should not invite AEP Ohio to submit a compliant proposal. Rather, the Commission should reject the fiber proposal because it cannot be approved under Ohio law.

Both Staff and OPAC conclude that the fiber proposal would be acceptable, if all fiber revenues are credited back to the ratepayers. Staff Report at 6; OPAC Initial Comments at 6. The fiber proposal does not comply with Ohio law in the first place, and this modification will not make it a lawful proposal. Moreover, Staff and OPAC fail to explain why the electric ratepayers should provide an unlawful and unwarranted subsidy to AEP Ohio to enter into a new telecommunications business by funding the costs upfront. Their recommendation for crediting back the revenues fails to make the proposal lawful. The Commission should reject AEP Ohio’s fiber proposal.

The adage “the ends do not justify the means” applies here. Even if AEP Ohio’s fiber proposal would help reduce the “digital divide” in Ohio (which is debatable), the Commission should not be swayed to ignore the law. Ohio has already developed a strategy for further

broadband deployment and AEP Ohio's fiber proposal is not a concept in that strategy. In December 2019, the Ohio Broadband Strategy Report was released by the Administration and soon thereafter the Office of Broadband was created in Ohio.³ The Ohio strategy includes goals, legislative initiatives and regulatory reforms. It does not include an initiative under which an electric utility sidesteps the law or the Ohio electric ratepayers subsidize an electric utility's entry into a non-electric line of business – telecommunications. The Commission should reject the fiber proposal.

B. Staff's claim that the fiber service is "likely not competitive" should be rejected because it is unreliable and contrary to Commission precedent.

Staff stated its preliminary belief that the telecommunications service proposed is "likely not competitive" if the area is underserved and other entities in the area have not received funding support. Staff Report at 5. Staff recommends additional documentation be provided. *Id.* Without the supporting documentation, the record is incomplete and Staff's belief – even if preliminary – is unreliable.

In addition, Staff's belief about the competitiveness of the telecommunications service proposed is not consistent with prior Commission precedent. As the OCTA noted in its initial comments at 5, the Commission has issued certificates authorizing other entities to provide the same or similar services in Ohio. The Commission has considered the service to be competitive. *See, e.g., In the Matter of the Application of Crown Castle Fiber LLC to Provide Telecommunications Services Throughout the State of Ohio*, Case No. 18-1544-TP-ACE; *In the Matter of Hudson Fiber Network, Inc. to Provide Telecommunications Services throughout the State of Ohio*, Case No. 19-1743-TP-ACE and *In the Matter of the Application of AEP*

³ The Ohio Broadband Strategy Report is available through InnovateOhio's website: <https://innovateohio.gov/wps/portal/gov/innovate/priorities/resources/broadband/strategy> (accessed September 22, 2020).

Communications, LLC to Provide Competitive Telecommunications Services, Case No. 97-842-CT-ACE. The Commission should give no weight to Staff’s preliminary characterization of the competitiveness of the telecommunications service proposed by AEP Ohio.

C. Ohio’s pole attachment law is irrelevant to the question of whether AEP Ohio should be allowed to provide telecommunications services under the fiber proposal.

OPAE “absolutely supports fully using the capabilities of a fiber network as proposed by AEP Ohio and paid for by its ratepayers.” OPAE Initial Comments at 6. OPAE’s support for the fiber proposal goes another step further as well because it argues for a “rule” that would require capital investments in fiber to be accessible to third parties as AEP Ohio proposed (and with all revenues generated from third-party access flowed back to the utility ratepayers). In support, OPAE claims the fiber proposal is analogous to utility pole attachments. *Id.* OPAE’s analogy is misplaced. Ohio’s pole attachment framework is based on a statutory mandate enacted in Ohio in 1981⁴ specifically requiring the monopoly telephone companies and electric light companies (of which AEP Ohio is one) to provide reasonable access to their poles, as well as pedestals and conduit duct space.⁵ *See* Ohio Revised Code Section 4905.71. The statute does not apply to any other utility facilities. The statute also does not give the Commission discretion to extend the attachment framework to require reasonable access to fiber optic cable owned by an electric utility. Thus, the Commission cannot rely on the pole attachment statute to justify AEP’s fiber proposal in this proceeding.

⁴ Before Ohio’s pole attachment statute took effect, the 1978 Pole Attachment Act changed policies in the U.S. *See* 47 U.S.C. § 224.

⁵ Conduit duct space is the underground pipe within which the electric utility equipment is placed. It is not fiber optic cables over which communications flow.

The Commission can only exercise that authority which has been specifically delegated to it by the General Assembly.⁶ As demonstrated in the OCTA's initial comments, the Commission lacks the ability to approve the fiber proposal as presented.

III. Conclusion

Numerous parties have analyzed AEP Ohio's fiber proposal and correctly concluded that it is not permitted under Ohio law. Staff and OPAE failed to fully address that question, and thus the Commission should find their comments flawed and not rely on them as detailed above. AEP Ohio's fiber proposal is unlawful, the Commission does not have the authority to approve the proposal, and (even if permissible under law, which it is not) the proposal is unjust and unreasonable. The Commission should reject AEP Ohio's fiber proposal.

Respectfully Submitted,

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⁶ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio’s e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 25th day of September 2020 upon the entities and persons listed below.

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Summary: Reply Comments electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Cable Telecommunications Association